

Access to Justice in Eastern Europe

Editor-in-Chief's Note

Iryna Izarova

Research Articles

Libor Klimek

Strengthening Environmental Protection
Through Criminal Law in Europe:
Normative Shifts and Enforcement Implications

Yuliya Radanova

Building a Compulsory Mediation Pathway:
Bulgaria as a Live Experiment in Dispute System Design?



ISSUE • 2



ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by the East European Law Research Center

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ISSN 2663-0575

Publishing House 'Academic Insights Press'

<https://academicinsightspress.com>

info@academicinsightspress.com

Access to Justice in Eastern Europe

Volume 9, Issue 2
May 2026

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Editorial

INTRODUCTORY REMARKS: EVOLVING LEGAL LANDSCAPES IN THE AGE OF DIGITALIZATION AND GLOBAL TRANSITION

Iryna Izarova

ABSTRACT

This issue of Access to Justice in Eastern Europe presents a collection of research from a diverse international cohort of scholars representing Bulgaria, Jordan, Kazakhstan, the Netherlands, Saudi Arabia, Slovenia, the United Arab Emirates, Ukraine, and Vietnam. This issue explores the evolving landscape of contemporary justice through four primary lenses: the intersection of law and emerging digital technologies (including AI and predictive policing); the reinforcement of criminal justice, anti-corruption, and procedural safeguards; the evolution of alternative dispute resolution and mediation; and the pursuit of social justice within family, property, and environmental 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.

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-ed>

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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, Jordan, Kazakhstan, the Netherlands, Saudi Arabia, Slovenia, the United Arab Emirates, Ukraine, and Vietnam. 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. 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 digital transformation and predictive policing. Furthermore, the issue delves into the intricacies of specialized legal regimes, examining alternative dispute resolution mechanisms, procedural safeguards in criminal law, and the nuances of international and property law. 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. I would like to specifically recommend them in my opening words.

In the article “Strengthening Environmental Protection Through Criminal Law in Europe: Normative Shifts and Enforcement Implications,” **Libor Klimek** provides a comprehensive look at how environmental protection is increasingly reliant on robust criminal justice mechanisms. The author analyzes the normative shifts within European frameworks, offering a vital perspective on how legal systems must adapt to enforce environmental standards effectively and hold violators accountable.

The practical challenges of alternative dispute resolution are further explored in “Building a Compulsory Mediation Pathway: Bulgaria as a Live Experiment in Dispute System Design?” by **Yuliya Radanova**. By examining Bulgaria’s implementation of mandatory mediation, the study offers valuable insights into the delicate balance between compulsory procedural requirements and the fundamental right to access justice, serving as a live experiment for future dispute system designs globally.

Addressing the human rights implications of technological advancement, **Phuc G. Dao** presents “The Right to Remain Offline in the Digital Transformation Era: A Comparative Study of Vietnam and the European Union.” This timely research tackles the blurred boundaries between professional and personal life in an increasingly hyper-connected world. Through a comparative lens, the author advocates for deeper integration and a systematised framework to bridge the gap between digital progression and the effective protection of individuals' well-being and privacy.

Special attention in this issue is given to a topic that serves as a logical continuation of our Special Issue "AI and Law 2025," published at the end of last year. I am referring to the Afterword and Guest Editorial by **Costas Popotas**, "*AI and Judicial Independence: A Critical Analysis*." This contribution acts as an intellectual bridge between our previous work and the current discourse, offering a profound reflection on how the rapid integration of intelligent systems correlates with the fundamental principles of justice. The author provides a critical analysis of the risks and opportunities that artificial intelligence presents to the autonomy of the judicial branch, emphasizing that digital transformation must unfold without compromising judicial independence, which remains the unshakable foundation of the rule of law.

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.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Слово редактора

ВСТУПНІ ЗАУВАЖЕННЯ: ЕВОЛЮЦІЯ ПРАВОВИХ ЛАНДШАФТІВ В ЕПОХУ ЦИФРОВІЗАЦІЇ ТА ГЛОБАЛЬНИХ ТРАНСФОРМАЦІЙ

Ірина Ізарова

АНОТАЦІЯ

У цьому випуску журналу «Access to Justice in Eastern Europe» представлено результати напрацювань міжнародної когорти науковців із Болгарії, В'єтнаму, Йорданії, Казахстану, Нідерландів, Об'єднаних Арабських Еміратів, Саудівської Аравії, Словенії та України. Матеріали номера аналізують мінливий ландшафт сучасного правосуддя

крізь чотири основні призми: вплив цифровізації, штучного інтелекту та предиктивної поліцейської діяльності на правові системи; посилення кримінального правосуддя, антикорупційних механізмів та процесуальних гарантій; розвиток альтернативного вирішення спорів і медіації; а також питання соціальної справедливості в межах сімейного, майнового та екологічного права.

*Окрему увагу у вступному слові приділено дослідженням **Лібора Клімека** щодо посилення охорони довкілля через кримінальне право в Європі, **Юлії Раданової**, яка аналізує запровадження обов'язкової медіації в Болгарії як експеримент у дизайні систем вирішення спорів, та **Фука Г. Дао** щодо права залишатися офлайн в епоху цифрових трансформацій. 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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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.

Competing interests: Prof. Iryna Izarova is the Editor-in-Chief of AJEE and, as such, has no competing interests to declare regarding the content of this Editorial. This Editorial, as is standard for this publication type, was not subject to peer review but aligns fully with the Journal's publication ethics.

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ABOUT THIS ARTICLE

Cite this article

Izarova I, 'Introductory Remarks: Evolving Legal Landscapes in the Age of Digitalization and Global Transition' (2026) 9 (2) Access to Justice in Eastern Europe 6-10 <<https://doi.org/10.33327/AJEE-18-9.2-ed>>

DOI <https://doi.org/10.33327/AJEE-18-9.2-ed>

Research Article

STRENGTHENING
ENVIRONMENTAL PROTECTION
THROUGH CRIMINAL LAW IN EUROPE:
NORMATIVE SHIFTS
AND ENFORCEMENT IMPLICATIONS

Libor Klimek

ABSTRACT

Background: Environmental crime has increasingly emerged as a serious threat to ecosystems, public health and sustainable development, often characterised by significant economic incentives, complex organisational structures and cross-border dimensions. Traditionally, environmental protection in Europe relied primarily on administrative and regulatory mechanisms, with criminal law playing a subsidiary and largely symbolic role. In recent years, however, the limitations of this approach have become evident, prompting a reassessment of criminal law's role in addressing serious environmental harm. This shift has materialised in significant normative developments at the European level, most notably within the European Union and the Council of Europe.

Method: The article employs a doctrinal and analytical legal methodology, focusing on the interpretation of European legal instruments, policy documents and relevant academic literature. It examines recent developments in EU secondary

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000193>

Date of Submission: 10 Feb 2026

Date of Acceptance: 20 Mar 2026

Publication: 20 May 2026

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legislation and Council of Europe treaty law from a multi-level European perspective, without concentrating on specific national legal systems. The analysis adopts a horizontal approach aimed at identifying converging normative trends, structural innovations and enforcement-related implications for national legal orders and legislative approximation.

Results and Conclusions: The analysis demonstrates that European environmental criminal law has entered a new phase characterised by a move from former criminalisation towards more enforcement-oriented and operationally meaningful frameworks. A new Directive (EU) 2024/1203 on the protection of the environment through criminal law represents a significant recalibration of the EU's approach by expanding the scope of criminal offences, strengthening sanctioning regimes for both natural and legal persons, and emphasising effective enforcement. In parallel, the Council of Europe's Convention on the Protection of the Environment through Criminal Law of 2025 establishes a standards-based framework grounded in human rights and the rule of law, introduces the concept of particularly serious environmental offences, and reinforces cooperation mechanisms. The parallel timing and substantive alignment of these instruments reveal an emerging convergence in European approaches to environmental criminal law, further underlined by the European Union's decision to sign the Council of Europe Convention. The article concludes that, while national criminal law frameworks addressing environmental harm already exist, recent European developments require States to move beyond formal compliance towards genuinely effective and coherent systems of environmental criminal justice capable of responding to contemporary environmental challenges.

1 INTRODUCTION

The environment constitutes the essential foundation of sustainable development, human health, food security and economic stability. Ecosystems provide indispensable services such as clean water, clean air and fertile soil, while natural resources sustain livelihoods, generate public revenues and support long-term societal development. At the same time, the integrity of the environment has increasingly come under threat from activities that cause serious and often irreversible harm. Environmental crime has emerged as a growing phenomenon, frequently characterised by significant economic incentives, complex organisational structures and cross-border dimensions, which together challenge traditional regulatory and enforcement mechanisms.¹

Against this background, the role of criminal law in environmental protection has undergone a notable transformation in Europe. For a long time, environmental protection

1 Christian Nellemann and others (eds), *The Rise of Environmental Crime: A Growing Threat to Natural Resources, Peace, Development and Security* (UNEP 2016); Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi (eds), *Environmental Crime in Europe* (Modern Studies in European Law, Bloomsbury 2020).

relied predominantly on administrative and regulatory instruments, with criminal law perceived as a subsidiary and exceptional response. However, the scale and gravity of contemporary environmental harm, coupled with the limited deterrent effect of purely administrative sanctions, have prompted a gradual reconsideration of the function of criminal law. Environmental offences are increasingly understood not merely as regulatory breaches, but as conduct capable of undermining fundamental societal interests, including public health, ecological sustainability and intergenerational justice.

In recent years, this shift has been reflected in significant normative developments at the European level. Within the European Union, the adoption of *Directive (EU) 2024/1203 on the protection of the environment through criminal law* represents a decisive step towards strengthening the criminal law response to environmental harm.² The Directive replaces the earlier framework established by Directive 2008/99/EC and seeks to address its identified shortcomings by expanding the scope of criminalisation, clarifying offence definitions and introducing more structured and dissuasive sanctioning regimes.³ In parallel, the Council of Europe has adopted a new *Convention on the Protection of the Environment through Criminal Law*, opened for signature in December 2025, which establishes a standards-based treaty framework aimed at enhancing cooperation, harmonising core offence categories and embedding environmental criminal law within a broader human rights and rule-of-law context.⁴ These parallel developments point towards a convergence in European environmental criminal law. Although the European Union and the Council of Europe operate through distinct legal instruments and regulatory techniques, both frameworks reveal a shared commitment to moving beyond symbolic criminalisation and towards more effective, enforcement-oriented models of environmental protection. Notably, the European Union's decision to sign the Council of Europe Convention further underscores the interconnectedness of these initiatives and signals an intention to ensure coherence between Union law and pan-European normative standards.

The purpose of this article is to analyse these new normative trends in European environmental criminal law and to assess their implications for national legal orders. The article examines the evolution of criminal law protection of the environment in Europe, with particular attention to recent legislative developments within the European Union and the Council of Europe. It explores how these instruments redefine the scope and function of criminal law in environmental protection, the extent to which they promote legislative

2 Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 'On the Protection of the Environment Through Criminal Law and Replacing Directives 2008/99/EC and 2009/123/EC' [2024] OJ L 1203/1 <<https://eur-lex.europa.eu/eli/dir/2024/1203/oj/eng>> accessed 10 February 2026.

3 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 'On the Protection of the Environment Through Criminal Law' [2008] OJ L 328/28 <<https://eur-lex.europa.eu/eli/dir/2008/99/oj/eng>> accessed 10 February 2026.

4 Convention on the Protection of the Environment through Criminal Law (3 December 2025) [2025] CETS 228 <<https://rm.coe.int/48801f9d20>> accessed 10 February 2026.

approximation, and the challenges they pose for effective enforcement. The analysis further considers the broader institutional and future-oriented implications of these developments, including emerging discussions on enhanced European-level coordination in the prosecution of environmental crime.

2 METHODOLOGY AND ANALYTICAL FRAMEWORK

This article adopts a doctrinal and analytical legal methodology to examine recent normative developments in European criminal law, with a focus on environmental crime. The analysis is primarily based on the interpretation of European legal instruments, namely the secondary legislation of the European Union, Council of Europe conventions, and relevant documents and academic literature. The focus is placed on identifying structural changes, normative innovations and emerging trends.

The analytical framework is structured around a multi-level European perspective. The article examines developments within the European Union and the Council of Europe, addressed to European States, as distinct yet interconnected normative orders, each employing different regulatory techniques to influence national criminal law. This approach allows for an assessment of converging and complementary trends in criminal law, while avoiding a purely institutional or jurisdiction-specific analysis. Particular attention is paid to the interaction between these frameworks and to their combined implications for legislative approximation and enforcement at the national level.

Methodologically, the article relies on qualitative legal analysis, focusing on the content, objectives and systemic context of the examined instruments. Comparative references to earlier legal frameworks are used selectively to highlight normative shifts and assess the extent to which recent instruments address previously identified shortcomings. The analysis does not seek to provide a comprehensive comparison of national legal systems; instead, it adopts a horizontal perspective that emphasises common European standards, shared challenges and evolving expectations placed on domestic criminal law systems. The analytical framework further integrates insights from contemporary scholarly discourse and policy debates, particularly regarding enforcement challenges and institutional questions. This includes consideration of emerging discussions at the European level regarding environmental crime, insofar as they shed light on future trajectories of the environmental criminal law perspective. By combining doctrinal analysis with contextual and policy-oriented perspectives, the article aims to provide a coherent and critical account of the current state and future direction of criminal law protection of the environment in Europe.

3 EVOLUTION OF CRIMINAL LAW PROTECTION OF THE ENVIRONMENT IN EUROPE: A BRIEF OVERVIEW

The criminal law protection of the environment in Europe has developed from a marginal and subsidiary instrument into an increasingly autonomous area of criminal regulation.⁵ Initially, environmental protection was primarily addressed through administrative and regulatory mechanisms, with criminal law intervention seen as exceptional and largely symbolic. Environmental offences were typically treated as breaches of administrative obligations, resulting in fragmented enforcement and a limited deterrent effect. As noted by the European Commission, “[f]or instance, administrative or other financial sanctions may not be dissuasive in cases where the offenders are impecunious or, on the contrary, financially very strong.”⁶ This early model gradually proved inadequate in responding to large-scale environmental harm, particularly when it was economically motivated, organised, or cross-border, thereby prompting a reconsideration of the role of criminal law at the European level.

Within the legal framework of the European Union, the first decisive step towards criminal law engagement was the recognition that environmental protection could justify harmonisation measures in criminal law. This approach culminated in the adoption of *Directive 2008/99/EC on the protection of the environment through criminal law*, which obliged Member States to criminalise a defined set of environmentally harmful conduct, including illegal emissions, waste management offences and the destruction of protected habitats.⁷ Although the directive relied heavily on references to administrative law and minimum harmonisation, it marked a structural shift by formally embedding environmental protection within the EU criminal law framework.⁸ The European

5 Mar Campins Eritja (ed), *The European Union and Global Environmental Protection: Transforming Influence into Action* (Routledge Studies in Environmental Policy, Routledge 2020) doi:10.4324/9781003018513; Martin Heger, *Die Europäisierung des deutschen Umweltstrafrechts* (Tübinger Rechtswissenschaftliche Abhandlungen, Mohr Siebeck 2009) doi:10.1628/978-3-16-167161-6; Farmer, Faure and Vagliasindi (n 1); Jaroslav Ivor, Libor Klimek and Jozef Záhora, *Trestné právo Európskej Únie: A jeho vplyv na právny poriadok Slovenskej Republiky* (Eurokódex 2013); Gert Vermeulen and others, *The Protection of the Environment Through Criminal Law* (RIDP 87(1), Maklu 2016) <<https://www.maklu-online.eu/nl/tijdschrift/ridp/2016/protection-environment-through-criminal-law/>> accessed 10 February 2026.

6 European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law’ (COM (2001) 139 final) [2001] OJ C 180E/238 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001PC0139>> accessed 10 February 2026.

7 Directive 2008/99/EC (n 3). See also, European Union, ‘European Union Law Against Environmental Crime: Summary of Directive 2008/99/EC – Protecting the Environment by Means of Criminal Law’ (*EUR-Lex*, 14 February 2022) <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32008L0099>> accessed 10 February 2026.

8 Campins Eritja (n 5); Farmer, Faure and Vagliasindi (n 1); Libor Klimek, *Základy trestného práva Európskej Únie* (Wolters Kluwer 2017).

Commission's Evaluation of Directive 2008/99/EC assessed the effectiveness, relevance and added value of the Directive since its adoption in 2008.⁹ Overall, the evaluation concluded that while the directive established a basic EU framework for the criminalisation of serious environmental offences and ensured its transposition into national law across all Member States, its objectives were only partially achieved in practice. The evaluation identified several key challenges, including limited scope of application, unclear legal definitions, and varying levels of prosecution and sanctioning across Member States, which collectively undermined the directive's deterrent effect and the creation of a truly level playing field in enforcement. Moreover, the directive's reliance on a catalogue of annexed environmental legislation was seen as increasingly outdated in light of evolving environmental risks and the multiplicity of relevant EU instruments. Consequently, the evaluation acknowledged the continued relevance of the directive's objectives but emphasised the need to refine and strengthen the legal framework to improve deterrence and enforcement outcomes. The evolution of EU environmental criminal law has recently entered a new phase with the adoption of *Directive (EU) 2024/1203 on the protection of the environment through criminal law*, which repealed and replaced Directive 2008/99/EC.¹⁰

In parallel to EU developments, the Council of Europe has contributed to the evolution of environmental criminal law through the articulation of common normative standards rather than harmonisation. The *Convention on the Protection of the Environment through Criminal Law*¹¹ of 1998 represented one of the earliest international instruments explicitly addressing environmental harm through criminal law.¹² Although ratification remained limited, the convention established an important conceptual link between environmental protection and criminal responsibility, recognising that serious environmental damage may warrant penal sanctions. This normative engagement was further reinforced by the adoption of a modernised *Convention on the Protection of the Environment through Criminal Law* in 2025, which addresses contemporary forms of environmental harm and aligns criminal law protections with broader human rights and rule-of-law principles.¹³

9 European Commission, 'Commission Staff Working Document Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 'On the Protection of the Environment Through Criminal Law (Environmental Crime Directive)' (SWD (2020) 259 final) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0259>> accessed 10 February 2026.

10 Directive (EU) 2024/1203 (n 2). See also, European Union, 'Protecting the Environment Through Criminal Law: Summary of Directive (EU) 2024/1203 – on the Protection of the Environment Through Criminal Law' (*EUR-Lex*, 28 February 2025) <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32024L1203>> accessed 10 February 2026.

11 Convention on the Protection of the Environment through Criminal Law (4 November 1998) [1998] ETS 172 <<https://rm.coe.int/168007f3f4>> accessed 10 February 2026.

12 Heger (n 5).

13 Convention on the Protection of the Environment Through Criminal Law 2025 (n 4).

Taken together, the instruments adopted within the European Union and the Council of Europe reveal a converging trajectory towards the recognition of environmental protection as a legitimate and necessary object of criminal law. While EU law drives binding approximation and minimum harmonisation, Council of Europe instruments provide a complementary normative framework grounded in fundamental rights and rule-of-law principles.¹⁴ This dual evolution signifies an increasing expectation to integrate environmental protection into criminal justice systems in a manner that is both effective and rights-compliant, moving beyond symbolic criminalisation towards meaningful enforcement.

4 NEW NORMATIVE TRENDS IN EUROPEAN ENVIRONMENTAL CRIMINAL LAW

4.1. European Union: Directive (EU) 2024/1203 on the Protection of the Environment Through Criminal Law as a Shift from “Minimum Criminalisation” to an Enforcement-Oriented Model

In the EU, *Directive (EU) 2024/1203 on the protection of the environment through criminal law* was adopted against the background of an explicit diagnosis that the earlier EU framework had produced only a limited practical impact.¹⁵ The European Commission's evaluation, focusing on Directive 2008/99/EC of 2000 and identified structural weaknesses that impeded deterrence and operational effectiveness, including uneven enforcement across Member States, definitional ambiguity, and the Directive's reliance on a catalogue-based approach that struggled to keep pace with the development of EU environmental legislation.¹⁶ On that basis, the Commission's 2021 proposal for a new legislation sought to recalibrate EU environmental criminal law from a largely symbolic approximation instrument to one more closely connected to effective investigation, prosecution, and sanctioning.¹⁷ The legislative rationale was not merely to expand criminalisation, but also to reduce interpretative divergence, enable cross-border operational cooperation, and strengthen the dissuasive character of penalties for conduct affecting the environment.

14 Council of Europe, 'Draft Explanatory Report to the Revised Convention on the Protection of the Environment through Criminal Law' (PC-ENV(2024)04 Rev2, 9 October 2024) <<https://rm.coe.int/pc-env-2024-04rev02-eng-draft-explanatory-report-convention-on-the-pro/1680b1efb2>> accessed 10 February 2026.

15 Directive (EU) 2024/1203 (n 2); European Union, 'Protecting the Environment Through Criminal Law' (n 10).

16 European Commission, 'Commission Staff Working Document Evaluation of the Directive 2008/99/EC' (n 9).

17 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment Through Criminal Law and Replacing Directive 2008/99/EC' (COM(2021) 851 final, 15 December 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0851>> accessed 10 February 2026.

Directive (EU) 2024/1203 establishes “*minimum rules with regard to the definition of criminal offences and penalties in order to protect the environment more effectively, as well as with regard to measures to prevent and combat environmental crime and to effectively enforce Union environmental law*” (Article 1 of the Directive). In terms of its regulatory technique, Directive (EU) 2024/1203 retains the core “unlawfulness” architecture of its predecessor but develops it in a more operationally robust manner. It establishes *minimum rules* on criminal offences and penalties and links “unlawful” conduct to breaches of EU environmental law (and implementing national measures), while also clarifying that conduct remains “unlawful” where an authorisation was obtained fraudulently or through corruption-related practices. This explicitly addresses a recurrent enforcement gap in which formally valid permits were used to shield environmentally harmful conduct from criminal qualification.

The most visible normative trend is the broadened and more granular offence catalogue. While Directive 2008/99/EC required criminalisation of selected categories of environmentally harmful conduct, the 2024 Directive expands the coverage and increases specificity, including by capturing modern patterns of environmental criminality that had previously been treated inconsistently (or primarily as administrative illegality). Even in the opening part of Article 3, the Directive frames criminalisation around environmental media and ecosystem harm (air, soil, water, and ecosystems), reflecting a move from sectoral compliance breaches to the protection of ecological interests as such.

A second core trend concerns the internal differentiation of *culpability* and *gravity*. The Directive does not rely solely on *intentionality*; it also requires criminalisation for certain conduct carried out with at least *serious negligence*, thereby reinforcing the message that large-scale environmental harm is not only a matter of deliberate wrongdoing but also of grossly deficient risk governance. This is normatively significant because it bridges the classical divide between administrative non-compliance and criminal responsibility, particularly in high-risk industrial settings and complex corporate structures.

The Directive’s sanctioning model is the most distinctly “new” element when compared to Directive 2008/99/EC. Rather than merely requiring that penalties be *effective, proportionate and dissuasive*, the Directive (EU) 2024/1203 introduces a more structured approach, including differentiated seriousness thresholds for custodial penalties for natural persons and a markedly strengthened regime for legal persons. In public reporting of the legislative process, the “most serious” offences are associated with imprisonment ceilings of at least ten years where the conduct causes a person’s death, and a graded approach applies to other offence categories.¹⁸

18 Michael Nicholson, *The EU Environmental Crime Directive: A Diverging Approach with the UK?* (Briefing paper, IEEP UK 2024). ‘EU Lawmakers Approve Tougher Bloc-Wide Penalties for Environmental Crime’ (*Reuters*, 27 February 2024) <<https://www.reuters.com/world/europe/eu-lawmakers-approve-tougher-bloc-wide-penalties-environmental-crime-2024-02-27/>> accessed 10 February 2026.

For legal persons, the Directive's trend is equally clear: it seeks to overcome the chronic problem that corporate fines were often economically absorbable and thus weakly dissuasive. The European Parliament's legislative train materials describe the adoption of turnover-linked maximum fine thresholds for the most serious offences (a maximum fine of at least 5% of worldwide turnover or, alternatively, EUR 40 million), with lower thresholds for other offences (a maximum fine of at least 3% or, alternatively, EUR 24 million).¹⁹ This design signals a deliberate shift towards sanctioning logic capable of addressing large undertakings and preventing "compliance through paying".

Moreover, Directive (EU) 2024/1203 reflects a broader European tendency to connect repression with restoration. Beyond punitive sanctions, the post-2008 approach increasingly treats remediation and compensation as integral to the criminal law response. In discussions surrounding the Directive and its proposal,²⁰ the "polluter pays" logic is explicitly framed not only as a matter of administrative liability but also as a consequence that may be enforced through criminal proceedings, including obligations to restore environmental damage and to compensate. This hybridisation of punitive and restorative objectives is likely to influence national legislative approximation and prosecutorial practice in the coming years.

The academic response to Directive (EU) 2024/1203 signals a broad recognition within expert circles that the new environmental crime framework represents a substantive response to the deficiencies of Directive 2008/99/EC. Scholars have emphasised that the earlier Directive was adopted in an era when environmental criminal law was a peripheral aspect of EU policy, and it was subsequently criticised for its limited practical impact, lack of detailed penalty regimes, and insufficient mechanisms for transnational cooperation.²¹ The Directive (EU) 2024/1203 was therefore welcomed by many legal commentators as a necessary recalibration of the EU's criminal law engagement with environmental protection, grounded in the Commission's own evaluative findings that the number of successfully investigated and prosecuted environmental crime cases remained low and that sanctions were often insufficiently dissuasive. From an expert standpoint, the Directive's comprehensive expansion of criminal offences and the introduction of specified penalty structures mark a significant advance toward a more effective legal regime. The legal analysis highlights that, unlike the Directive 2008/99/EC, the Directive (EU) 2024/1203 not only updates the offence catalogue to reflect contemporary environmental policy concerns but

19 Nicholson (n 18) 13.

20 *ibid*

21 Radion Cojocaru, 'Prevention of Environmental Crimes According to Directive (EU) 2024/1203 on the Protection of the Environment Through Criminal law' (2025) (spec) *Legea și Viața* 194; Patient Mpunga-Biayi, 'The European Union Environmental Crime Directive 2024: The Construction of an Autonomous Legal Framework for the Repression of Environmental Crimes Within the European Union' (2025) 27(2) *Environmental Law Review* 135, doi:10.1177/14614529251344643; Elżbieta Zębek and Denis Solodov, 'The EU Environmental Crime Directive 2024/1203: Legal Solutions and Perspectives' (2025) 89 *Journal for Nature Conservation* 127093, doi:10.1016/j.jnc.2025.127093.

also incorporates new categories of offences such as illegal surface water abstraction, unlawful ship recycling and certain invasions of natural habitats. Such extensions respond directly to empirical critiques that the previous Directive failed to keep pace with the broader environmental law landscape, leaving coverage gaps.

The introduction of clearer rules on penalties – including differentiated imprisonment terms for individuals and structured regimes for legal persons – reflects a normative shift within EU criminal law discourse toward enhanced deterrence, proportionality and harmonisation of sanctions across Member States.

From a conceptual perspective, Directive (EU) 2024/1203 cannot be understood merely as a procedural or technical update of the existing framework. While the Directive certainly introduces important procedural and operational improvements, its primary significance lies in a substantive reconfiguration of environmental criminal liability at the EU level. In particular, the shift from a model of “minimum criminalisation” towards an enforcement-oriented and operational framework reflects a deeper transformation in the function of criminal law, which is no longer conceived as a subsidiary or symbolic instrument, but as an integral component of environmental governance. This is evidenced by the expanded and more precise offence catalogue, the structured sanctioning regime, and the explicit recognition of serious environmental harm – including conduct committed with at least serious negligence – as a matter of criminal responsibility. Accordingly, the Directive represents a qualitative normative shift in the conceptualisation of environmental criminal liability within EU law, albeit complemented by significant procedural modernisation aimed at ensuring its practical effectiveness.

4.2. Council of Europe: Convention on the Protection of the Environment Through Criminal Law as a Standards-Based Framework with “Ecological Seriousness” and Procedural-Modernisation

The Council of Europe’s *Convention on the Protection of the Environment through Criminal Law* of 2025, opened for signature in Strasbourg on 3 December 2025, expresses a distinct normative ambition: to establish *minimum rules* to guide States’ domestic legislation, promote cooperation, and enhance environmental protection through criminal law, while situating these measures within human rights and rule-of-law coordinates.²² The purposes of this Convention are to: “a) *effectively prevent and combat environmental crime*; b) *promote and enhance national and international co-operation against environmental crime*; c) *establish minimum rules to guide States in their national legislation; and thereby promote and enhance the protection of the environment*” (Article 1 of the Convention). The preamble of the Convention explicitly anchors the instrument in the “triple planetary crisis of pollution, climate change and loss of biodiversity for human rights” framing and references

22 Convention on the Protection of the Environment Through Criminal Law 2025 (n 4).

relevant Strasbourg acquis, including the European Convention on Human Rights and the case-law of the European Court of Human Rights.

The Convention represents a significant normative step towards strengthening the role of criminal law in addressing serious environmental harm at the pan-European level. The Convention seeks to overcome the limitations of earlier instruments by establishing a coherent set of criminal offences covering unlawful pollution, waste-related conduct and damage to protected natural sites, while simultaneously reinforcing cooperation and monitoring mechanisms. Particular scholarly attention has been drawn to the introduction of the concept of “particularly serious offences”, which reflects an emerging European understanding that certain forms of environmental damage require a qualitatively distinct criminal law response.²³ At the same time, the Convention explicitly situates environmental criminal law within a broader framework of human rights and the rule of law, thereby promoting consistent standards of accountability while respecting fundamental procedural guarantees.

Compared with the 1998 Convention, the 2025 Convention modernises both substance and structure. The earlier instrument contained an important “hard core” of offences and required sanctions including imprisonment and pecuniary measures, but its practical influence was limited, not least due to low ratification and a comparatively sparse operational framework. By contrast, the 2025 Convention is drafted as an implementation-oriented instrument, including a specific monitoring mechanism and a broader set of procedural and cooperation provisions that aim to reduce the gap between formal criminalisation and effective application. Substantively, the 2025 Convention adopts a notably expanded and thematically structured offence catalogue. The draft history shows that the new instrument was designed to replace and supersede the 1998 Convention and to respond to contemporary forms of environmental harm, including technologically and economically complex activities.²⁴ The offences cover, inter alia, illegal pollution-type conduct, unlawful waste operations and shipments, unlawful operation or closure of dangerous installations, ship-source discharges, unlawful water abstraction, trade in unlawfully harvested timber, unlawful mining, and biodiversity-related offences (including deterioration of habitats within protected sites and conduct concerning invasive alien species).

As seen, a key normative innovation is the explicit concept of a “*particularly serious offence*”. The Convention requires Parties to establish as particularly serious any offence under the Convention when committed intentionally and causing destruction, or

23 Patient Mpunga-Biayi, ‘The Council of Europe Convention on the Protection of the Environment Through Criminal Law: A Normative Turning Point in European Environmental Governance’ (2025) 27(4) *Environmental Law Review* 279, doi:10.1177/14614529251397623.

24 Council of Europe, ‘Explanatory Report to the Convention on the Protection of the Environment Through Criminal Law’ (3 December 2025) [2025] CETS 228 <<https://rm.coe.int/48801f9d22>> accessed 10 February 2026.

irreversible, widespread and substantial damage, or long-lasting, widespread and substantial damage to an ecosystem of considerable size or environmental value (or to protected habitats or environmental media). This provision crystallises a European trend towards recognising a category of environmental criminality that is qualitatively different from routine regulatory offending and warrants distinct criminal-law treatment, even if domestic systems differ in doctrinal classifications.

On sanctions for natural persons, the Convention retains the classical continental principle that penalties must be effective, proportionate and dissuasive, while ensuring that imprisonment is available. For legal persons, it strengthens the modern “compliance and governance” approach: Parties must ensure that legal persons can be held liable for offences committed for their benefit by persons in leading positions, as well as where lack of supervision or control enabled the offence. The Convention then requires monetary sanctions and contemplates a set of additional measures with clear preventive and compliance-oriented functions, including withdrawal of permits, exclusion from public funding, judicial supervision, winding-up, publication of judicial decisions in the public interest, and even an obligation to establish due diligence schemes to enhance compliance with environmental standards.

Procedurally and institutionally, the Convention’s trend is to treat enforcement capacity and participation rights as integral to environmental criminal law. It contemplates specialised coordination and monitoring bodies at the national level, protection for persons who report offences or cooperate with authorities, and it invites Parties to consider granting NGOs and persons with sufficient interest the right to participate in criminal proceedings concerning environmental offences. This reflects a broader European movement to integrate access-to-justice logics into criminal enforcement models, while operating within the constraints of domestic criminal procedure.

It should be noted that, in a further sign of the growing normative integration of environmental criminal law across Europe, the European Union itself moved to sign the Council of Europe Convention on the Protection of the Environment through Criminal Law on behalf of the Union. This step was authorised by Decision (EU) 2025/2493, adopted on 1 December 2025,²⁵ which explicitly recognises that the Convention aligns with the Union’s environmental objectives under Article 191 of the Treaty on the Functioning of the European Union and complements the EU’s own Directive (EU) 2024/1203 on the protection of the environment through criminal law. The Decision reflects a strategic choice by the Union to ensure uniform application and compatibility between EU criminal law standards and the emerging pan-European treaty framework, and to participate, alongside Member States, as a Party in a binding instrument that establishes common definitions, criminal offences, liability regimes, and cooperation mechanisms for environmental crime.

25 Council Decision (EU) 2025/2493 of 1 December 2025 on the Signing, on Behalf of the European Union, of the Council of Europe Convention on the Protection of the Environment Through Criminal Law [2025] OJ L 2493/1 <<https://eur-lex.europa.eu/eli/dec/2025/2493/oj/eng>> accessed 10 February 2026.

4.3. Converging Normative Trajectories: Coordinated Advancement of Environmental Criminal Law in Europe

Taken together, the recent developments within the European Union and the Council of Europe reveal a clear convergence in normative direction and timing in the field of environmental criminal law. Both frameworks responded to comparable diagnoses of insufficiency in earlier legal instruments and to a shared perception that existing administrative and criminal responses were no longer adequate to address the scale, complexity and cross-border nature of contemporary environmental harm. Significantly, the legislative and policy debates within the European Union leading to the adoption of Directive (EU) 2024/1203 unfolded in parallel with the negotiations and drafting process of the Council of Europe Convention on the Protection of the Environment through Criminal Law, indicating a broader European consensus on the need to modernise and strengthen criminal law responses to environmental crime.

While the EU and the Council of Europe employ different regulatory techniques, their recent instruments pursue complementary objectives. The EU has opted for a binding approximation model with detailed offence definitions and structured sanctioning requirements, whereas the Council of Europe has developed a standards-based treaty framework grounded in minimum rules, cooperation mechanisms and human rights safeguards. Both approaches nevertheless reflect a shared commitment to moving beyond symbolic criminalisation towards enforcement-oriented and operationally meaningful legal regimes capable of addressing serious environmental harm.

The European Union's decision to sign the Council of Europe Convention on the Protection of the Environment through Criminal Law further underscores this convergence. By acceding to the Convention, the Union explicitly acknowledged the compatibility and mutual reinforcement of the two normative frameworks and signalled its intention to participate actively in a pan-European system of environmental criminal law governance. This step confirms that recent EU and Council of Europe initiatives should not be viewed as isolated or competing projects, but rather as interconnected elements of a broader European effort to ensure that environmental criminal law keeps pace with evolving environmental risks and societal expectations.

5 IMPLICATIONS FOR NATIONAL LEGAL ORDERS AND LEGISLATIVE APPROXIMATION

The recent normative developments at the European Union and the Council of Europe have significant implications for national legal orders and the ongoing process of legislative approximation in the field of environmental criminal law. While it can no longer be maintained that environmental protection through criminal law is absent or

underdeveloped at the domestic level, the adoption of Directive (EU) 2024/1203 and the Council of Europe Convention on the Protection of the Environment through Criminal Law of 2025 clearly demonstrates that the existing legal frameworks are no longer sufficient in light of contemporary environmental risks. The current state of national criminal law across Europe may therefore be characterised as formally established, yet substantively incomplete.

From a legislative perspective, Member States of the European Union and Parties are required to move beyond mere transposition or formal compliance. The new European instruments demand a qualitative adjustment of domestic criminal law, including the expansion and clarification of offence definitions, the recalibration of sanctioning regimes, and the introduction of liability models capable of addressing complex organisational and corporate structures. In particular, the reinforced emphasis on serious and particularly serious environmental offences requires national legislators to reassess traditional distinctions between administrative and criminal liability and to ensure that criminal law intervention is not confined to residual or symbolic functions.

Legislative approximation in this context does not imply full harmonisation of national criminal law systems. Rather, it requires the alignment of core normative elements, such as the protection of ecological interests, the recognition of serious environmental harm as a distinct category of criminal wrongdoing, and the establishment of effective, proportionate and dissuasive sanctions for both natural and legal persons. This process necessarily interacts with deeply rooted principles of national criminal law, including legality, culpability and proportionality, and therefore calls for careful legislative design that respects constitutional traditions while fulfilling European obligations.

Beyond substantive criminal law, the implications extend to procedural and institutional dimensions. Both the EU Directive and the Council of Europe Convention implicitly challenge States to strengthen enforcement capacities, improve coordination among competent authorities, and ensure that environmental criminal law is supported by adequate investigative tools and expertise. The mere existence of criminal offences is insufficient if they are not accompanied by effective mechanisms for detection, prosecution and adjudication. In this respect, the European normative shift underscores the need to integrate environmental criminal law into broader criminal justice policy and environmental governance strategies.

At the same time, the evolving European framework signals a gradual reconfiguration of the relationship between environmental protection and criminal law. Criminal law is no longer conceived solely as an *ultima ratio* in the narrow sense, but increasingly as a complementary instrument that operates alongside administrative and civil mechanisms to ensure comprehensive environmental protection. This does not negate the principle of subsidiarity; rather, it reflects a recognition that certain forms of environmental harm, due to their scale, irreversibility or societal impact, require a distinctly criminal law response.

Ultimately, the implications for national legal orders lie not only in legislative change but also in a broader transformation of legal and institutional practice. The convergence of EU and Council of Europe initiatives indicates that European States are expected to move from formally existing frameworks towards genuinely effective systems of environmental criminal law. Legislative approximation thus becomes a dynamic, ongoing process, that requires continuous adaptation, evaluation, and refinement to ensure that criminal law keeps pace with evolving environmental challenges and societal expectations.

Notwithstanding the significant normative strengthening introduced by recent European instruments, certain structural challenges remain. The effectiveness of environmental criminal law ultimately depends not only on the existence of harmonised offence definitions and sanctioning regimes, but also on the practical capacity of national authorities to investigate and prosecute complex environmental offences. In several European States, enforcement of environmental criminal law has historically been constrained by limited specialised expertise, fragmented institutional competences and difficulties in detecting environmentally harmful conduct, particularly where such activities involve corporate actors or cross-border operations. Moreover, the increasing reliance on criminal law as a regulatory tool may raise doctrinal questions within some national systems concerning the traditional principle of *ultima ratio* in criminal law. These factors suggest that the success of the new European framework will depend not only on legislative approximation but also on sustained investment in enforcement capacity and national-level institutional coordination.

Practical experience across several European jurisdictions illustrates the challenges of effectively enforcing environmental criminal law. Despite the formal criminalisation of a range of environmentally harmful activities, prosecution rates for environmental offences have traditionally remained relatively low in many Member States, and cases are frequently addressed through administrative or regulatory sanctions rather than criminal proceedings. This tendency has been observed particularly in situations involving complex corporate structures or technically demanding environmental violations, where investigative authorities may face difficulties in establishing criminal liability. Such examples illustrate the enforcement gap that has repeatedly been identified in policy reports and academic literature, and which partly motivated the strengthening of the European legal framework through Directive (EU) 2024/1203 and the recent Council of Europe Convention.

Notwithstanding the normative convergence achieved at the European level, the harmonisation and effective implementation of the new instruments are likely to encounter a number of structural, doctrinal, and practical challenges across diverse national legal systems. From a doctrinal perspective, significant differences persist in the core concepts of criminal law, including culpability (Slovak: *zavinenie*), the scope of negligence (Slovak: *nedbanlivosť*), and the conditions of criminal liability of legal persons. These divergences may affect the uniform interpretation of offence definitions and the calibration of sanctions, particularly in legal systems where environmental offences have traditionally been treated as administrative rather than criminal matters.

From a practical perspective, the effectiveness of the new framework will depend on national authorities' capacity to investigate and prosecute complex environmental offences. This includes challenges related to specialised expertise, evidentiary complexity, cross-border cooperation and the involvement of corporate actors. In addition, differences in institutional structures, prosecutorial priorities and resource allocation may lead to uneven enforcement across Member States, thereby undermining the objective of creating a level playing field. These factors suggest that harmonisation in environmental criminal law remains a gradual and dynamic process, requiring not only legislative approximation but also sustained institutional adaptation and investment in enforcement capacity.

6 FUTURE PERSPECTIVES AND INSTITUTIONAL REFLECTIONS ON ENVIRONMENTAL CRIMINAL LAW IN EUROPE

The recent normative developments at the European Union and the Council of Europe indicate that European environmental criminal law has entered a phase of consolidation, combined with cautious expansion. While the adoption of Directive (EU) 2024/1203 and the Council of Europe Convention on the Protection of the Environment through Criminal Law has substantially strengthened the legal framework, these instruments should not be regarded as an endpoint. Rather, they form part of an evolving process in which environmental criminal law is increasingly expected to respond to complex, transnational and economically driven forms of environmental harm.

One of the most significant future challenges lies in ensuring that the newly established normative standards translate into *effective enforcement*. As environmental crime often involves cross-border activities, complex corporate structures and significant financial incentives, purely national enforcement strategies may prove insufficient. This opens discussions within European legal and policy discourse about the adequacy of existing institutional arrangements and the potential need for enhanced coordination at the European level. In this context, attention has increasingly turned to the possible role of the *European Public Prosecutor's Office* (EPPO).²⁶

At present, the mandate of the EPPO is limited to *criminal offences affecting the financial interests of the European Union*. Environmental crime, as such, falls outside its material

26 Council Regulation (EU) 2017/1939 of 12 October 2017 'Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office' ('the EPPO') [2017] OJ L 283/1 <<https://eur-lex.europa.eu/eli/reg/2017/1939/oj/eng>> accessed 10 February 2026. See also: European Union, 'The Establishment of the European Public Prosecutor's Office: Summary of Regulation (EU) 2017/1939 – Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office (the EPPO)' (*EUR-Lex*, 9 September 2024) <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32017R1939>> accessed 10 February 2026.

competence. Nevertheless, debates²⁷ have begun to explore whether certain categories of environmental offences, particularly those with a clear cross-border dimension or those closely linked to economic and financial crime, might warrant consideration in discussions on a possible future extension of the EPPO's remit. These debates do not reflect an agreed policy direction, but rather signal an emerging awareness that environmental crime poses enforcement challenges comparable to those that initially justified the EPPO's creation.

Importantly, any discussion of extending the EPPO's competence to environmental crime must be approached with caution. Such a development would raise complex legal and constitutional questions, including issues of subsidiarity, proportionality and the relationship between national prosecutorial autonomy and supranational enforcement mechanisms. Moreover, the diversity of national criminal law systems and enforcement capacities suggests that institutional innovation cannot substitute for effective domestic implementation of existing obligations. The primary responsibility for investigating and prosecuting environmental crime will therefore continue to rest with national authorities.

Beyond the question of institutional competence, future perspectives of "European environmental criminal law" also involve a gradual refinement of substantive concepts. The increasing emphasis on serious and particularly serious environmental offences suggests a trend towards recognising environmental harm as a core protected legal interest deserving of autonomous criminal law protection. This development may, over time, influence domestic doctrines concerning the culpability and liability of legal persons, as well as the relationship between criminal, administrative, and civil enforcement mechanisms.

Taken together, the future of environmental criminal law in Europe appears to be characterised by incremental development rather than radical transformation. The current European framework provides a solid foundation, but its effectiveness will depend on sustained political commitment, continued legislative adaptation and the willingness of States to invest in enforcement capacity. The parallel evolution of EU and Council of Europe instruments, combined with emerging institutional debates at the European level, demonstrates a shared understanding that environmental criminal law must remain responsive to evolving environmental risks. In this sense, the future trajectory of European environmental criminal law is likely to be shaped less by the creation of entirely new structures than by the progressive strengthening, coordination and practical application of those that already exist.

27 See, for example: Irene Chiocchetti, *Can the New EU Directive Boost the Fight Against Environmental Crime?* (Institute for European Environmental Policy, 28 November 2022) <<https://ieep.eu/publications/can-the-new-eu-directive-boost-the-fight-against-environmental-crime>> accessed 10 February 2026; Mar Jimeno Bulnes, 'The European Public Prosecutor's Office and Environmental Crime: Further Competence in the Near Future?' (2024) 19(2) *Eucrim* 146, doi:10.30709/eucrim-2024-010.

At the same time, it should be recognised that the strengthening of the European normative framework does not automatically guarantee effective enforcement in practice. Environmental crime often involves technically complex activities, transnational corporate structures and forms of conduct that are difficult to detect through traditional investigative methods. In several European jurisdictions, enforcement of environmental criminal law has historically been constrained by limited specialised expertise, fragmented institutional competences and insufficient investigative resources. These structural factors may continue to influence the practical application of the newly adopted European instruments. Consequently, the effectiveness of the evolving European framework will depend not only on legislative approximation and the adoption of new offence definitions, but also on the capacity of national authorities to develop specialised knowledge, improve inter-institutional coordination and ensure consistent investigative and prosecutorial practice in environmental crime cases.

7 CONCLUSIONS

This article examines the recent evolution of criminal law protection of the environment in Europe, focusing on emerging normative trends within the European Union and the Council of Europe. The analysis demonstrates that environmental criminal law has moved beyond its traditional role as a subsidiary and largely symbolic instrument and has increasingly become an integral component of European environmental governance.

The adoption of Directive (EU) 2024/1203 represents a significant recalibration of the European Union's approach to environmental crime. By expanding and clarifying the catalogue of criminal offences, strengthening sanctioning regimes for both natural and legal persons, and emphasising enforcement-oriented mechanisms, the Directive seeks to remedy the structural deficiencies of its predecessor. In doing so, it reinforces the role of criminal law as a tool that can meaningfully contribute to environmental protection, particularly in cases involving serious, economically motivated, or cross-border conduct. At the same time, the Council of Europe's Convention on the Protection of the Environment through Criminal Law illustrates a complementary normative trajectory. Through its standards-based approach, emphasis on "particularly serious offences" and integration of human rights and rule-of-law considerations, the Convention provides a pan-European framework that both guides national legislation and promotes cooperation beyond the confines of Union law. The parallel timing and substantive alignment of these two instruments indicate an emerging convergence in European thinking on the role of criminal law in addressing environmental harm. The European Union's decision to sign the Convention further underscores the interconnectedness of these normative developments and highlights a shared commitment to coherence and mutual reinforcement between the two legal frameworks.

The implications for national legal orders are considerable. Although many European States already possess criminal law provisions addressing environmental harm, the new European

instruments require more than formal transposition or minimal compliance. They call for a qualitative reassessment of domestic criminal law frameworks, including the delineation of serious environmental offences, recalibration of sanctioning systems, and strengthening of enforcement capacities. Legislative approximation in this field thus emerges as an ongoing and dynamic process, shaped by evolving environmental risks and by the need to balance effectiveness with fundamental criminal law principles.

From a scholarly perspective, this article contributes to the ongoing legal discourse by providing a structured analysis of the emerging convergence between the European Union and the Council of Europe in environmental criminal law. By examining the parallel development of Directive (EU) 2024/1203 and the Council of Europe Convention on the Protection of the Environment through Criminal Law, the article highlights how European environmental criminal law is evolving from a model primarily focused on formal criminalisation towards a more enforcement-oriented and operational framework. In doing so, the analysis offers a conceptual perspective on the transformation of criminal law into an increasingly central instrument of European environmental governance.

Looking ahead, the future of European environmental criminal law is likely to be characterised by gradual consolidation rather than radical transformation. The current normative framework provides a solid foundation, but its success will depend on sustained political commitment, effective national implementation and continued coordination at the European level. Emerging institutional debates, including discussions on enhanced cooperation in the prosecution of environmental crime, reflect an awareness that enforcement challenges increasingly transcend national borders. Whether and to what extent such debates will lead to further institutional innovation remains uncertain. What is clear, however, is that environmental criminal law in Europe is no longer a marginal field. It has become a dynamic and evolving area of law, expected to adapt continuously in order to keep pace with contemporary environmental challenges and societal expectations.

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Competing interests: The author of this article is a member of the Editorial Board of the Journal. To ensure the impartiality of the publication process, the author was not involved in the editorial decision-making or the peer-review process for this manuscript. The submission was handled independently by other members of the Editorial Board and team in accordance with the Journal's policy.

Disclaimer: The author declares that his opinions and views expressed in this manuscript are free of any impact from any organisations.

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EDITORS

Managing editor – Valentina Krivolapova. **English Editor** – Robert Reddin.
Ukrainian language Editor – Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Klimek L, 'Strengthening Environmental Protection Through Criminal Law in Europe: Normative Shifts and Enforcement Implications' (2026) 9(2) Access to Justice in Eastern Europe 11-34 <<https://doi.org/10.33327/AJEE-18-9.2-a000193>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000193>

Summary: 1. Introduction. – 2. Methodology and Analytical Framework. – 3. Evolution of Criminal Law Protection of the Environment in Europe: A Brief Overview. – 4. New Normative Trends in European Environmental Criminal Law. – 4.1. *European Union: Directive (EU) 2024/1203 On the Protection of the Environment Through Criminal Law as a Shift from “Minimum Criminalisation” to an Enforcement-Oriented Model.* – 4.2. *Council of Europe: Convention on the Protection of the Environment through Criminal Law as a Standards-Based Framework with “Ecological Seriousness” and Procedural Modernisation.* – 4.3. *Converging Normative Trajectories: Coordinated Advancement of Environmental Criminal Law in Europe.* – 5. Implications for National Legal Orders and Legislative

Approximation. – 6. Future Perspectives and Institutional Reflections on Environmental Criminal Law in Europe. – 7. Conclusions.

Keywords: *environmental crime; legislative approximation; enforcement mechanisms; Directive (EU) 2024/1203 on the protection of the environment through criminal law; Convention on the Protection of the Environment through Criminal Law*

ADDITIONAL INFORMATION

The paper was elaborated as a part of the research project VEGA No. 1/0100/24 'Implementation of European Crimes into the Legal Order of the Slovak Republic' [Slovak: Zavedenie európskych trestných činov do právneho poriadku Slovenskej republiky]. The funding was awarded to the Matej Bel University in Banská Bystrica, Slovak Republic.

DETAILS FOR PUBLICATION

Date of Submission: 10 Feb 2026

Date of Acceptance: 20 Mar 2026

Publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in the first round: 2 reports

Number of revision rounds: 2 rounds with minor revisions

Technical tools used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The author declares that no generative artificial intelligence (AI) tools were used in the research, drafting, analysis, or preparation of this manuscript.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПОСИЛЕННЯ ЗАХИСТУ ДОВКІЛЛЯ ЗА ДОПОМОГОЮ КРИМІНАЛЬНОГО ПРАВА В ЄВРОПІ: НОРМАТИВНІ ЗМІНИ ТА НАСЛІДКИ ДЛЯ ПРАВОЗАСТОСУВАННЯ

Лібор Клімек

АНОТАЦІЯ

Вступ. Екологічні злочини дедалі частіше стають серйозною загрозою для екосистем, громадського здоров'я та сталого розвитку, часто характеризуючись значними економічними стимулами, складними організаційними структурами та транскордонними вимірами. Традиційно охорона довкілля в Європі спиралася переважно на адміністративні та регуляторні механізми, а кримінальне право відігравало допоміжну та здебільшого символічну роль. Однак останнім часом обмеженість такого підходу стала очевидною, що зумовило переоцінку функції кримінального права щодо вирішення проблеми екологічної шкоди. Ця зміна матеріалізувалась у значних нормативних розробках на європейському рівні, зокрема в межах Європейського Союзу та Ради Європи.

Методи. У статті використовується доктринальна та аналітична правова методологія, що зосереджується на тлумаченні європейських правових інструментів, політичних документів та відповідної наукової літератури. У ній розглядаються останні зміни у вторинному праві ЄС та договірному праві Ради Європи з багаторівневої європейської перспективи без зосередження на конкретних національних правових системах. Аналіз застосовує горизонтальний підхід, спрямований на виявлення конвергентних нормативних тенденцій, структурних інновацій та наслідків, пов'язаних із правозастосуванням, для національних правопорядків та процесах законодавчої гармонізації.

Результати та висновки. Аналіз демонструє, що європейське кримінальне право у сфері довкілля вступило в нову фазу, яка характеризується переходом від формальної криміналізації до більш орієнтованих на ефективність і практичне застосування механізмів. Нова Директива (ЄС) 2024/1203 про захист довкілля за допомогою кримінального права є суттєвим переосмисленням підходу ЄС: вона розширює перелік кримінальних правопорушень, посилює санкційні режими як для фізичних, так і для юридичних осіб, а також наголошує на необхідності ефективного правозастосування. Паралельно Конвенція Ради Європи про захист довкілля засобами кримінального права 2025 року встановлює стандартну систему, що ґрунтується на правах людини та верховенстві права, запроваджуючи концепцію особливо серйозних екологічних правопорушень та посилюючи механізми співпраці. Синхронність ухвалення та

змістовна узгодженість цих інструментів свідчать про нову конвергенцію в європейських підходах до кримінального права у сфері довілля, що ще більше підкреслюється рішенням Європейського Союзу підписати Конвенцію Ради Європи. У статті було зроблено висновок, що, хоча національні кримінально-правові механізми захисту довілля вже існують, нові європейські ініціативи вимагають від держав переходу від формального дотримання норм до створення справді ефективних і узгоджених систем захисту довілля, здатних адекватно реагувати на сучасні екологічні виклики.

Ключові слова. Екологічні злочини; гармонізація законодавства; механізми правозастосування; Директива (ЄС) 2024/1203 про захист довілля за допомогою кримінального права; Конвенція про захист довілля засобами кримінального права.

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000194>

Date of submission: 27 Jan 2026

Date of acceptance: 16 Mar 2026

Online First Publication: 20 Apr 2026

Last Publication: 20 May 2026

Disclaimer:

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Research Article

BUILDING A COMPULSORY MEDIATION PATHWAY: BULGARIA AS A LIVE EXPERIMENT IN DISPUTE SYSTEM DESIGN?

Yuliya Radanova

ABSTRACT

Background: Bulgaria has had a statutory mediation framework for over two decades, yet mediation remains underused compared with court adjudication. In the context of judicial reform and caseload reduction, Bulgaria adopted rules in 2023 that introduced mandatory judicial mediation pursuant to which parties to pending court proceedings are required to attend a free-of-charge mediation information session of up to three hours before the first open hearing. The provision was scheduled to come into force on 1 July 2024. On that date, however, the Bulgarian Constitutional Court (Decision No. 11 of 1 July 2024, Constitutional Case No. 11/2024) declared the core provisions of the reform unconstitutional, reviving the question of how far the legislature can require a mediation step without impairing access to justice. In July 2025, Bulgaria adopted a revised model centred on mandatory participation in a mediation information meeting during pending proceedings for specified categories of disputes subject to additional referral by judges.

This article analyses the new model, positions it within European approaches, and identifies design requirements for legislation that can stimulate mediation uptake without creating procedural barriers.

Method: *The article employs doctrinal and comparative legal analysis. It examines the 2025 amendments to the Bulgarian Civil Procedure Code and the Mediation Act, introducing mandatory participation in a mediation information meeting, and considers them in light of the Bulgarian Constitutional Court's reasoning on proportionality and effective access to court. It situates Bulgaria's approach within European standards, particularly the interpretation of mandatory ADR/mediation models by the Court of Justice of the European Union and the European Court of Human Rights, as well as the mandatory mediation models applicable in Italy, Lithuania, Spain, Greece, and Cyprus. The analysis also draws on international discussions on the design features of effective mandatory mediation models, including incentives, costs, procedural safeguards, and protections in cases involving violence or risks to children, to offer suggestions regarding the features an effective mandatory mediation approach should adopt.*

Results and Conclusions: *The 2025 Bulgarian mandatory mediation model is best characterised as a hybrid: it combines a legislatively defined set of case types with broad judicial discretion and multiple statutory exceptions. It compels attendance at an information meeting (not mediation itself), does not require settlement, does not automatically stay the court case, and limits adverse costs consequences to a modest fee, all features aimed at meeting constitutional proportionality requirements. At the same time, its effectiveness will depend on implementation choices (funding, quality control of mediators, clear referral criteria, and workable incentives). The Bulgarian trajectory confirms the broader European trend: mandatory or semi-mandatory mediation mechanisms can be compatible with the right to effective judicial protection, but only when designed to avoid turning ADR into a procedural barrier and when safeguards for vulnerable parties are robust. The ultimate conclusion is that it may be advisable to adopt uniform, mandatory mediation procedures that apply across the EU and form the backbone of an efficient mediation ecosystem across the Union that truly promotes out-of-court dispute settlement.*

1 INTRODUCTION

Although mediation has been regulated in Bulgaria for more than twenty years under the Mediation Act,¹ public and professional recognition of mediation as a realistic alternative to court adjudication remains limited. Over time, Bulgarian policy debates gradually shifted from purely voluntary mediation toward approaches under which, rather than relying solely on a judge, the parties are encouraged or directed to work with a mediator, who supports communication and assists them in seeking a mutually acceptable solution under conditions of voluntariness and confidentiality.

1 Law of the Republic of Bulgaria 'On Mediation' [2004] State Gazette 110 (amended 8 July 2025) <<https://lex.bg/laws/ldoc/2135496713>> accessed 5 January 2026.

Parties often value mediation because it may produce agreements that reflect their interests and, where needed, can be given enforceability through subsequent court proceedings. Nevertheless, mediation historically remained non-mandatory and was not a procedural prerequisite for filing or continuing court proceedings, thereby constraining its practical scope. This triggered a debate in recent years on whether and how to amend the legal framework so that parties would be required, at least, to attempt consensual settlement through an out-of-court process.

These discussions developed in the broader context of judicial reform: as a tool to reduce the courts' caseload, increase party satisfaction with dispute administration, and align Bulgaria with practices already adopted in many European and non-European jurisdictions. As a result, the transition toward mandatory judicial mediation was included as a key step in Reform C10.R3 ("Introduction of mandatory judicial mediation") under Bulgaria's National Recovery and Resilience Plan.²

Within the set timelines, amendments to both the Mediation Act and the Civil Procedure Code were adopted and published in State Gazette No. 11/2023, scheduled to come into force on 1 July 2024. During the deferred coming-into-force period, the Supreme Bar Council filed a constitutional challenge against the relevant provisions of the Mediation Act and the Civil Procedure Code. On 1 July 2024, the day the contested rules were to become applicable, the Constitutional Court issued its decision in Constitutional Case No. 11/2024 (the "Constitutional Court decision on mandatory mediation"), declaring each of the challenged provisions unconstitutional.³

The declaration of unconstitutionality reignited debate on the future of judicial mediation in Bulgaria and the direction reform should take. This culminated in the adoption of new amendments to the Civil Procedure Code, promulgated in State Gazette No. 55 of 8 July 2025,⁴ introducing a mandatory mediation information meeting (up to three hours) in a broad range of proceedings, aimed at explaining to parties the principles of mediation and how it might support the resolution of their dispute.

This article critically examines the newly adopted model (a second attempt at "mandatory mediation" in Bulgaria) and compares it with established mandatory mediation models in the European Union, situating Bulgaria's approach within the broader landscape and outlining possible avenues for improvement. Separately, the article seeks to offer guidance on the requirements for a well-functioning model of mandatory mediation, based on the comparative analysis conducted and the processes that should be undertaken in the course of identifying a country's mandatory mediation model.

2 Reform C10.R3 "Introduction of mandatory judicial mediation" see, Council of Ministers of the Republic of Bulgaria, 'National Recovery and Resilience Plan' (amended 2025) <<https://nextgeneration.bg/14>> accessed 5 January 2026.

3 Case No 11/2024 (Constitutional Court of the Republic of Bulgaria, 1 July 2024) <<https://www.constcourt.bg/bg/case-660>> accessed 5 January 2026.

4 Civil Procedure Code of the Republic of Bulgaria [2007] State Gazette 59 (amended 8 July 2025) <<https://lex.bg/laws/ldoc/2135558368>> accessed 5 January 2026.

2 RESEARCH METHODOLOGY

The methodology deployed in preparing this article primarily involves doctrinal-comparative methodology, combined with normative institutional design analysis. While the reform trajectory in Bulgaria serves as the central empirical referent, the article does not aim to offer a purely descriptive case narrative focused on the mediation design of a particular country. Rather, Bulgaria serves as a *case through which* broader questions of the design of mandatory (or semi-mandatory) mediation are tested against constitutional and European standards of effective judicial protection, proportionality, the voluntariness of outcomes, and procedural fairness.

The core method used herein is a doctrinal interpretation of the 2023 and 2025 amendments to the Bulgarian Civil Procedure Code and the Mediation Act, their interaction with the national mediation framework, and their place within the broader European framework. The analysis reads the new provisions in light of the Bulgarian Constitutional Court's reasoning (Decision No 11 of 1 July 2024, Constitutional Case No 11/2024) on the constitutional limits of imposing a compulsory ADR step within pending proceedings, with particular attention to proportionality, legal certainty, and access to court. Doctrinal analysis is used to (i) map the normative structure of the 2025 model (triggers, exceptions, legal consequences, incentives); (ii) identify how the legislature attempted to “repair” the constitutional defects of the 2023 model; and (iii) evaluate the internal coherence and foreseeable operation of the rules from the standpoint of procedural law and constitutional requirements. To situate the Bulgarian model within wider European practice, the article applies a structured comparative approach. The comparison is functional rather than taxonomic: it examines how different jurisdictions address the same regulatory problem, stimulating mediation uptake without creating a procedural barrier through varying combinations of (a) categorical referral, (b) judicial discretion, (c) sanctions/incentives, (d) time limits and limitation-period protection, and (e) safeguards for vulnerable parties. Within this comparative framework, the article draws on EU and Council of Europe standards to identify design features that tend to be legally decisive (e.g., absence of mandatory settlement, avoidance of substantial delay, cost proportionality, access to interim measures, and operational opt-outs).

The methodology used in drafting this article further focuses on the case law of the Court of Justice of the European Union and the European Court of Human Rights as the principal supranational benchmarks for assessing the compatibility of “mandatory mediation” models with the right to effective judicial protection. The relevant jurisprudence is used not merely as background, but as a set of criteria to assess whether the Bulgarian legislative design (as a hybrid information-meeting model within pending proceedings) plausibly satisfies the established European thresholds and safeguards.

To situate Bulgaria within wider European practice, the study adopts a structured functional comparison. Rather than classifying jurisdictions by formal labels (“mandatory” vs. “voluntary”), it examines how legal systems address the same regulatory problem,

stimulating mediation uptake without creating a procedural barrier, through varying combinations of (a) categorical referral, (b) judicial discretion, (c) sanctions and incentives, (d) time limits and limitation-period protection, and (e) safeguards for vulnerable parties. Within this framework, the article further undertakes a comparative analysis of national jurisprudence in Italy, Lithuania, Greece, Spain, and Cyprus to examine how mandatory mediation models have evolved.

It should be further stressed that this manuscript is non-empirical. It does not evaluate settlement rates, user satisfaction, or system-level outcomes of the 2025 Bulgarian mandatory mediation model, as the reform is recent and comprehensive implementation data is not yet publicly available. Any claims about expected effectiveness are, therefore, framed conditionally and linked to identifiable implementation variables, funding, mediator capacity, quality assurance, and the consistency of judicial referral practice. The article's contribution is primarily doctrinal and analytical: clarifying constitutional and European parameters, explaining the internal logic and safeguards of the 2025 framework, and identifying design choices that determine whether a compulsory element operates as a facilitative nudge or an access-to-justice barrier.

Building on the doctrinal and comparative findings, the article develops a normative synthesis of "design requirements" for constitutionally and EU-law compatible mandatory mediation mechanisms. This step is methodologically distinct: it translates the legal constraints (constitutional proportionality; access to court; voluntariness of outcome; equality of arms; legal certainty) into operational design propositions (scope calibration; meaningful exceptions; proportionate consequences; funding and quality assurance; workable judicial referral criteria; safeguards for violence/child-risk cases). The recommendations are grounded in identified legal criteria and comparative practice, rather than being purely policy-driven.

The study further relies on primary legal sources (Bulgarian legislation and amendments, Constitutional Court decision and separate opinions), EU legal instruments and jurisprudence, ECtHR standards under Article 6 ECHR, and relevant academic literature on mandatory mediation, ADR and access to justice. Secondary sources are used to contextualise policy objectives and to reflect scholarly debate on mandatory ADR, but the analysis and conclusions remain anchored in the interpretation of legal norms and jurisprudential criteria.

It should also be clarified that the manuscript is non-empirical, as it does not present a statistical evaluation of settlement rates or the implementation outcomes of the 2025 model. The reform is recent, and comprehensive implementation data is not yet publicly available. Accordingly, claims regarding expected effectiveness are framed as conditional and tied to identifiable implementation variables (funding, mediator capacity, quality control, and consistent referral practice). The contribution of the article is therefore primarily doctrinal and analytical: it clarifies the constitutional and European parameters

of the model, explains its internal logic and safeguards, and identifies legally relevant design choices that determine whether “mandatory” mediation functions as a facilitative nudge or an access-to-justice barrier.

3 THE CONCEPT OF MANDATORY MEDIATION

Before offering additional insights into the mandatory mediation model that has emerged in Bulgaria, it is worth explaining what mandatory mediation is.

Mandatory mediation may be defined as a process that requires parties to a dispute to participate in a structured, neutral, and facilitative process aimed at informing them of the nature of the process and how it may be practically helpful to them, while preserving the voluntariness of any agreement reached. Unlike voluntary mediation, it compels attendance or initial engagement while avoiding coercive settlement tactics that could undermine self-determination.⁵ Academic sources emphasise this distinction by asserting that “*at its core, mandatory mediation aims to familiarize parties with the process or to initiate it, without compelling them to reach a settlement.*”⁶ Such forced attempts to familiarise parties with the principles of mediation and raise their general understanding of how best to use it in the context of their specific dispute have, however, always been accompanied by raised concerns. Mandatory mediation is often criticised on three main grounds: doubts about efficiency, concerns that compulsion undermines party self-determination, and the risk that it restricts effective access to the courts;⁷ however, proponents argue that if framed as mandatory attendance/consideration rather than mandatory settlement, and supported by safeguards, mediation can legitimately advance justice by reducing delay and cost, narrowing issues early, supporting proportionality and case management, improving the parties’ sense of voice and procedural fairness, and enabling more durable, tailored outcomes (with courts remaining available where adjudication is needed).⁸ Empirical reviews of court-connected programmes provide support for these claims, finding that design choices and implementation matter for settlement, time/cost effects, and participant experience, and that mediation can deliver perceived fairness and meaningful participation even where settlement is not reached.⁹

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

6 Giuseppe De Palo, ‘Da Promessa à Prática: Solucionando o paradoxo da mediação na Europa’ (2025) 3(3) *Revista Trabalho, Direito e Justiça*, e143, doi:10.37497/RevistaTDJ.TRT9PR.3.2025.143.

7 Frank EA Sander, ‘Another View of Mandatory Mediation’ (2007) 13(2) *Dispute Resolution Magazine* 16.

8 Michael Bartlet, ‘Mandatory Mediation and the Rule of Law’ (2019) 1(1) *Amicus Curiae: Series 2* 50, doi:10.14296/ac.v1i1.5066.

9 Roselle L Wissler, ‘The Effectiveness of Court-Connected Dispute Resolution in Civil Cases’ (2004) 22(1-2) *Conflict Resolution Quarterly* 55, doi:10.1002/crq.92.

At the same time, rule-of-law analyses emphasise that any “mandatory” model must preserve voluntariness of outcome, protect against coercion,¹⁰ and provide meaningful opt-outs and procedural guarantees to address access-to-justice and autonomy objections, while comparative work highlights both the promise and the limits of mandated schemes across jurisdictions.¹¹ For a balanced treatment, it is common to acknowledge leading critiques cautioning against over-reliance on ADR and the potential dilution of adjudicative justice, and to use them to justify robust safeguards rather than to reject mediation outright.¹²

To date however, the legitimacy of mandatory mediation has been confirmed by the European Court of Human Rights (ECtHR)¹³ and the Court of Justice of the European Union (CJEU)¹⁴ as in a mandatory mediation model, the parties’ core obligation is typically limited to inviting the other party and attending an initial session with a mediator to explore whether mediation could help resolve the dispute. This “mandatory attempt” strikes a pragmatic balance between full compulsory mediation and a purely voluntary regime, in which parties have no duty to initiate or attend a preliminary meeting. Across the EU, particularly in jurisdictions such as Italy, Lithuania, Spain, Greece, and Cyprus, mandatory mediation schemes have been introduced primarily to ease court congestion, lower dispute-resolution costs, and encourage faster, more comprehensive outcomes.¹⁵ Beyond these operational goals, legislators often aim to trigger a broader cultural shift toward consensual settlement, ultimately strengthening social cohesion and stability.

- 10 Dorcas Quek, ‘Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program’ (2010) 11(2) *Cardozo Journal of Conflict Resolution* 479.
- 11 Sameer Ali, ‘Conciliation Beyond the Courts – Aspirations and Limits of Mandated and Voluntary Court Mediation Programmes from a Multi-Jurisdictional Perspective’ in Burkhard Hess and others (eds), *Comparative Procedural Law and Justice* (2024) pt 15, Ch 2 <<https://www.cplj.org/a/15-2>> accessed 25 March 2026.
- 12 Hazel Genn, ‘What is Civil Justice For? Reform, ADR, and Access to Justice’ (2013) 24 *Yale Journal of Law and the Humanities* 397.
- 13 *Ashingdane v the United Kingdom* App no 8225/78 (ECtHR, 28 May 1985) <<https://hudoc.echr.coe.int/eng?i=001-57425>> accessed 5 January 2026; Case C-35/22 *CAJASUR Banco SA v JO and IM* (CJEU (Fourth Chamber), 13 July 2023) <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0035>> accessed 5 January 2026.
- 14 Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini and Others v Telecom Italia SpA and Others* (CJEU (Fourth Chamber), 18 March 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CJ0317>> accessed 4 January 2026; Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v Banco Popolare - Società Cooperativa* (CJEU (First Chamber), 14 June 2017) <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0075>> accessed 5 January 2026.
- 15 This has been found to be true, particularly for family disputes where mandatory mediation schemes across the EU have been depicted in the following article: Indre Korsakoviene, Julija Branimirova Radanova and Agnė Tvaronavičienė, ‘Mandatory Mediation in Family Disputes: An Emerging Trend in the European Union?’ (2023) 53(2) *Review of European and Comparative Law* 67, doi:10.31743/recl.15707.

The compatibility of mandatory mediation attempts with fundamental principles, especially effective access to justice and voluntariness, has been extensively debated.¹⁶ Nevertheless, several Member States have chosen to test whether a structured “nudge” toward mediation would increase uptake in practice. In some jurisdictions, results have exceeded expectations. Italy is frequently cited as a leading example:¹⁷ for roughly the past fifteen years, it has operated an “easy opt-out” model requiring parties, in many civil and commercial matters (and sometimes by judicial order in pending litigation), to attend an initial session at a mediation body accredited by the Ministry of Justice before proceeding in court. The Italian approach has faced repeated legal challenges, including arguments before the Italian Constitutional Court and in EU-law contexts, claiming that mandatory mediation interferes with the right to bring a case before a court.¹⁸ This shows that not only the content and form of the mediation model are important, but also the way it is introduced to society, an aspect that has also been reconfirmed by recent developments in Bulgaria prior to adopting the mandatory mediation model.

4 MANDATORY MEDIATION IN THE EUROPEAN UNION CONTEXT

Before analysing in full the newly emerged mandatory model in Bulgaria, it is worth further exploring the wider European Union context in which it is positioned. The earliest EU-level policy discussion on mandatory mediation can be traced to the European Commission’s 2002 Green Paper on ADR, which linked out-of-court resolution to improved access to justice through reduced caseload and lower time/cost burdens, while cautioning that mandatory schemes must not violate the right of access to court under Article 6 ECHR.¹⁹ The consultation revealed polarised national views, indicating that Member States differed significantly in their willingness to embrace a unified mediation approach.

These divergences persisted even after Directive 2008/52/EC on mediation in cross-border civil and commercial disputes (“Mediation Directive”) (transposed in into Bulgarian law by the Mediation Act amended in 2007).²⁰ While the Directive does not fully harmonise national mediation regimes, Article 5(2) explicitly permits Member States to introduce

16 Timothy Hedeem, ‘Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some are More Voluntary than Others’ (2005) 26(3) *The Justice System Journal* 273.

17 Giovanni Matteucci, ‘Mandatory Mediation, the Italian Experience, a Case Study–2025’ (2025) 16(1) *Beijing Law Review* 353, doi:10.4236/blr.2025.161017.

18 Giovanni Matteucci, ‘Civil Process and Mediation in Italy’ (2024) 15(3) *Beijing Law Review* 1347, doi:10.4236/blr.2024.153080.

19 European Commission, ‘Green Paper on Alternative Dispute Resolution in Civil and Commercial Law’ (COM/2002/0196 final, 19 April 2002) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52002DC0196>> accessed 5 January 2026.

20 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 ‘On Certain Aspects of Mediation in Civil and Commercial Matters’ [2008] OJ L 136/3 <https://eur-lex.europa.eu/eli/dir/2008/52/oj/eng?utm_source=chatgpt.com> accessed 5 January 2026.

mandatory mediation provided access to the judicial system is not prevented. It leaves open how “mandatory” mediation may be implemented, allowing it to operate before or during proceedings and to be supported by sanctions or incentives.²¹

The compatibility of mandatory mediation with EU law has been repeatedly debated. In the Italian preliminary reference in Case C-492/11 (*Giudice di pace di Mercato San Severino*),²² the referring court questioned whether a mandatory pre-trial mediation requirement, and possible cost consequences for non-participation, could conflict with Article 47 of the Charter, the Directive, and ECHR principles. Although the CJEU did not decide that reference (because parts of the Italian framework were declared unconstitutional in 2012 and the questions became hypothetical), the questions themselves reflected the core tension: how far may procedural obligations go before they become a barrier to justice?

Subsequently, in Joined Cases C-317/08 to C-320/08 (*Alassini*),²³ the CJEU accepted that mandatory ADR/mediation may be permissible when the scheme:

1. does not force parties into settlement;
2. does not cause substantial delay in bringing proceedings;
3. suspends limitation periods during the procedure; and
4. causes no or only insignificant costs for parties; and
5. allows for the adoption of interim measures.

It was, therefore, concluded that if national legislation imposes a mandatory out-of-court settlement procedure, which fully meets the above criteria, the principles of equivalence and effectiveness or the principle of effective judicial protection, are not violated or disproportionately restricted. These conditions are widely treated as a baseline EU standard for compatibility of mandatory mediation mechanisms with effective judicial protection.²⁴

A few years later, in 2017, the CJEU revisited and refined the criteria developed in *Alassini*. In *Menini and Rampanelli* (the *Menini* case),²⁵ the Court was asked whether making mediation a prerequisite to bringing a claim before a court is compatible with the Consumer ADR Directive, which stresses that ADR should be voluntary. The CJEU

21 F Peter Phillips, “The European Directive on Commercial Mediation: What it Provides and What it Doesn’t” in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill 2008) 311, doi:10.1163/ej.9789004175556.i-382.104.

22 Case C-492/11 *Ciro Di Donna v Società Imballaggi Metallici Salerno S.r.l* (SIMSA) (CJEU (Third Chamber), 27 June 2013) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62011CJ0492>> accessed 5 January 2026.

23 Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 (n 14).

24 Giovanni De Berti, ‘ECJ Finds Italian Rules on Mandatory Mediation Consistent with EU Law’ (*International Law Office*, 29 April 2010) <https://www.dejalex.com/wp-content/uploads/2017/12/publ_100429.pdf> accessed 5 January 2026.

25 Case C-75/16 (n 14).

reaffirmed its *Alassini* approach, holding that mandatory mediation may be acceptable provided it does not hinder consumers' right of access to the courts, and reiterated the *Alassini* criteria as the benchmark for assessing its compatibility with the right to justice. In addition, the Court introduced two consumer-specific requirements. First, under the Consumer ADR Directive, consumers cannot be compelled to be represented by a lawyer in ADR proceedings; however, Italian law requires legal assistance in mandatory mediation, which the CJEU found inconsistent with Articles 8(b) and 9 of the Directive, as these provisions ensure access to ADR without the burden of legal representation costs. Second, the Court ruled that national rules must not excessively limit a consumer's ability to withdraw from mediation: since Article 9(2) of the Directive permits parties to leave the procedure at any time, a national rule requiring consumers to provide special justification to withdraw conflicts with EU law.

In contrast, the UK (before leaving the EU) adopted a more sceptical stance in *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920, rejecting compulsory mediation but allowing adverse costs consequences where a party unreasonably refused mediation. The judgment also formulated criteria to assess unreasonable refusal: (i) nature of the dispute; (ii) clarity of applicable law; (iii) whether other ADR was tried; (iv) proportionality of mediation cost to the claim; (v) urgency; and (vi) the refusing party's prospects of success. The decision sparked significant debate, including criticism that it overstates mediation as a barrier rather than a facilitative process.²⁶

The latest judgment in this area from an EU perspective is *Investcapital Ltd v TK*.²⁷ In that case, the CJEU reaffirmed that Member States may provide for mandatory mediation before or after court proceedings, provided that the right of access to justice remains protected. The Court also offered an important clarification, stating in essence that Article 5(2) of the Mediation Directive, read together with the principle of primacy of EU law, does not prevent a national court from disregarding a Constitutional Court ruling that annulled domestic legislation making certain actions admissible only if the claimant attended an information session on the benefits of mediation, where that constitutional ruling itself falls outside the scope of Article 5(2) and therefore cannot be contrary to it. Romanian and Bulgarian scholars have interpreted this approach as strengthening Member States' discretion to adopt mandatory mediation schemes: the CJEU suggested that obliging parties to attend an informational meeting on mediation is not, by itself, incompatible with EU law, which may prompt renewed consideration of models previously rejected.²⁸ Overall, the CJEU's case law indicates that mandatory mediation can be integrated into national

26 Miryana Nestic, 'Mediation – On the Rise in the United Kingdom?' (2001) 13(2) *Bond Law Review* 20, doi:10.53300/001c.5383.

27 Case C-658/23 *Investcapital* (CJEU (Seventh Chamber), 3 September 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C_202406067> accessed 5 January 2026.

28 Yuliya Radanova, 'Forms of Mandatory Judicial Mediation in the Context of the Right of Access to Justice' (2022) 3 *Contemporary Law* 43.

legal systems provided the national framework complies with the established criteria designed to preserve a fair balance between the compulsory nature of ADR and the right to effective judicial protection.

Against this comparative background, the Bulgarian model should be analysed and positioned against the evolving criteria for designing a mandatory mediation model.

5 BULGARIA AND THE CONSTITUTIONAL COURT AS A POSITIVE LEGISLATOR IN THE FIELD OF MEDIATION

A proper assessment of Bulgaria's currently operative approach to mandatory mediation requires a brief step back to the legislative package adopted in 2023 and annulled by the Bulgarian Constitutional Court immediately prior to its scheduled entry into force on 1 July 2024. The 2023 model sought to stimulate mediation uptake by embedding an obligatory procedural step within the litigation pathway. In practical terms, it required parties in defined categories of disputes to engage in mediation at a specified procedural moment, with procedural consequences for non-compliance. The mechanism was intended to shift dispute resolution behaviour through institutional design rather than through voluntary market uptake. Under the annulled framework, once civil proceedings were initiated and the dispute fell within statutorily defined categories (or where the court so ordered), the parties would have been obliged to attend a free, court-based **mediation procedure of up to three hours**. The cases, listed in the Civil Procedure Code as subject to such obligation, include disputes concerning the partition of co-owned property and the allocation of its use; monetary claims arising from co-ownership; divorce and issues relating to parental rights, the child's place of residence, and maintenance; modification of measures concerning the exercise of parental rights and the resolution of disagreements in that sphere; remuneration or compensation arising from employment relationships, as well as claims for the recognition of unlawful dismissal, its annulment, and reinstatement; monetary and non-monetary claims in civil disputes where the value of the claim does not exceed BGN 25,000 (app. EUR 12 500); commercial disputes regardless of the value of the claim; and contractual and property disputes up to a specified amount. The session would be conducted by a mediator working in newly established court-annexed mediation centres. The mandatory session aimed to inform the parties about the benefits of mediation and how it could help resolve their dispute. Crucially, the scheme did not compel parties to reach a settlement and was not designed as "full" compulsory mediation; rather, it functioned primarily as a mandatory initial informational meeting intended to acquaint parties with mediation and evaluate its potential utility in the dispute. In this sense, the model sought to preserve mediation's voluntary character, understood as the absence of any duty to settle, while nevertheless imposing a procedural duty to participate in an introductory session once litigation had already commenced.

In anticipation of implementation, the Supreme Judicial Council (SJC/VSS) adopted two implementing ordinances in October 2023: one regulating the selection, status, and activities of mediators within judicial mediation centres, and another governing the structure and organisation of those centres. By late June 2024, only days before the Constitutional Court's judgment, the selection and training of judicial mediators intended to staff the newly established centres (created under an unchanged provision of the Judiciary Act, art. 84a) had been completed, underscoring the degree of institutional commitment already invested in the reform.

The legislative package was challenged by the Supreme Bar Council of Bulgaria, which initiated Constitutional Court proceedings on 6 March 2024²⁹ to test the constitutionality of the civil procedural code provisions that were to come into force on 1 July 2025. The Council argued that mandatory participation, limited even to an informational session, unduly constrained effective access to justice, particularly because non-attendance triggered significant cost-related consequences. The arguments put before the Constitutional Court mainly focused on the fact that, through such "mandatory" participation in an informative meeting, effective access to justice is impeded, and that refusal to participate is sanctioned by requiring the non-participating party to bear the costs of the entire case. Ten separate submissions were filed with the court by a range of public institutions and professional organisations, including the Bulgarian Ministry of Justice, the President, the Association of Judges in Bulgaria, the National Association of Mediators, and the Professional Association of Mediators in Bulgaria,³⁰ all supporting the newly adopted mandatory mediation model and arguing that it is consistent with the Bulgarian Constitution. The only concern raised in these submissions came from the Association of Judges in Bulgaria, which questioned the costs sanction for refusing to participate in mediation, namely, the rule requiring non-participating parties to bear all procedural expenses regardless of the outcome of the case. The Constitutional Court dismissed all those professional positions and approached the amendments to the Mediation Act and the Civil Procedure Code as a single "unified normative complex" that should be invalidated as in breach of the Constitution. The Court's reasoning, as analysed in the relevant scholarship, centred on three main concerns: (1) the model risked delaying access to court and timely adjudication; (2) it undermined the principle of voluntariness by introducing coercion into participation; and (3) it raised rule-of-law objections, including deficiencies in clarity and predictability.

Notably, the Court did not dispute the legitimacy of the underlying policy objectives, namely, encouraging ADR, reducing court workload, and aligning with broader European developments. Its critique focused instead on institutional design. A recurrent implication

29 Constitutional claim of the Supreme Bar Council of Bulgaria No 276 (Constitutional Court of Bulgaria, 6 March 2024) <<https://www.constcourt.bg/bg/dl-05d52ed7c60b9fc9311b1382bce25844343213c7>> accessed 5 January 2026.

30 All positions that were filed before the Constitutional Court under its constitutional case No. 11/2024 assessing the constitutionality of the mandatory mediation model, see Case No 11/2024 (n 3).

of the Court's analysis is a preference for mandatory pre-trial ADR mechanisms, rather than those imposed after proceedings have been initiated. This orientation was linked to EU case-law, including *Alassini*, which accepts mandatory pre-litigation conciliation/mediation where appropriate safeguards are respected.

Further constitutional objections were directed at the scope of disputes captured by the mandatory referral mechanism and the absence of sufficiently coherent criteria. In particular, the Court criticised the exclusion of the state and state institutions from the mandatory regime, viewing this carve-out as an unjustified privilege. Similar concerns were raised regarding the handling and exclusion of various consumer disputes, suggesting an uneven and insufficiently reasoned legislative categorisation.

A decisive element in the Court's invalidation concerned the cost-sanction mechanism (CPC art. 78a), which allowed a party who failed to attend the initial mediation meeting to be ordered to bear all litigation costs, regardless of the outcome on the merits. The Court considered this constitutionally unacceptable because cost allocation in civil proceedings should generally reflect success or failure in the litigation, not compliance with a preliminary procedural step. The provision was also deemed insufficiently clear to guide consistent judicial application. While comparative systems may impose consequences for non-attendance, these are more commonly framed as targeted and proportionate measures (e.g., fixed fines or limited cost consequences) rather than an outcome-blind shifting of all costs.

The scholars also highlight a separate opinion by Judge Sonya Yankulova, which draws a conceptual distinction between coercion to attempt mediation (i.e., to attend an initial session) and coercion within mediation (i.e., to negotiate or settle).³¹ On that account, a requirement to attend an introductory meeting does not, in itself, negate voluntariness because it does not compel agreement; the constitutional problem arises when participation is coupled with sanctions that effectively operate as a barrier to judicial protection.

Beyond doctrinal considerations, the judgment generated immediate practical and policy challenges. For some stakeholders, the judgment confirmed that compulsory elements must remain narrowly tailored and procedural consequences must be proportionate and predictable. For others, it highlighted the need to redesign the mechanism rather than abandon the objective of promoting mediation uptake. Importantly, the public debate after annulment did not only address constitutionality in the abstract; it also engaged implementation questions such as mediator capacity, funding, quality control, and how referrals can be made workable in routine court practice without creating unequal burdens for weaker parties. Concerns were raised in public discussion that failure to implement the reform might entail financial consequences under the National Recovery and Resilience Plan, including a potential exposure of BGN 100 million (i.e., approximately EUR 50 million),

31 Separate opinion of Judge Sonya Yankulova in Case No 11/2024 (Constitutional Court of the Republic of Bulgaria, 1 July 2024) <<https://www.constcourt.bg/bg/act-9841>> accessed 5 January 2026.

although no confirmed outcomes were identified at the time of writing. A further unresolved issue relates to the legal position of the already selected and trained judicial mediators. Given that the ordinances and selection procedures were adopted to operationalise a statutory framework later declared unconstitutional, questions arise as to whether affected mediators might pursue state liability claims grounded in legitimate expectations and legal certainty, assessed through the prism of art. 7 of the Bulgarian Constitution, the State and Municipal Liability for Damages Act, and relevant fundamental rights considerations. As typically framed, such claims would require proof of (1) an unconstitutional norm, (2) damage (pecuniary and or non-pecuniary), and (3) a causal link, although claims for speculative future earnings would likely face evidentiary difficulties.

In sum, Bulgaria's annulled 2023–2024 “judicial mediation” model illustrates the constitutional sensitivity of mandatory ADR design, particularly where mandatory post-filing participation is combined with severe cost sanctions. This background is indispensable for evaluating the contours and legal sustainability of any subsequent or currently operative mandatory mediation arrangements.

Separately, this reconfirms that constitutional courts play a pivotal role in reviewing the constitutionality of mandatory mediation schemes and may invalidate legislative designs they consider incompatible with fundamental rights, most notably the right of access to justice and the principle of mediation's voluntariness. In practice, however, some constitutional courts go beyond a narrow compliance review and adopt a more substantive, policy-tinged assessment that also scrutinises the *effectiveness* or institutional soundness of the proposed mandatory mediation model. This development reflects a broader shift in constitutional adjudication: rather than acting solely as “negative legislators” in Kelsen's classic sense (annulling unconstitutional norms), constitutional courts increasingly operate as de facto “positive legislators” by shaping, through their case law, the models that may or may not be tolerated.³² In the Bulgarian context, the Constitutional Court not only annulled the previously adopted provisions on mandatory mediation, but also signalled how future reforms could be designed to withstand constitutional scrutiny. In essence, the Court indicated that a compulsory mediation step may be permissible in principle, provided it does not operate as a procedural barrier; most notably, it should not stay court proceedings and should not be coupled with cost-allocation rules that penalise non-attendance at the mediation meeting. As a consequence, the Bulgaria legislature drew lessons from the Constitutional Court's decision and took the next step by promulgating a new legal framework that favours mandatory mediation.

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

6 THE NATURE OF THE NEWLY ADOPTED MODEL OF JUDICIAL MEDIATION IN BULGARIA AFTER THE CONSTITUTIONAL COURT'S DECISION OF 1 JULY 2024

Mandatory judicial mediation in Bulgaria was reintroduced through amendments to the Civil Procedure Code promulgated in State Gazette No. 55 of 8 July 2025.³³ The stated aim of these provisions was to remedy the constitutional defects identified by the Constitutional Court in the earlier model and to replace it with a framework aligned with the Court's understanding of the constitutional limits on imposing additional procedural obligations on parties before the judiciary proceeds to examine the merits of their dispute. Nonetheless, the reform was not preceded by any meaningful, in-depth assessment: the new draft was introduced without comprehensive analysis or further empirical or impact studies to inform its design.

The 2025 amendments created new Article 140a of the Civil Procedure Code. Under Article 140a (1), the court obliges the parties personally to participate in an information meeting on mediation where an action or application concerns, *inter alia*:

- management of a co-owned property or allocation of its use (Ownership Act, Art. 32(2));
- monetary claims under the Ownership Act (Arts. 30(3) and 31(2));
- partition (Ownership Act, Art. 34) – at the stage of carrying out the partition;
- divorce under the Family Code (Art. 49(1)), together with the mandatory joint claims (CPC, Art. 322(2));
- disputes on a child's residence, parental rights, personal relations, and maintenance (Family Code, Arts. 123(2) and 127(2));
- modification of residence, parental rights, contact, and maintenance following divorce upon changed circumstances;
- measures on personal relations with grandparents (Family Code, Art. 128);
- maintenance;
- remuneration or compensation arising from employment, as well as claims for unlawful dismissal and reinstatement;

33 Civil Procedure Code of the Republic of Bulgaria (n 4); Law of the Republic of Bulgaria 'On Amendment and Supplementation of the Civil Procedure Code' [2025] State Gazette 55 <[https://www.ciela.net/svobodna-zona-darjaven-vestnik/document/2137251770/issue/7409/zakon-za-izmenenie-i-dopalnenie-na-grazhdanskiya-protsesualen-kodeks-\(dv-br-59-ot-2007-g\)>](https://www.ciela.net/svobodna-zona-darjaven-vestnik/document/2137251770/issue/7409/zakon-za-izmenenie-i-dopalnenie-na-grazhdanskiya-protsesualen-kodeks-(dv-br-59-ot-2007-g)>)> accessed 5 January 2026.

- civil contractual/tort/unjust enrichment/agency-without-authority claims with claim value up to BGN 25,000;
- commercial disputes under CPC Art. 365(1), regardless of the claim value.

Article 140a (2) expands the court's ability to order such a meeting by granting the judge discretion to assess whether mediation is suitable, including: whether the parties have ongoing relationships; whether multiple related cases exist; whether there are multiple claims and counterclaims; whether costs are proportionate to the material interest; whether facts are undisputed; and other circumstances indicating suitability for mediation. This pushes judges toward a more detailed case-specific suitability analysis, rather than a purely categorical referral.

Article 140a(3) introduces important exceptions: the obligation does not apply, for example, if the first notice was not personally served on the defendant (or an authorised legal recipient), if the claim has been admitted by the respondent, if there is evidence of violence by the opposing party or risk to the life/health/interests of a child, if participation would jeopardise adjudication within a reasonable time, if the parties cannot dispose of the right at issue, or if other circumstances suggest mediation is unlikely to succeed. This further strengthens judicial discretion and embeds safeguards for vulnerable situations.

Accordingly, Bulgaria's developing approach can be described as a discretion-based hybrid: while the law formally defines categories of cases in which the court "shall" refer parties to an information meeting, judges retain broad power, based on exceptions and suitability criteria, to decide whether the obligation will be applied in practice. The model integrates features of (a) categorical systems (often associated with the Italian approach) and (b) discretionary systems (common in some common law jurisdictions).³⁴

A second key feature is the nature of the "mandatory" obligation. The statutory duty concerns only an information meeting, not mediation itself. It does not bind parties to achieve any particular outcome and is not backed by a severe sanction. The principal consequence of non-compliance is limited to payment of the cost of one hour of the information meeting under Ordinance No. 12 of 28 July 2025 (BGN 60 or app. EUR 30).³⁵ During the information meeting, the case is not stayed, and procedural steps continue, highlighting that the 2025 approach is designed to avoid delay and run in parallel with the court process.

The framework also introduces incentives: if a case ends with a court settlement after mediation, the claimant receives a 70% refund of the state fee; and if the agreement is reached through mediation conducted at a court mediation centre after the mandatory

³⁴ Nestic (n 26).

³⁵ Order of the Supreme Judicial Council No 12 of 28 July 2025 'On Mediators and Procedures in Judicial Mediation Centers' [2025] State Gazette 62 <<https://bgmediation.com/biblioteka/normativni-aktove/sadebni-centrove/>> accessed 5 January 2026.

information meeting under Art. 140a, the refund rises to 85%. A similar rule applies to appellate fees when a settlement is reached during appeal proceedings.

Under Article 140b (1), the obligation to attend an information meeting is a one-time obligation for the entire dispute, regardless of the instance. The meeting is held within a period set by the court, but the parties may, by mutual agreement, attend later and may request a stay under CPC Art. 229(1)(1). Where the statutory conditions for decision-making are met, the court may proceed to judgment even if no information meeting occurred, particularly if the court did not instruct attendance or one party did not attend. The court postpones the case for an information meeting or mediation only upon the request of **all** parties. Where mediation produces an agreement submitted to the court, it is reviewed under CPC Art. 234 or Art. 321(5).

In light of the Constitutional Court's critique of the earlier model as impairing access to justice, the 2025 regime (Arts. 140a–140b CPC) formally addresses the key constitutional objections: proportionality, voluntariness (no forced settlement), limited costs, no procedural barrier to court, and explicit protection for violence-related cases.

As the regime is now in force, the next question is where Bulgaria's model stands vis-à-vis EU models and standards. Upon a closer examination of the existing mandatory mediation models, distributed across categorical mandatory mediation, discretionary mandatory mediation, and quasi-mandatory mediation,³⁶ the newly emerged mandatory mediation model in Bulgaria does not fit coherently into any of the existing categories. This is because it combines categorical triggers (a defined list of dispute types in which the court "shall" order an information meeting) with broad judicial discretion and multiple safeguards/exceptions, while limiting the "mandatory" element to a one-off informational session. This one-off informational session would run in parallel with the proceedings and is backed only by modest, non-preclusive cost consequences and fee-refund incentives - features that place it between classic categorical schemes, discretionary referral models, and softer quasi-mandatory "nudge" approaches without fully belonging to any single category.³⁷

7 CONCLUSIONS AND RECOMMENDATIONS

The mandatory judicial mediation model adopted by Bulgaria in July 2025 is best described as a hybrid model. It does not neatly fit the two categories often used in scholarship, strict categorical mandatory models versus fully discretionary referral models. Its hybridity is apparent, first, because it compels a settlement-oriented step after a case is already pending

36 Korsakoviene, Radanova and Tvaronavičienė (n 15).

37 Mandatory mediation in the legal doctrine is classified into certain models depending on the degree and source of the mandatoriness: categorical mandatory mediation, discretionary mandatory mediation, and quasi-mandatory-mediation. See, Daniel Kaufman Schaffer, 'An Examination of Mandatory Court-Based Mediation' (2018) 84(3) *Arbitration* 229.

in court (after pleadings and adversarial positioning have begun), rather than functioning as a true pre-action gatekeeping stage.

Second, the state's involvement appears comparatively stronger than in many systems: initial costs are effectively socialised (with only modest cost consequences for non-attendance), and mediator activity in court mediation centres is organised through enhanced control, selection, and mandate-based engagement linked to specific courts. This makes the Bulgarian model distinctive and, to some extent, a compromise that reflects competing institutional and professional interests.

Whether this framework will succeed in producing meaningful settlement rates and improving mediation culture remains an empirical question that can only be answered after sufficient implementation time. For now, a cautious inference is that Bulgaria has joined the growing group of jurisdictions treating mediation as structurally connected to effective judicial functioning and improved access to justice, while attempting to do so in a constitutionally cautious manner, shaped by the Constitutional Court's 2024 decision.

Notwithstanding the above, the “live experiment” currently unfolding in Bulgaria - where legislative design is being tested in practice as a tool to stimulate mediation - has already suggested several practical lessons. One recurring theme in comparative practice is that such frameworks are often easier to justify and implement when understood less as “mandatory mediation” in the strict sense and more as a mandatory information-and-suitability step. In this context, terminology is not cosmetic: it can affect legitimacy and uptake. Bulgaria's experience confirms that the label “mandatory mediation” may trigger well-known, historically rooted resistance, particularly where parties perceive that they are being forced into an unfamiliar process or pressured to settle. A more accurate and publicly acceptable framing - such as an obligatory information meeting or an obligatory attempt to consider mediation - may help reduce misinterpretation and improve the reform's “sellability” to the public. In that sense, wording can function as an initial design lever within a broader mediation ecosystem, of which any court-connected meeting is only one component.

Second, the legal duty to attend such mediation information meetings should be carefully limited in scope and intensity. It is advisable to extend such obligation only to attendance at a short, structured mediation information meeting (ideally sixty to ninety minutes, subject to a clear statutory maximum), during which a neutral mediator explains the core principles and mechanics of mediation, conducts a basic suitability assessment, and outlines realistic, case-specific pathways for using mediation. Crucially, this step should preserve the parties' autonomy in full, by neither compelling them to mediate nor pressuring them to settle. This calibrated approach may allow legislators to promote informed engagement with mediation while safeguarding access to court and maintaining the voluntary nature of both participation and settlement. Simultaneously, the latter may further specify the scope of obligations that mediators conducting such information sessions bear, as well as the systems of control being put in place to ensure strict compliance

with them. The model should further embed voluntariness at the core: parties remain free to settle or not, to withdraw at any time, to choose their mediator (from accredited rosters, with party choice as default), and to shape the process (joint session, caucuses, online/hybrid, language, accessibility). To ensure proportionality and constitutional robustness, the scheme should avoid hindering effective access to justice by avoiding substantial delays in filing or progressing a claim. Furthermore, such information sessions should suspend or protect limitation periods during any required step; impose no or negligible cost on parties for the mandatory step (state-funded, or a nominal fee with waivers); and provide clear safeguards for fairness (confidentiality, neutrality, informed consent, and access to legal advice, including allowing counsel to participate). Statutory exemptions should be explicit and operational, especially for violence or coercion risks, urgent interim relief, power imbalance, child protection concerns, or where parties cannot freely dispose of the rights at issue. Finally, the design should be supported by infrastructure: quality standards and training for mediators, predictable referral criteria for judges/registries, and incentives that encourage good-faith engagement without penalising legitimate choice (e.g., modest fee-shifting only for unreasonable non-attendance, plus positive incentives such as fee refunds or reduced court fees if settlement is reached).

If a jurisdiction seeks to implement a system incorporating compulsory elements, comparative practice suggests that it is most effectively approached as a **system** reform rather than as a stand-alone procedural amendment.³⁸ One plausible sequencing model begins with a constitutional and human rights compatibility assessment, translating proportionality, legal certainty, and access-to-court concerns into clear statutory parameters (narrow obligations, time caps, cost rules, limitation-period protection, and exemptions).

A next step commonly involves defining scope with precision, either by targeting dispute categories that are plausibly more amenable to consensual resolution or by using a discretion-based suitability test constrained by clear criteria, while preserving the ability to bypass the step where it would be futile or unsafe. Further design choices typically include operational detail on timing, notice, mediator appointment (often with party choice as a default), compliance criteria (attendance and receipt of information rather than settlement), and proportionate consequences for non-compliance.

The fourth step is to build the institutional architecture necessary for the model to function: clear accreditation and ethical standards, sustainable funding mechanisms (for court-connected mediation centres, public vouchers, or fee waivers), training and quality assurance requirements, oversight arrangements, and a transparent allocation of roles among courts, ADR bodies, professional organisations, and mediators.

38 Agnė Tvaronavičienė, Indrė Kasiulaitė and Yuliya Radanova, 'Designing an Effective Mandatory Mediation Model: Guidelines from the International Jurisprudence and National Constitutional Limits' (2025) 8(3) Access to Justice in Eastern Europe 36, doi:10.33327/AJEE-18-8.3-a000119.

The fifth step is to engage stakeholders early and continuously, judges, bar associations, mediators, consumer organisations, and institutional repeat players, both to reduce predictable resistance and to ensure that the model is workable in practice. Engaging these actors before and during implementation can help surface predictable friction points, such as unclear referral criteria, capacity constraints, cost allocation, confidentiality concerns, and the handling of vulnerable parties, and can reduce the risk that the reform is perceived as externally imposed or as a hidden barrier to court access. A practical way to operationalise this is to use structured consultations, drafting guidance (e.g., referral criteria and standard information scripts), and regular feedback loops during the first implementation phase.

Where feasible, comparative experience also suggests that piloting can be a useful risk-management tool before national rollout. Rather than introducing a new mandatory element across all courts and case types at once, a legislature may choose to test it in a limited number of regions or in dispute categories that are typically considered more “settlement-amenable” (for example, certain family, neighbour/co-ownership, or lower-value civil claims). Pilots allow the system to gather operational data (referral rates, attendance, time impacts, user experience, costs) and to adjust practical parameters, such as scheduling, mediator capacity, exemptions, and communication materials, before scaling. Even without definitive settlement statistics at an early stage, a pilot can provide concrete evidence on whether the mechanism is working as a facilitative nudge or creating delay and confusion, and it can build legitimacy by showing responsiveness to practitioner and user feedback.

An example of such consultations is the manner in which Lithuania introduced mandatory mediation in family disputes, with effect from 1 January 2020. This reform formed part of a broader national mediation policy³⁹ that predated the transition to mandatory family mediation. That strategic approach is further reflected in the Ministry of Justice’s structured follow-up, including a dedicated ex post evaluation plan and the publication, on 30 December 2022, of an ex-post evaluation report on the impact of mandatory family mediation, indicating that the reform was implemented and subsequently reviewed within a broader policy cycle and system-building agenda. More broadly, Lithuania’s mediation policy trajectory may be traced to earlier national policy planning, including the Minister of Justice’s 2015 Concept for the Development of the Mediation System, which frames mediation as a system to be developed through coordinated regulatory and institutional measures and suggests that coordination among the various stakeholders is a condition *sine qua non* for the success of any mandatory mediation framework.

39 Order of the Minister of Justice of the Republic of Lithuania No 1R-268 of 17 September 2015 ‘On the Approval of the Concept for the Development of a Conciliation (Mediation) System’ [2015] TAR 13939 <<https://www.e-tar.lt/portal/it/legalAct/b84a2a305d3b11e589fccd6fa118e11c>> accessed 5 January 2026.

The sixth step is to embed monitoring and evaluation directly into the law through mandatory data collection (including referral rates, attendance, conversion to mediation, settlement outcomes, time-to-resolution, party satisfaction, and cost impacts), periodic public reporting, and a statutory review clause that enables calibrated adjustments after an initial implementation period. Taken together, these steps increase the likelihood that the design of a mandatory information session on mediation will meaningfully raise mediation uptake while remaining legally robust, administratively feasible, and fully consistent with parties' rights and effective access to justice.

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Corresponding author, responsible for research methodology, data collection, writing, and supervision.

Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that their opinion and views expressed in this manuscript are free of any impact of any organisations.

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EDITORS

Assistant Editor – Valentina Krivolapova. **English Editor** – Robert Reddin.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Radanova Yu, 'Building a Compulsory Mediation Pathway: Bulgaria as a Live Experiment in Dispute System Design?' (2026) 9(2) Access to Justice in Eastern Europe 35-59 <<https://doi.org/10.33327/AJEE-18-9.2-a000194>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000194>

Summary: 1. Introduction. – 2. The Concept of Mandatory Mediation. – 3. Mandatory Mediation in the European Union Context. – 4. Bulgaria and the Constitutional Court as a Positive Legislator in the Field of Mediation. – 5. The Nature of the Newly Adopted Model of Judicial Mediation in Bulgaria after the Constitutional Court's Decision of 1 July 2024. – 6. Conclusions and Recommendations.

Keywords: *Mediation; mandatory judicial mediation; mandatory mediation information meeting; unconstitutionality; Constitutional Court of Bulgaria; Italian model of mandatory mediation; access to justice.*

ADDITIONAL INFORMATION

This research was conducted under a research staff employment contract concluded with Mykolas Romeris University for the period from 1 June 2025 to 31 May 2026, with Yuliya Radanova (DOI: 10.13039/501100004504).

DETAILS FOR PUBLICATION

Date of submission: 27 Jan 2026

Date of acceptance: 16 Mar 2026

Online First Publication: 20 Apr 2026

Last Publication: 20 May 2026

Was the manuscript fast-tracked? No

Number of reviewer reports submitted in the first round: 3 reports

Number of revision rounds: 2 rounds with minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

This English translation and language polishing were prepared with the assistance of AI tools (ChatGPT, OpenAI). The author remains fully responsible for the content, arguments, and conclusions.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

**ЗАПРОВАДЖЕННЯ ОБОВ'ЯЗКОВОЇ ПРОЦЕДУРИ МЕДІАЦІЇ:
БОЛГАРІЯ ЯК РЕАЛЬНИЙ ЕКСПЕРИМЕНТ У РОЗРОБЦІ СИСТЕМИ ВИРІШЕННЯ СПОРІВ?**

Юлія Раданова

АНОТАЦІЯ

Вступ. Болгарія має законодавчу базу для медіації вже понад два десятиліття, проте ця процедура залишається недостатньо використовуваною порівняно з судовим розглядом. У контексті судової реформи та зменшення навантаження на справи, Болгарія у 2023 році ухвалила правила, що запроваджують обов'язкову судову медіацію, відповідно до яких сторони судових проваджень, що розглядаються, повинні відвідати безкоштовну інформаційну сесію з медіації тривалістю до трьох годин до першого відкритого слухання.

Це положення мало набути чинності 1 липня 2024 року. Однак того ж дня Конституційний Суд Болгарії (Рішення № 11 від 1 липня 2024 року, Конституційна справа № 11/2024) оголосив основні положення реформи неконституційними, знову порушивши питання про те, наскільки законодавчий орган може вимагати проходження етапу медіації, не обмежуючи доступ до правосуддя. У липні 2025 року Болгарія затвердила переглянуту модель, зосереджену на обов'язковій участі в інформаційній зустрічі з медіації під час розгляду певних категорій спорів, які судді можуть додатково скеровувати на таку процедуру. У цій статті аналізується нова модель, яка позиціонується серед європейських підходів, та визначаються вимоги до розробки законодавства, яке може стимулювати використання медіації без створення процесуальних бар'єрів.

Методи. У статті застосовуються методи доктринального та порівняльно-правового аналізу. У ній розглядаються зміни 2025 року до Цивільного процесуального кодексу Болгарії та закону «Про медіацію», що запроваджують обов'язкову участь в інформаційній зустрічі з питань медіації, з огляду на міркування Конституційного Суду Болгарії щодо пропорційності та ефективного доступу до правосуддя. Підхід Болгарії розглядається в межах європейських стандартів, зокрема тлумачення моделей обов'язкового альтернативного вирішення спорів/медіації Судом Європейського Союзу та Європейським судом з прав людини, а також моделей обов'язкової медіації, що застосовуються в Італії, Литві, Іспанії, Греції та на Кіпрі. Аналіз також спирається на міжнародні дискусії щодо особливостей ефективних моделей обов'язкової медіації, зокрема стимули, витрати, процесуальні гарантії та захист у справах, що пов'язані з насильством або ризиками для дітей, щоб запропонувати рекомендації щодо того, які риси має мати ефективний підхід до обов'язкової медіації.

Результати та висновки. Болгарську модель обов'язкової медіації 2025 року найкраще охарактеризувати як гібридну: вона поєднує законодавчо визначений набір типів справ із широкими судовими повноваженнями та численними законодавчими винятками. Вона зобов'язує відвідувати інформаційну зустріч (не саму медіацію), не вимагає врегулювання, не зупиняє автоматично судову справу та обмежує негативні фінансові наслідки (судові витрати) помірним збором – усі ці риси спрямовані на виконання конституційних вимог пропорційності. Водночас її ефективність залежатиме від варіантів впровадження (фінансування, контроль якості медіатора, чіткі критерії направлення та дієві стимули). Болгарська траєкторія розвитку підтверджує ширшу європейську тенденцію: обов'язкові або напівобов'язкові механізми медіації можуть бути сумісними з правом на ефективний судовий захист, але лише тоді, коли вони розроблені таким чином, щоб уникнути перетворення альтернативного вирішення спорів на процесуальний бар'єр, і коли гарантії для вразливих сторін є надійними. Кінцевий висновок полягає в тому, що може бути доцільним розглянути питання про затвердження єдиних процедур обов'язкової медіації, які застосовуються у ЄС та формують основу ефективної екосистеми медіації у всьому Союзі, що дійсно сприяє позасудовому врегулюванню спорів.

Ключові слова. Медіація; обов'язкова судова медіація; інформаційна зустріч із питань обов'язкової медіації; неконституційність; Конституційний суд Болгарії; італійська модель обов'язкової медіації; доступ до правосуддя.

Research Article

THE RIGHT TO REMAIN OFFLINE IN THE DIGITAL TRANSFORMATION ERA: A COMPARATIVE STUDY OF VIETNAM AND THE EUROPEAN UNION

Phuc G. Dao

ABSTRACT

Background: *The digital transformation is increasingly reshaping the delivery of public services and justice, yet 'digital-by-default' reforms can produce exclusion where access becomes contingent on mandatory online engagement. This article examines the emerging right to remain offline, understood as an individual's freedom not to be compelled to use internet-based technologies to exercise rights or fulfil everyday obligations, and analyses its normative foundations in autonomy, equality, and non-discrimination, with a particular focus on older people and the risks of digital ageism. The study compares Vietnam's rapid, state-driven digitisation with the European Union's evolving standards on digital inclusion and 'digital choice'.*

Method: *This article adopts a qualitative doctrinal and functional-comparative methodology. It combines doctrinal analysis of legal texts with a functional comparison of how Vietnam and the EU legal order address access to public services and justice under digital-by-default reforms. The study analyses*

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000190>

Date of submission: 31 Dec 2025

Date of acceptance: 25 Feb 2026

Online First Publication: 31 Mar 2026

Last Publication: 20 May 2026

Disclaimer:

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legislation, policy instruments, and (where available) administrative guidance alongside relevant scholarship and institutional reports. Socio-legal insights were used only for desk-based contextualisation, drawing on existing literature and published evidence; no original empirical research (surveys or interviews) was conducted.

Results and Conclusions: The analysis finds that Vietnam's legal architecture strongly enables electronic transactions and digital identification, yet provides no explicit entitlement to offline access. Mandatory verification of e-ID accounts even for 'offline' procedures and local 'paperless' pilots illustrates how digitalisation may translate into *de facto* compulsion, with older adults disproportionately struggling to use key platforms, raising risks of indirect discrimination and digital ageism. In the EU, policy instruments emphasise inclusion and freedom of choice, but binding EU law does not codify a justiciable offline right; protection, therefore, remains uneven and largely dependent on Member State implementation. A comparative discussion suggests that, despite different regulatory styles, both contexts face a common risk: the erosion of substantive equality and effective access to justice when offline options are not legally secured. The article concludes that safeguarding offline access should be treated as a core condition of rights-respecting digital governance and recommends: (1) enshrining offline access in law; (2) mandating multi-channel service delivery; (3) adopting digital inclusion impact assessments; and (4) countering digital ageism through inclusive service design, training, and assisted access mechanisms. It further clarifies the dual nature of the right to remain offline: as an autonomy-based freedom and as an enabling guarantee for the effective exercise of other rights.

1 INTRODUCTION

Digital transformation has become a defining project of contemporary governance. States increasingly redesign public administration around online portals, digital identification, and 'paperless' procedures, often justified by efficiency, transparency, and service quality. However, this shift raises a distinct legal problem: when access to public services is conditioned, formally or *de facto*, on digital participation, individuals who cannot or do not go online face increased risks of exclusion, loss of autonomy, and unequal enjoyment of rights. In practice, digitalisation can move from facilitation to *compulsion* through procedural architecture, service design, and administrative practice, even where 'offline' interaction nominally remains available.

This article addresses that problem through the concept of the right to remain offline. It denotes an individual's freedom not to be compelled to use online technologies or internet-based services to exercise rights or fulfil everyday obligations, protecting the choice to live and interact without being forced to rely on the Internet. The concept is also framed as the 'negative mirror' of the right to internet access. As internet use becomes virtually obligatory for participation in society, the normative question shifts to whether individuals require protection against being dragged into the digital realm against their will. This framing is not

anti-technology; instead, it foregrounds a rights-based demand that digital government should remain compatible with autonomy, equality, and effective access.

A comparison between Vietnam and the European Union is particularly instructive because both jurisdictions pursue ambitious digitalisation but embody different regulatory logic and, consequently, different vulnerabilities. The article focuses on older people as a salient case study because age-related barriers make the distributive consequences of digitalisation especially visible. Older adults are frequently positioned at the intersection of limited digital skills, usability constraints, accessibility barriers, and reliance on assisted interaction. For that reason, they constitute a paradigmatic group through which ‘digital-by-default’ reforms may generate indirect discrimination and what is increasingly discussed as digital ageism, a systemic bias in service design and governance assumptions that privileges digitally fluent users. The comparison thus tests whether public law principles of equality and access can realistically protect offline citizens in the absence of explicit entitlements. While older people provide an analytically clear lens, the right to remain offline is not confined to age; it also matters for persons with disabilities, low-income or rural residents, and individuals who prefer offline interaction for privacy, conscience, or safety reasons.

Methodologically, juxtaposing a national legal system and a supranational one is relevant because the problem studied, digital-by-default reforms turning into de facto digital compulsion, arises across governance levels. Vietnam’s unitary state still operates as a two-level system in practice (central mandates and local administrative implementation). In contrast, the EU is structurally two-level (EU-level norms and Member State execution). Comparing these legally two-component systems helps to trace how high-level commitments (autonomy, equality, non-discrimination, and accessibility) are translated into enforceable entitlements, and where implementation gaps emerge. It also enables cross-learning, as EU multi-level rights standards serve as reference points for Vietnam’s rapidly evolving framework. At the same time, Vietnam’s accelerated digitisation creates visible risks that can also materialise in EU Member States when offline options are not legally secured.

The article makes three contributions. First, it clarifies the right to remain offline as a rights-based concept linked to autonomy, equality, and access to public services. It asks whether it should be understood as a stand-alone right or as a doctrinal implication of existing guarantees. Second, it offers a structured comparison between a national jurisdiction undergoing accelerated digitalisation (Vietnam) and a supranational legal order with multi-level governance (EU), highlighting convergences and divergences in legal design and implementation risks. Given this institutional distinction, the EU is not treated as a unitary state. Instead, the analysis distinguishes EU-level norms and policy commitments from Member State implementation, using selected national examples as illustrative patterns rather than an exhaustive mapping. This design aims to preserve functional comparability: how different governance structures prevent (or enable) digital-by-default reforms from turning into digital-only barriers for offline citizens. Third, it develops reform-oriented

insights by identifying transferable practices and proposing rights-based safeguards that can reconcile digital innovation with substantive equality.

The article proceeds as follows. Section 2 sets out the methodology. Section 3 develops the theoretical foundations of the right to remain offline. Sections 4 and 5 examine Vietnam and the EU, respectively, analysing their legal architecture and practice, and the implications for older persons. Section 6 synthesises the comparative findings and advances a set of consolidated recommendations to safeguard offline access as a condition of rights-respecting digital governance.

2 METHODOLOGY

This article adopts a qualitative doctrinal and functional-comparative methodology, informed by socio-legal scholarship. The doctrinal component examines how the 'right to remain offline' (or equivalent protections) can be derived from, or constrained by, existing legal norms governing access to public services, non-discrimination, and administrative procedures. The analysis is desk-based: socio-legal insights are used to contextualise how digitalisation operates in practice, drawing on published reports and existing literature rather than original fieldwork. Accordingly, no original empirical research (surveys or interviews) is undertaken.

The analysis relies on primary and secondary sources. Primary sources include: (i) Vietnamese legislation and subordinate regulations relevant to digital government, administrative procedure, service delivery channels, and the rights of older persons; (ii) Vietnamese national strategies and governmental policy instruments on digital transformation and public service modernisation; and (iii) EU-level legal and policy instruments framing digital governance and inclusion (e.g., treaty principles, the EU Charter of Fundamental Rights, relevant directives and regulations, and major policy declarations and strategies). Where available and relevant, the study also considers administrative practice (official guidance, procedural rules, service design requirements) and jurisprudence addressing access barriers, discrimination, or procedural fairness in digital settings. Secondary sources include peer-reviewed scholarship on digital exclusion, digital rights, and access to justice, alongside reports and position papers from institutions and civil society organisations (e.g., EU bodies and ageing or digital-inclusion advocacy groups). These materials are used to contextualise legal developments, identify practical frictions, and assess the plausibility and limits of an offline-right claim in each legal order.

The comparison is structured using a functional approach: Vietnam and the EU are examined as distinct legal systems that respond to the same problem, ensuring equal access to public services as digital channels become dominant. Shared evaluative criteria guide the comparison: (i) the existence and clarity of legal entitlements to non-digital access; (ii) institutional duties to provide offline alternatives or assistance; (iii) implementation

tools (procedural safeguards, accessibility obligations, service standards); and (iv) accountability mechanisms (review, complaints, remedies). This approach allows identification of convergences, divergences, and transferable practices. Older adults are treated as a salient case of digital vulnerability and potential indirect discrimination. The article draws on existing demographic and policy literature (rather than empirical data) to explain why ageing-related barriers, limited skills, usability, accessibility, and reliance on assisted interaction make offline options especially important for maintaining substantive equality in access to public services.

The study does not include original empirical research (no surveys or interviews). It is also constrained by language and source availability, particularly in capturing variation across EU Member States. Accordingly, the EU discussion emphasises EU-level standards and illustrative practices rather than an exhaustive mapping of national regimes.

The comparison is intentionally asymmetric in institutional terms: Vietnam is a unitary state capable of centrally mandated ‘hard-law’ requirements and administrative directives, whereas the EU is a supranational, multi-level legal order in which binding rules coexist with soft-law instruments and varied Member State implementation. To avoid false equivalence, the article compares functional equivalents rather than institutional forms. It, therefore, assesses: (i) the overarching legal-policy architecture that enables digital-by-default public services; and (ii) the presence, enforceability, and effectiveness of safeguards that preserve offline access (multi-channel duties, procedural accommodations, and remedies). The EU discussion proceeds in two steps: mapping EU-level standards, followed by examining illustrative Member State practices, while the Vietnam discussion analyses national mandates alongside selected local implementation examples.

3 THEORETICAL FOUNDATIONS OF THE RIGHT TO REMAIN OFFLINE

3.1. Defining the ‘Right to Remain Offline’

The right to remain offline, often phrased as the right not to use the Internet or the right to an analogue life, refers to an emerging concept in human rights and digital policy discourse. It entails an individual’s freedom not to be compelled to use online technologies or internet-based services to exercise their rights or fulfil everyday obligations.¹ In essence, as daily life becomes digitised by default, this proposed right would protect one’s choice of how to live, interact, and access services without being forced to rely on the Internet. Academically, scholars frame it as a necessary counterbalance to the push for digitalisation, questioning

1 Ilberto J Cerda Silva, ‘Internet Freedom is Not Enough: Towards an Internet Based on Human Rights’ (2013) 10(18) SUR 16.

whether forcing people online conforms to democratic standards.² Legally, it is explored as a prospective fundamental right, potentially a stand-alone right, or as an interpretation of existing rights applied to the digital context.³ The core issue is whether current human rights (such as privacy, autonomy, or equality) already protect those who remain offline, or if a new explicit right is needed to ensure no one is forced onto digital platforms against their will.⁴ Analytically, the right to remain offline is dual in nature: (i) as an independent right reflecting human freedom and autonomy (a negative liberty not to be coerced online); and (ii) as an enabling guarantee for the effective exercise of other rights (such as access to justice and public services, equality, and privacy) when digital-by-default arrangements create practical barriers.

Importantly, the right to remain offline is conceived as the negative mirror of the widely discussed right to access the Internet. For over a decade, global discourse has touted internet access as essential for development and participation, with the UN Human Rights Council affirming in 2012 that people's rights offline must also be protected online.⁵ In those earlier debates, going online was seen as a choice or even a benefit to be guaranteed. However, within a relatively short period, the situation inverted, with internet use ceasing to be merely optional and becoming virtually obligatory for participation in society.⁶ This evolution has prompted scholars to ask whether individuals now require a right not to be dragged into the digital realm.⁷ Thus, the right to remain offline can be understood as a facet of personal autonomy and self-determination in the digital age, ensuring that opting out of ubiquitous connectivity does not result in exclusion or deprivation of rights.⁸ Legally, while no international treaty yet explicitly names a 'right to offline life', it is increasingly argued that such a right is implicit in or derived from existing human rights principles of dignity, freedom of choice, and equality.⁹

3.2. Relationship with Fundamental Rights

The proposal for a right to remain offline is deeply intertwined with several fundamental rights and principles. Rather than existing in isolation, it builds on and complements

2 Dariusz Kloza, 'The Right Not to Use the Internet' (2024) 52 Computer Law & Security Review 105907, doi:10.1016/j.clsr.2023.105907.

3 *ibid*; Paul De Hert and Dariusz Kloza, 'Internet (Access) as a New Fundamental Right. Inflating the Current Rights Framework?' (2012) 3(3) European Journal of Law and Technology <<http://ejlt.org//article/view/123/268>> accessed 31 December 2025.

4 De Hert and Kloza (n 3).

5 The Promotion, Protection and Enjoyment of Human Rights on the Internet (adopted 16 July 2012 HRC Res 20/8) <<https://docs.un.org/a/hrc/res/20/8> accessed> 31 December 2025.

6 Kloza (n 2).

7 Bart Custers, 'New Digital Rights: Imagining Additional Fundamental Rights for the Digital Era' (2022) 44 Computer Law & Security Review 105636, doi:10.1016/j.clsr.2021.105636.

8 Kloza (n 2).

9 *ibid*

established rights by addressing new challenges arising in a digitised society. Key connections include the following:

3.2.1. Autonomy and Freedom of Choice

At its heart, the right to stay offline upholds individual autonomy as the freedom to make personal choices about how one uses technology. Scholars argue that the growing expectation to engage digitally may undermine individual autonomy, especially when accessing basic services or rights depends on being online.¹⁰ The ability to disconnect and refuse digital services is seen as part of one's informational self-determination, grounded in human dignity.¹¹ In this view, just as people have the liberty to use the Internet, they should equally have the liberty not to use it. Protecting this choice ensures that technology remains a tool for human empowerment rather than a coercive requirement. Indeed, recent research emphasises that the freedom to disconnect is equally essential to prevent new forms of exclusion, coercion, and surveillance.¹² In practical terms, the right to offline life would guarantee that opting out of digital services (whether for a day or permanently) does not strip someone of their agency or access to society.

3.2.2. Access to Public Services and Participation

The right to access public services is a fundamental aspect of citizenship and equality. As governments move toward e-government and 'digital by default' administration, there is a risk that people who remain offline could be shut out of essential services such as healthcare, social security, taxation, voting, and administrative procedures. The right to remain offline asserts that citizens must retain alternative, non-digital pathways to interact with public authorities.¹³ This right would oblige authorities to maintain offline access points (e.g. physical offices, paper forms, or phone lines) so that no one is denied public services due to

10 De Hert and Kloza (n 3); Seeta Peña Gangadharan, 'The Downside of Digital Inclusion: Expectations and Experiences of Privacy and Surveillance among Marginal Internet Users' (2017) 19(4) *New Media & Society* 597, doi:10.1177/1461444815614053.

11 Angela Vivarelli, 'The Crisis of the Right to Informational Self-Determination Essays' (2020) 6(1) *The Italian Law Journal* 301, doi:10.23815/2421-2156.ITALJ.

12 Kloza (n 2); Dariusz Kloza and others (eds), *The Right Not to Use the Internet: Concept, Contexts, Consequences* (Routledge 2025) doi:10.4324/9781003528401.

13 For example, Belgium's experience illustrates this tension: although laws exist to prevent a forced switch to all-digital public services, they can be overridden by new policies, as seen in a 'Digital Brussels' plan aiming for 100% online services. Such moves sparked criticism for not guaranteeing in-person or human-operated options. In response, legal scholars in Belgium have advocated enshrining a 'right to choose the digital way' in the Constitution, explicitly including both 'the right to access the Internet and the right not to use it (the right to human interaction).' See, Elise Degrave, 'Digitalisation of Public Services in Belgium: Enshrining the Right Not to Use the Internet in the Constitution' in Dariusz Kloza and others (eds), *The Right Not to Use the Internet: Concept, Contexts, Consequences* (Routledge 2025) 44, doi:10.4324/9781003528401-5.

being offline. These measures reflect the principle that digital inclusion must not come at the expense of inclusiveness; people should not have to surrender their offline existence to receive government services or participate in civic life. Ensuring offline access is not about resisting progress; it is about inclusive design and maintaining trust. For example, keeping a paper form or staffed office as an option not only aids those currently offline but also provides a safety net for all, if an online system crashes or suffers a cyberattack, having a non-digital fallback can be critical for continuity.¹⁴

3.2.3. Equality and Non-Discrimination

A core rationale behind the right to remain offline is to prevent *digital exclusion* from worsening social inequalities. Making services and opportunities 'internet-only' can disproportionately disadvantage certain groups, particularly the elderly, people experiencing poverty, those with low digital literacy, or people in areas with poor connectivity. Equal treatment demands that these individuals are not left behind in the rush to digitalise. Researchers highlight that the digital divide remains significant.¹⁵ However, these same individuals increasingly face a *de facto* obligation to go online to access essential services, creating a paradox where those least capable of going online are most pressured to do so.¹⁶ This can amount to indirect age discrimination or discrimination based on education and income. The right to remain offline would help mitigate such bias by ensuring that offline citizens enjoy the fundamental freedom of choice, including the freedom to be offline, without suffering a loss of opportunities.¹⁷ In human rights terms, it draws on the right to non-discrimination (e.g., Article 14 ECHR),¹⁸ suggesting that requiring internet use for basic rights could violate equality if it puts vulnerable groups at a systematic disadvantage.¹⁹

14 Elżbieta Kuźelewska, Damian Malinowski and Mariusz Tomaszuk, 'Human Rights and Digital Choice: Rethinking the Right (Not) to Use the Internet' (2025) 30(4) Białostockie Studia Prawnicze 57, doi:10.15290/bsp.2025.30.04.04.

15 For instance, in Europe, a substantial percentage of seniors (65+) either do not use the internet or lack home access, often citing lack of skills or interest rather than just cost. See, Elżbieta Kuźelewska, Mariusz Tomaszuk and Damian Malinowski, 'The Elderly Digital Divide: Digital Exclusion Versus the Right Not to Use the Internet' [2025] International Journal for the Semiotics of Law, doi:10.1007/s11196-025-10334-4.

16 Kuźelewska, Malinowski and Tomaszuk, 'Human Rights and Digital Choice' (n 14).

17 De Hert and Kloza (n 3).

18 Council of Europe, *European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols)* (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 31 December 2025.

19 Kuźelewska, Malinowski and Tomaszuk, 'Human Rights and Digital Choice' (n 14).

3.2.4. Privacy and Other Fundamental Rights

The right to remain offline can also be linked to privacy and related freedoms. Some individuals may choose to stay offline to protect their privacy, avoid data surveillance, or preserve a slower pace of life. As digital services often entail the collection of personal data, an offline life can be seen as a way to opt out of pervasive data processing. Scholars have noted that continuous connectivity blurs boundaries and may infringe on the right to private life and even freedom of thought or leisure.²⁰ The freedom not to be permanently connected, akin to the ‘right to disconnect’ in labour law, is connected to one’s mental health, work-life balance, and privacy.²¹ Ensuring an offline alternative helps protect individuals from pressures that might infringe on these rights. Furthermore, some jurists suggest that existing rights, such as privacy (Article 8 ECHR) and freedom of expression (Article 10 ECHR), can be interpreted in today’s context to encompass a right to an offline life.²²

4 VIETNAMESE POLICY, LAW AND PRACTICE

4.1. Digital Transformation and the Emerging Legal Architecture

Vietnam is undergoing a rapid state-driven digital transformation. The Prime Minister’s Decision No. 749/QĐ-TTg (2020) approved a National Digital Transformation Programme to 2025 to completely renovate the way in which the Government operates and build a *digital government, economy, and society* by 2030.²³ In 2022, Decision No. 411/QĐ-TTg set ambitious targets for the digital economy and society, including having the digital economy

20 For example, being bombarded by online work communications or social media. See, Hugh Collins, ‘Privacy and the Right to (Dis)Connect’ (2025) 45(3) *Comparative Labor Law & Policy Journal* 467, doi:10.60082/2819-2567.1064.

21 Sylwia Pangsy-Kania and Marcin Zieleniecki, ‘Right to Disconnect as a Challenge Determined by the Digitisation of the Labor Market-Implications in the Context of Work-Life Balance’ (2024) 20(1) *Polityka Społeczna* 1, doi:10.5604/01.3001.0054.8939

22 Sohail Aftab, ‘Reconciling the Freedom of Expression with the Right to Privacy: Protecting Private Life from Media Invasions Under the ECHR’ in *Comparative Perspectives on the Right to Privacy: Pakistani and European Experiences* (Springer 2024) 127, doi:10.1007/978-3-031-45575-9_5.

23 Decision of the Prime Minister of Vietnam No 749/QĐ-TTg ‘On Approving the National Digital Transformation Programme by 2025, with Orientations Toward 2030’ (adopted 3 June 2020) [in Vietnamese] <<https://chinhphu.vn/default.aspx?pageid=27160&docid=200163>> accessed 31 December 2025. This strategy envisions broad adoption of e-government services and the expansion of infrastructure to ‘narrow the digital gap’, for example, by bringing fibre-optic internet to 100% of communes and universalising smartphone access. See, Ministry of Science and Technology, ‘Vietnam Aims to Become a Digital Society by 2030’ (*Ministry of Science and Technology (MST) portal*, 5 June 2020) <<https://english.mic.gov.vn/vietnam-aims-to-become-a-digital-society-by-2030-197142430.htm>> accessed 31 December 2025.

contribute 20% of GDP by 2025.²⁴ Alongside these strategies, the government launched Project 06 as a nationwide initiative to develop an integrated population data system and digital identification (VNeID) platform as the backbone of e-government. Under Project 06, a single VNeID account allows citizens to access a wide range of public services (ID, household registration, social insurance, etc.) through a 'one national portal' approach.²⁵ The overarching legal architecture has been adapted to facilitate this transformation; notably, a new Law on Electronic Transactions 2023 was enacted (replacing the 2005 law) to cover *all* socio-economic activities conducted by electronic means.²⁶ The 2023 law removed prior restrictions that had barred specific procedures (like marriage or land records) from being conducted online,²⁷ thereby re-emphasising that electronic transactions are legally on par with traditional ones in virtually every domain.

Vietnam's current laws and policies, however, make little mention of any right to remain offline or to opt for non-digital services. The push is overwhelmingly toward 'digital by default.' For instance, from July 2025, authorities will require the use of e-ID (VNeID) accounts for all administrative procedures – both online and offline. Even when citizens submit paperwork in person, officials must verify the individual's digital ID account.²⁸ In effect, possessing a digital identity has become a *de facto* obligation for participating in basic civic transactions. Existing legal instruments, such as the Law on the Elderly 2009²⁹ and the Law on E-Transactions, do not provide an explicit option for offline access to public services. There is no provision guaranteeing citizens the right to choose paper-based or in-person processes. While Vietnam's digital strategy documents occasionally invoke the principle of

24 Decision of the Prime Minister of Vietnam No 411/QĐ-TTg 'On Approving the National Strategy for the Development of the Digital Economy and Digital Society by 2025, with Orientation Toward 2030' (adopted 31 March 2022) [in Vietnamese] <<https://vanban.chinhphu.vn/?pageid=27160&docid=205555>> accessed 31 December 2025; Nguyen Minh Thao and Nguyen Quoc Viet, 'Improving the Regulatory Framework for Tech Governance: The Key to Achieving High Growth in Vietnam' (*Tech for Good Institute*, 25 April 2025) <<https://techforgoodinstitute.org/blog/country-spotlights/improving-the-regulatory-framework-for-tech-governance-the-key-to-achieving-high-growth-in-vietnam/>> accessed 31 December 2025.

25 Thai Khang, '25 Full-Online Public Services Launched to Digitize Vietnam's Administration' (*VietNamNet Global*, 18 November 2025) <<https://vietnamnet.vn/en/25-full-online-public-services-launched-to-digitize-vietnam-s-administration-2463884.html>> accessed 31 December 2025.

26 Law of the National Assembly No 20/2023/QH15 'Law on Electronic Transactions' (adopted 22 June 2023) [in Vietnamese] <<https://vanban.chinhphu.vn/?pageid=27160&docid=208421>> accessed 31 December 2025.

27 Vinh Luu and others, 'Unpacking Vietnamese Law on E-Transaction 2023: A Thorough Exploration of Key Points' (*International Bar Association*, 12 December 2023) <<https://www.ibanet.org/Unpacking-Vietnameses-law-on-ettransactions-2023>> accessed 31 December 2025.

28 Tram Ngoc Bich Nguyen, Dung Thi Phuong Le and Trung Duc Nguyen, 'Vietnam to Require E-ID Accounts for Companies' (*Tilleke & Gibbins*, 6 June 2025) <<https://www.tilleke.com/insights/vietnam-to-require-e-id-accounts-for-companies/>> accessed 31 December 2025.

29 Law of the National Assembly No 39/2009/QH12 'Law on the Elderly' (adopted 4 December 2009) [in Vietnamese] <<https://vanban.chinhphu.vn/default.aspx?pageid=27160&docid=92321>> accessed 31 December 2025.

inclusivity (e.g. ‘ensuring no one is left behind’ in the digital transition),³⁰ this has not yet been translated into enforceable rights or clear mandates to preserve alternative, non-digital service channels. The emphasis remains on bringing the population onto digital platforms, rather than on balancing digital obligation vs digital choice. To address this issue, a specific amendment should be proposed for the Law on the Elderly 2009, or possibly for the Law on Electronic Transactions 2023 and its implementing regulations. This amendment should ensure that individuals have the right to choose how they access essential public services and justice-related procedures, whether in person, by paper, over the phone, or through assisted channels. Additionally, it should include a rule to ensure equivalence and prevent disadvantage, as well as an obligation to provide reasonable assistance.

4.2. Implementation and Inclusion Challenges for Older People

The on-the-ground implementation of Vietnam’s digital government strategy reveals significant inclusion challenges, especially for older people. A clear example is Hanoi’s recent ‘paperless administration’ mandate. Since October 2025, Hanoi authorities have no longer accepted paper documents for 25 standard public services, requiring them to be completed entirely online via the national e-portal or VNeID. This shift to all-digital workflows, part of Project 06’s pilot, aims to streamline services, but it risks leaving less tech-savvy citizens adrift. City officials have set up scanners and on-site staff at service centres to assist those who arrive with physical documents.³¹ In rural and remote areas, ‘Community Digital Technology Groups’ (often youth volunteers) have been mobilised to help villagers use online portals. These stopgap measures highlight a core issue: without direct support, many older adults cannot navigate the new digital-only procedures and risk being excluded from the process. Indeed, about 30% of citizens, especially the elderly and those in remote areas, struggle to use the VNeID app or the National Public Service Portal independently.³² Older people in Vietnam today did not grow up with computers and smartphones; many have low digital literacy and may not own modern devices or reliable internet connections. When essential services like welfare benefits, healthcare registration, or personal identification go online-only, these older individuals face disproportionate hurdles. The result is a form of digital ageism, in which a seemingly neutral ‘digital transformation’ policy has an indirect discriminatory impact on a particular age group that is less digitally fluent.

30 Thai (n 25).

31 ibid

32 ibid. For example, some elderly people have access only to a smartphone that ‘actually belongs to their children,’ leading them to forget passwords or feel a lack of ownership over the device. Many find government apps and websites not fully age-friendly: small font sizes, English-only interfaces, and complex multi-step logins can discourage use. Notably, the government has begun adding accessibility features to the VNeID app, such as voice guidance and instructional videos, but these adaptations are still in early stages.

From a law-and-policy perspective, Vietnam's push has introduced rules (the 'law' modality) that effectively require digital interfaces to be mandatory. These legal mandates lack accompanying rights to accommodations, so the burden falls on *social measures* (like volunteer helpers) to prevent exclusion. The code or architecture modality, as well as platform design, influences outcomes. If the National Public Service Portal is not intuitive for seniors or if one must have a smartphone to receive a one-time password, then the technology *itself* acts as a gatekeeper. Meanwhile, social norms can either ameliorate or exacerbate digital exclusion. In Vietnam, a positive norm is emerging in urban areas where community classes teach the elderly how to use smartphones and even AI apps, fostering intergenerational support.³³ However, a negative norm is the stereotype that older people are 'too old to learn' technology. This assumption can creep into policy design (e.g., a lack of investment in seniors' training) and into everyday interactions. If younger service staff grow impatient with elders at a digital kiosk, or if important information is only announced via Facebook or Zalo (popular messaging apps), assuming everyone is online, older citizens are implicitly marginalised.

The net effect is indirect discrimination through digital design. Vietnam's Constitution and laws formally guarantee equality for all citizens, but when public services go digital, equal access in practice is not assured. *Digital ageism* manifests as systems that accommodate the young and connected, while imposing new hardships on the old. For example, a smart city app for medical appointments might be hailed as progress.³⁴ However, an 80-year-old without a smartphone could effectively be *denied access* to healthcare unless alternative arrangements are made. Such scenarios reveal that digital exclusion is a modern form of social exclusion. In Vietnam's case, unless deliberate inclusion measures are scaled up, the laudable drive for efficiency may inadvertently create a two-tier society divided by digital ability, with older people at risk of becoming second-class citizens in the digital state.

5 THE EU LEGAL FRAMEWORK AND MEMBER STATE IMPLEMENTATION

5.1. Digital Strategy and Legal Norms at the EU Level

The European Union's digital policy frameworks paint an ambitious vision of a 'Digital Decade' by 2030, in which governments and citizens pivot strongly toward online services. The 2030 Digital Compass sets concrete targets such as '100% online provision of key public

33 Lê Hương, 'Digital Technology for the Elderly' (*Viet Nam News*, 6 May 2025) <<https://vietnamnews.vn/society/1717072/digital-technology-for-the-elderly.html>> accessed 31 December 2025.

34 Ittay Mannheim, 'Ageism in the Use and Design of Digital Technology' (PhD thesis, Tilburg University 2023) doi:10.13140/RG.2.2.14854.75840.

services' for citizens and businesses.³⁵ In parallel, the EU has enshrined high-level principles in the 2022 European Declaration on Digital Rights and Principles, pledging a human-centric digital transition that 'benefits everyone' and 'leaves no one behind'.³⁶ This Declaration underscores values of inclusion and solidarity, affirming that rights must be respected online as well as offline. Notably, it highlights the freedom of choice in the digital environment, underscoring the importance of user autonomy. However, conspicuously absent is an explicit right to opt out of digital life, i.e. the choice to remain offline is more an implicit aspiration than an enforceable guarantee.

Several binding EU laws address digitalisation, but again without expressly securing offline alternatives. The eIDAS Regulation (electronic identification and trust services) and its upcoming update drive Member States to offer digital ID and signatures for cross-border e-government transactions.³⁷ This facilitates 'digital-by-default' public services, but EU law does not mandate parallel paper-based procedures. Likewise, the landmark GDPR (General Data Protection Regulation) empowers individuals in the digital realm, strengthening privacy and personal data autonomy, but focuses on regulating online processing rather than affirmatively ensuring an offline option.³⁸ GDPR's provisions do reflect concern for human agency (for instance, the right *not* to be subject solely to automated decisions), which aligns with the idea that individuals should have control and not be forced into purely digital interactions. However, no GDPR article grants a right to receive services *in person* or via paper.³⁹ In short, EU law robustly protects privacy and data autonomy, but digital autonomy, understood as the right *not* to digitalise one's life, remains underdeveloped in binding norms. The EU's accessibility regulations are significant in this context. The European Accessibility Act (Directive (EU) 2019/882) sets out standardised accessibility requirements for various products and services, including e-commerce and consumer banking services.⁴⁰ Its aim is to reduce barriers for people with disabilities and older users. While this can help address digital exclusion by making online interfaces more user-friendly, it does not, on its

35 European Commission, '2030 Digital Compass: The European Way for the Digital Decade' (COM(2021) 118 final, 9 March 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0118>> accessed 31 December 2025.

36 European Commission, 'European Digital Rights and Principles' (*European Commission: Shaping Europe's Digital Future*, 2022) <<https://digital-strategy.ec.europa.eu/en/policies/digital-principles>> accessed 31 December 2025

37 European Commission, 'eIDAS Regulation' (*European Commission: Shaping Europe's Digital Future*, 5 May 2025) <<https://digital-strategy.ec.europa.eu/en/policies/eidas-regulation>> accessed 31 December 2025.

38 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

39 Oskar Josef Gstrein, 'Data Autonomy: Recalibrating Strategic Autonomy and Digital Sovereignty' (2023) 28(4) *European Foreign Affairs Review* 379, doi:10.54648/eerr2023028.

40 Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (European Accessibility Act) [2019] OJ L 151/70.

own, establish a right to remain offline or require public authorities and service providers to offer alternative non-digital options. Therefore, while accessibility duties can enhance usability, they cannot replace the need for legally guaranteed access to services offline.

Importantly, EU policymakers have at times acknowledged that going fully digital must be tempered by inclusivity. The European Commission's Digital Compass communication explicitly reassured that '*public services will always be accessible in person*' even as digital becomes the preferred way to access them.⁴¹ The Digital Decade policy program thus recognises the duty to accommodate those who cannot or prefer not to engage online. However, this promise is a policy commitment rather than a justiciable right. No EU regulation concretely obliges national or EU administrations to maintain offline channels.⁴² In practice, whether citizens can exercise 'digital choice,' the autonomy to interact with authorities and essential services offline, is left to Member State implementation and political goodwill. The evolving concept of 'digital inclusion' in EU discourse certainly aims to ensure that everyone benefits from the digital transformation,⁴³ but stops short of declaring a legal *right to remain offline*.

5.2. Implementation Realities in Member States

Across EU Member States, the push for e-government and digital commerce has accelerated, and so have tensions between efficiency drives and the imperative of inclusion. Many countries have adopted 'digital-by-default' strategies, but the implementation realities reveal a persistent grey digital divide. Europe's population is ageing, and while internet use among older adults is rising, a significant share of seniors remain offline or struggle with digital interfaces.⁴⁴ This means that digital-only public services risk indirectly discriminating against older persons, even in the absence of any intent to exclude. The shift to online-only administration can thus lead to indirect age discrimination and exacerbate social exclusion if not mitigated.

Member States have taken varied approaches to preserving offline alternatives (or not).⁴⁵ France presents a cautionary tale of rapid digitalisation that fails to fully account for the

41 European Commission, '2030 Digital Compass' (n 35).

42 Kuzelewska, Malinowski and Tomasz, 'Human Rights and Digital Choice' (n 14).

43 Juliane Müller, *Rights in the Digital Age* (International IDEA 2025) doi:10.31752/idea.2025.33.

44 As of 2020, roughly one in five EU citizens was over 65, and many older people 'lack access to technology, face accessibility and cost barriers, lack digital skills or simply prefer not to use these technologies.' Overall, more than 40% of Europe's population still lacks basic digital skills, a statistic that aligns closely with the older demographic. See, Andre Felix, 'EDF Resolution: Right to Offline Access to Essential Services' (*European Disability Forum*, 13 November 2024) <<https://www.edf-feph.org/publications/edf-resolution-right-to-offline-access-to-essential-services/>> accessed 31 December 2025.

45 The Member State examples discussed below (France, Germany, Belgium, and Estonia) are illustrative rather than exhaustive, selected to reflect recurrent patterns and contrasting approaches in the implementation of digital-by-default public services, rather than to provide a comprehensive survey of all EU Member States.

elderly. The French government's *Public Action 2022* programme sought to dématérialiser 100% of administrative procedures by 2022.⁴⁶ Indeed, many essential processes, from tax filing to pension applications, moved to primarily online formats. The outcome has been mixed: while digital access improved for some, 61% of people 'sometimes or often' encounter difficulties with online administrative procedures, up from 44% in 2016.⁴⁷ The French case highlights how digitisation without sufficient offline safeguards can lead to *real-world exclusion*. In response, French authorities have begun to stress the need for multiple access channels. France has expanded 'France Services,' a network of about 3,000 one-stop offices (often in town halls or post offices) where staff assist citizens with online admin or provide in-person help.⁴⁸ These efforts aim to ensure that those *left behind by dematerialisation*, often older rural citizens, still have a human interlocutor and do not forfeit their rights due to a lack of digital skills.

In Germany, similar tensions are evident, though the federal structure leads to diverse outcomes. Germany's Onlinezugangsgesetz (Online Access Act)⁴⁹ mandated that over 500 public services be available online by the end of 2022, pushing municipalities and Länder towards digital portals. While Germany has not eliminated in-person administration, parts of the public and private sectors have shifted toward '*digital-only*' service delivery.⁵⁰ These changes sparked public outcry and concern that *ruthless digitalisation* of transport and other services is undermining accessibility. Critics point out that digital-only ticketing excludes the very groups most dependent on public transport, low-income individuals, people with disabilities, and many older people, who may not have smartphones or be comfortable with apps.⁵¹

46 Digital Watch, 'French E-Government Strategy' (*DigWatch*, October 2017) <<https://dig.watch/resource/french-e-government-strategy>> accessed 31 December 2025.

47 Tellingly, 23% of respondents had given up on obtaining a public service or benefit they had a right to because the online process was too complicated, a phenomenon the ombudsperson warns 'amounts to a loss of rights'. Older adults and other disadvantaged groups are over-represented among those struggling, e.g. two-thirds of people with disabilities or in financial difficulty reported problems. See, Hannah Thompson, 'Two Thirds of People Polled Say They Struggle with Online French Admin' (*The Connexion France*, 22 October 2025) <<https://www.connexionfrance.com/news/two-thirds-of-people-polled-say-they-struggle-with-online-french-admin/750033>> accessed 31 December 2025.

48 ibid

49 German Online Access Act 'Onlinezugangsgesetz (OZG)' (adopted 14 August 2017) <<https://www.gesetze-im-internet.de/ozg/>> accessed 31 December 2025.

50 For example, Deutsche Bahn (the national railway) recently stopped selling specific discount train tickets at station machines, making them available only via smartphone or online. Even when buying in person, the customer must provide a mobile number or an email address, effectively coercing digital engagement. In some cities, even public bus tickets can no longer be purchased from drivers in cash and must be bought through an app. See, Digitalcourage, 'German Petition Calls for 'a Life without Digital Coercion' (*European Digital Rights (EDRi)*, 20 November 2024) <<https://edri.org/our-work/german-petition-calls-for-a-fundamental-right-to-a-life-without-digital-coercion/>> accessed 31 December 2025.

51 Anne Durand and others, 'Access Denied? Digital Inequality in Transport Services' (2022) 42(1) *Transport Reviews* 32, doi:10.1080/01441647.2021.1923584.

While federal reform remains pending, some sub-national governments have acted. The State of Schleswig-Holstein added a new article to its constitution in 2021, guaranteeing '*personal, written and electronic access*' to government services and courts, and, crucially, that '*no one may be disadvantaged as a result of the method of access*'.⁵² This provision ensures that an individual who files a paper form or appears in person is given equal treatment to one who transacts online. The German experience thus illustrates both the creeping digitalisation of essential services and emerging safeguards to protect offline access, often motivated by concerns of age-related equity and privacy.

Other Member States offer additional examples of the balance between digital innovation and retention of offline alternatives. In Belgium, despite advanced telecom infrastructure, an estimated 46% of the population was at risk of digital exclusion in 2021. Older Belgians, along with people with low levels of education and income, make up a large share of this digitally vulnerable group.⁵³ The Belgian approach sees financial services as a key front in this battle: recognising that it is impossible to live everyday life without financial services, banks have been reminded of their responsibility to keep services '*accessible to all*', including via non-digital channels. Indeed, Belgium's banking sector has pledged measures such as maintaining ATMs and counter services in less tech-savvy communities, following advocacy by senior groups. This underscores that the 'right to remain offline' debate extends beyond government services to essential private services (banks, utilities, etc.), where branch closures and shifts to apps can also marginalise older clients.

In hyper-digital Estonia, often heralded as '*e-Estonia*,' most public services have been available online for years (from e-ID and e-voting to digital prescriptions). Nevertheless, Estonia has not eliminated offline options: *in-person voting* is still offered alongside internet voting, recognising that some (including many older voters) prefer the traditional ballot box. The government has also invested in user-friendly design and digital literacy training specifically tailored to older citizens, mitigating the age divide. However, studies show that a digital skills gap persists among the oldest Estonians, indicating that, no matter how advanced the digital infrastructure, a segment of the elderly may remain offline or require assistance.⁵⁴ Estonia's example highlights that strong digital infrastructure *can* reduce the grey divide, but it does not erase it; some proportion will still rely on analogue modes.

In all Member States, ageism and concerns about indirect discrimination loom in the background: if governments assume 'everyone is digital,' they risk designing systems that

52 Digitalcourage (n 50).

53 Rik Coeckelbergs, 'Digital Inclusion in Belgium Anno 2022' (*The Banking Scene*, 3 October 2022) <<https://thebankingscene.com/opinions/digital-inclusion-in-belgium-anno-2022>> accessed 31 December 2025.

54 Anu Leppiman, Iivi Riivits-Arkonsuo and Anneli Pohjola, 'Old-Age Digital Exclusion as a Policy Challenge in Estonia and Finland' in Kieran Walsh and others (eds), *Social Exclusion in Later Life: Interdisciplinary and Policy Perspectives* (Springer 2021) 409, doi:10.1007/978-3-030-51406-8_32.

exclude by default.⁵⁵ The rise of terms like ‘digital ageism’ signals awareness that neglecting older adults in digital strategies (or implicitly blaming them for not adapting) is a form of systemic age bias.

6 COMPARATIVE ANALYSIS AND DISCUSSION

Before turning to substantive findings, it is important to clarify the units and levels of comparison. Vietnam is assessed primarily through national legal mandates and administrative practice within a unitary structure. The EU is assessed as a two-level governance setting: EU-level norms and policy instruments set the framework, while Member States determine much of the concrete implementation. The comparative purpose is therefore functional, to evaluate how each system manages the risk that digital-by-default governance becomes digital compulsion, particularly for older persons, rather than to suggest institutional symmetry.

Both Vietnam and the EU illustrate a common tension in the digital transformation era: how to modernise service delivery without marginalising those who cannot, or choose not to, go online. In neither jurisdiction is there an explicit, enforceable ‘right to remain offline,’ yet both have acknowledged in principle the importance of inclusion. Vietnam’s digital strategies and the EU’s digital principles each invoke the mantra of leaving ‘no one behind.’ However, these lofty commitments have not crystallised into concrete legal entitlements to analogue services. Instead, the prevailing approach has been ‘digital-by-default’ in practice. This creates similar risks in both contexts: individuals with low digital literacy (disproportionately older adults) face indirect discrimination as public services migrate online. The result is an implicit systemic bias, sometimes termed *digital ageism*, in which policies assume universal tech-savviness, thereby disadvantaging those who are less connected.

Despite these shared challenges, Vietnam and the EU differ markedly in their regulatory philosophies. Vietnam’s approach is top-down and enforcement-driven. The government’s ambitious National Digital Transformation Programme and related mandates have aggressively pushed citizens and agencies onto e-platforms. Nowhere do Vietnamese laws (such as the Law on E-Transactions 2023 or the Law on the Elderly) guarantee a choice to use paper or face-to-face channels. The emphasis is overwhelmingly on compliance with the digital shift, not on accommodating digital holdouts. Vietnam’s strategy, while successful in rapidly digitising services, tends to treat non-digital access as a temporary crutch rather than a right. As a result, older people in Vietnam often rely on family or community help to navigate e-government, and pernicious stereotypes (e.g. that the elderly are ‘too old to learn’ technology) persist. The lack of enforceable offline options means that the principle of equality in Vietnam’s Constitution is not fully realised in practice. A ‘two-tier society’ is

55 Kuzelewska, Tomaszuk and Malinowski, ‘The Elderly Digital Divide’ (n 15).

emerging, divided by digital ability, with those remaining offline at risk of becoming second-class citizens in their access to services.

The EU's approach, by contrast, is multi-level and rooted in soft-law commitments, with variability across Member States. At the EU level, policy frameworks chart a bold digital future (e.g., the Digital Compass 2030 target of 100% of key public services online), tempered by high-level principles of inclusion. The 2022 *European Declaration on Digital Rights and Principles* proclaims a human-centric digital transition that 'leaves no one behind' and affirms the importance of user autonomy. Notably, it emphasises *freedom of choice* in the digital environment, implicitly supporting the idea that people should not be forced online. However, these EU proclamations stop short of creating any justiciable right to offline access. Binding EU law in the digital realm facilitates digital-by-default interactions but does not require governments to maintain parallel paper or in-person services. The European Commission has reassured, in policy documents, that 'public services will always be accessible in person', underscoring a *duty to accommodate* those who are not online. However, this remains a political promise rather than an enforceable guarantee. In practice, the extent of an EU citizen's 'digital choice,' the ability to interact offline, depends on national and local implementation. This soft-law, decentralised approach means that some jurisdictions have pioneered robust safeguards, while others lag behind.

Notwithstanding differences in governance style, the implications of digital-by-default policies in both contexts converge on several points, as follows:

1) *Autonomy*

When public services require digital interaction by default, individuals effectively lose a measure of personal autonomy;⁵⁶ the freedom to decide how to engage with government or essential services. Both Vietnam and EU member states rhetorically support user autonomy (the EU explicitly frames it as a principle). However, the current trajectory often forces a binary choice: get online or get left out.

2) *Equality and Non-Discrimination*

In both jurisdictions, formal equality rights exist (Vietnam's Constitution guarantees equality; the EU Charter and national laws prohibit age and disability discrimination), but *substantive* equality is at stake if vulnerable groups cannot access digital services on equal terms. *Indirect discrimination* arises when a neutral policy like online-only administration disproportionately harms certain groups,⁵⁷ e.g. older people or persons with disabilities, without reasonable justification. The concept of 'digital ageism' has

56 Michael E Milakovich, *Digital Governance: New Technologies for Improving Public Service and Participation* (Routledge, 2012) doi:10.4324/9780203815991.

57 Malin Roiha, 'Beyond the Screen. Digital Realities and Embodied Harm in the Experiences of Gender-Based Online Hate Speech' (PhD thesis, Universitat de Barcelona 2024).

entered public discourse in Europe to describe systemic bias against older adults in tech initiatives, and Vietnam's experience shows a similar pattern of older persons being inadvertently sidelined by tech-centric reforms.

3) *Access to Services and Justice*

Perhaps most critically, the rights to access public services and to seek justice are on the line. If court systems, social security, healthcare, or administrative processes default to electronic form, those without digital access face barriers in exercising fundamental rights. Both contexts reveal that the absence of offline avenues can translate into real-world exclusion: an elderly Vietnamese citizen missing out on welfare benefits because she cannot navigate an e-form, or a pensioner in an EU country unable to renew an ID or file a legal claim. After all, the process has gone online-only.

Such scenarios undermine the universality of public services and access to justice, calling into question whether the state is meeting its obligation to all citizens. Ultimately, the comparative lesson is clear: digital transformation without sufficient safeguards for offline access can erode core legal values.⁵⁸ To avoid this, both Vietnam and the EU must balance efficiency with inclusivity, ensuring that technological progress does not come at the expense of the rights and dignity of the offline population. The drive to modernise should be accompanied by a commensurate commitment to digital inclusivity by design, so that 'e' does not inadvertently stand for *exclusion*.

7 CONCLUSION AND RECOMMENDATIONS

7.1. Key Findings

This comparative study confirms the central claim that safeguarding the right to remain offline is essential to rights-respecting digital governance and to equal access to justice and public services in the digital age. The analysis clarifies the dual nature of the right to remain offline, as an autonomy-based freedom and as an enabling guarantee for the exercise of other rights. The right to remain offline should be conceptualised in both its independent and enabling dimensions (Section 3). As an independent right, it protects personal autonomy and freedom from digital coercion; as an enabling guarantee, it functions as a practical condition for the effective enjoyment of other rights (e.g., access to public services and justice, equality and non-discrimination, privacy), particularly where digital-by-default designs create barriers.

Vietnam's state-driven digitisation and the expansion of e-transactions and digital identification facilitate service modernisation, but the current legal framework provides no explicit entitlement to offline access (Section 4). Mandates such as e-ID account verification,

58 Müller (n 43).

even in ostensibly in-person procedures, and local 'paperless' pilots illustrate how digitalisation can translate into de facto compulsion, with older persons facing disproportionate hurdles and heightened risks of indirect discrimination and digital ageism. A key legislative implication is the need for an explicit 'choice of service methods' clause (in the Law on the Elderly 2009 and/or the Law on Electronic Transactions 2023) backed by equivalence and assisted-access duties. On the other hand, EU policy instruments articulate inclusion and freedom of choice, but binding EU law still does not codify a justiciable right to remain offline; protection therefore remains uneven and mediated by Member State implementation (Section 5). EU accessibility instruments, including the European Accessibility Act, strengthen accessibility of certain products and services and can reduce exclusion. However, they do not, by themselves, guarantee analogue alternatives or protect purely preference-based offline choice.

Despite different institutional architectures, both legal orders face the same structural risk that substantive equality and effective access to justice can be eroded when offline alternatives are not legally secured and practically usable (Section 6). Effective safeguards require multi-channel duties, *ex ante* assessment of exclusion risks, accessibility-by-design, and accountability mechanisms (complaints, review, and remedies).

7.2. Consolidated Recommendations

Based on the comparative findings and emerging best practices, the following consolidated recommendations aim to entrench meaningful protection for offline access while preserving the benefits of digital innovation:

1) Enshrine offline access in law.

Legislators should formally recognise a legal entitlement to access essential public services and courts through non-digital channels. This may be achieved through statutory amendment or constitutional clarification that no person shall be disadvantaged because they interact with public authorities in person, by post, or through other offline means. In Vietnam, this could be operationalised by amending the Law on the Elderly 2009 (or the Law on Electronic Transactions 2023 and its implementing acts) to insert an explicit 'right to choose service methods' clause for essential public services and justice-related procedures, coupled with a rule that offline users must not be disadvantaged in legal effect, timeliness, or procedural treatment.

2) Mandate multi-channel service delivery ('digital by default, not digital only').

Public bodies should be legally required to provide multiple access channels for key services, online, in-person, telephone, and paper, at least for essential functions (social security, healthcare, identity services, courts, and core administrative procedures). Multi-channel obligations should include: clear public communication of offline options; equivalence in legal effect and timeliness; and monitoring through audits and administrative oversight.

Where private actors deliver services that are effectively indispensable for daily life (e.g., banking, utilities, transport), regulators should also consider minimum multi-channel expectations to avoid ‘digital-only’ exclusion by market design.

3) Introduce Digital Inclusion Impact Assessments.

Before adopting ‘paperless’ reforms or moving services to online-only platforms, authorities should conduct structured assessments to identify risks of exclusion or indirect discrimination, especially for older people, persons with disabilities, rural residents, and those with low literacy or limited connectivity. If risks are identified, implementation should be contingent on mitigation measures (offline channels, assisted services, simplified user journeys, phased rollouts). Impact assessments should explicitly consider both capability-based barriers and legitimate preference-based offline use (including privacy and security concerns), since the right to remain offline protects autonomy as well as vulnerability.

4) Combat digital ageism and build an inclusion culture.

Digital transformation policies should explicitly recognise the risk of digital ageism and counter it through training, institutional incentives, and service design. Front-line staff should receive training in accessibility and respectful assistance, ensuring offline citizens are treated as equal users rather than burdens. Digital platforms should be developed using co-design methods that involve seniors and low-skill users, improving usability and reducing exclusion by design. Public literacy campaigns should promote intergenerational support and normalise the idea that choosing offline is legitimate, not a failure to modernise. In the EU context, these complement (but go beyond) accessibility compliance under instruments such as the European Accessibility Act, because even fully accessible digital systems may still leave a segment of the population with legitimate reasons to choose offline interaction.

In conclusion, the Vietnam-EU comparison demonstrates that the right to remain offline merits serious legal recognition and practical protection. Safeguarding this right does not hinder progress; it aligns digital transformation with foundational commitments to justice, equality, and human dignity. A balanced approach, combining enforceable offline entitlements, multi-channel delivery, impact assessment, procedural safeguards, cultural change, and sustained support, offers a credible pathway for both Vietnam and the EU to modernise while ensuring that the digital transition genuinely leaves no one behind. Recognising its dual nature, both autonomous choice and a guarantee for other rights, helps to frame offline access as a permanent element of rights-based digital governance, not merely a transitional exception.

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Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

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EDITORS

Managing editor – Dr. Olena Terekh. **English Editor** – Robert Reddin.

Ukrainian language Editor – Lilia Hartman.

ACKNOWLEDGEMENT

This research is funded by Vietnam National University Ho Chi Minh City (VNU-HCM) under grant number DM2024-34-02.

ABOUT THIS ARTICLE

Cite this article

Dao PG, 'The Right to Remain Offline in the Digital Transformation Era: A Comparative Study of Vietnam and the European Union' (2026) 9(2) Access to Justice in Eastern Europe 60-87 <<https://doi.org/10.33327/AJEE-18-9.2-a000190>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000190>

Summary: 1. Introduction. – 2. Methodology. – 3. Theoretical Foundations of the Right to Remain Offline. – 3.1. *Defining the 'Right to Remain Offline'.* – 3.2. *Relationship with Fundamental Rights.* – 3.2.1. *Autonomy and Freedom of Choice.* – 3.2.2. *Access to Public Services and Participation.* – 3.2.3. *Equality and Non-Discrimination.* – 3.2.4. *Privacy and Other Fundamental Rights.* – 4. Vietnamese Policy, Law and Practice. – 4.1. *Digital Transformation and the Emerging Legal Architecture.* – 4.2. *Implementation and Inclusion Challenges for Older People.* – 5. The EU Legal Framework and Member State Implementation. – 5.1 *Digital Strategy and Legal Norms at the EU Level.* – 5.2. *Implementation Realities in Member States.* – 6. Comparative Analysis and Discussion. – 7. Conclusion and Recommendations. – 7.1. *Key Findings.* – 7.2. *Consolidated Recommendations.*

Keywords: *right to remain offline; digital transformation; digital choice; access to public services; digital exclusion; ageism; privacy; comparative EU-Vietnam law.*

DETAILS FOR PUBLICATION

Date of submission: 31 Dec 2025

Date of acceptance: 25 Feb 2026

Online First Publication: 31 Mar 2026

Last Publication: 20 May 2026

Was the manuscript fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT:

This article was prepared with the assistance of AI tools. Specifically, Grammarly was employed for proof-reading during the drafting process (version reviewed: December 2025). The author confirms that all content, arguments, and conclusions were generated independently and remain their sole responsibility. No AI tool was used for generating original research findings or analysis.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВО ЗАЛИШАТИСЯ ОФЛАЙН В ЕРУ ЦИФРОВОЇ ТРАНСФОРМАЦІЇ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ В'ЄТНАМУ ТА ЄС

Фук Г. Дао

АНОТАЦІЯ

Вступ. Цифрова трансформація дедалі більше змінює надання державних послуг та правосуддя, проте реформи «цифрового режиму за замовчуванням» можуть призвести до ситуацій, коли доступ стає залежним від обов'язкової онлайн-активності. У цій статті розглядається право залишатися офлайн, що виникає та розуміється як свобода людини не бути змушеною використовувати інтернет-технології для здійснення прав або виконання повсякденних обов'язків, а також аналізується його нормативна основа в автономії, рівності та недискримінації, з особливим акцентом на літніх людях та ризики цифрового ейджизму. У дослідженні порівнюється швидка, державна цифровізація В'єтнаму з еволюційними стандартами Європейського Союзу щодо цифрової інклюзії та «цифрового вибору».

Методи. У цій статті використовується якісна доктринальна та функціонально-порівняльна методологія. Вона поєднує доктринальний аналіз правових текстів з функціональним порівнянням того, як В'єтнам та правовий порядок ЄС вирішують питання доступу до державних послуг та правосуддя в межах реформ «цифрового режиму за замовчуванням». У дослідженні аналізується законодавство, політичні інструменти та (де доступно) адміністративні рекомендації, а також відповідні наукові та інституційні звіти. Соціально-правові висновки використовувалися лише для контекстуалізації на основі кабінетного аналізу, який спирався на наявну літературу та опубліковані докази; не було проведено жодного оригінального емпіричного дослідження (опитування чи інтерв'ю).

Результати та висновки. Аналіз показує, що правова архітектура В'єтнаму значною мірою сприяє електронним транзакціям та цифровій ідентифікації, але не надає чіткого права на доступ офлайн. Обов'язкова перевірка облікових записів електронних ідентифікацій навіть для «офлайн» процедур та місцевих пілотних проектів «без паперової документації» ілюструє, як цифровізація може перетворитися на фактичний примус, коли люди похилого віку непропорційно користуються ключовими платформами, що підвищує ризики непрямой дискримінації та цифрового ейджизму. У ЄС політичні інструменти наголошують на інклюзії та свободі вибору, але обов'язкове законодавство ЄС не кодифікує право, яке можна захистити в судовому порядку офлайн; тому захист залишається нерівномірним і здебільшого залежить від впровадження державами-членами. Порівняльне обговорення показує, що, незважаючи на різні стилі регулювання, обидва контексти стикаються зі спільним ризиком: руйнуванням суттєвої рівності та ефективного доступу до правосуддя, коли офлайн-альтернативи не захищені юридично. У статті було зроблено висновок, що захист доступу офлайн слід розглядати як ключову умову цифрового управління, що поважає права, і рекомендовано: (1) закріплення доступу офлайн у законодавстві; (2) обов'язкове багатоканальне надання послуг; (3) впровадження оцінок впливу цифрової інклюзії; та (4) протидія цифровому ейджизму за допомогою інклюзивного проектування послуг, навчання та механізмів допоміжного доступу. Це додатково пояснює подвійну природу права залишатися офлайн: як свободи, що ґрунтується на автономії, та як гарантії, що забезпечує ефективне здійснення інших прав.

Ключові слова. Право залишатися офлайн; цифрова трансформація; цифровий вибір; доступ до державних послуг; цифрова ізоляція; ейджизм; конфіденційність; порівняльне право ЄС та В'єтнаму.

TÓM TẮT BẰNG TIẾNG VIỆT*

Bài báo nghiên cứu

QUYỀN ĐƯỢC NGOẠI TUYỂN TRONG KỶ NGUYÊN CHUYỂN ĐỔI SỐ:
MỘT NGHIÊN CỨU SO SÁNH GIỮA VIỆT NAM VÀ LIÊN MINH CHÂU ÂU

Đào Gia Phúc

TÓM TẮT

Bối cảnh: Chuyển đổi số đang ngày càng tái định hình việc cung cấp dịch vụ công và tư pháp. Tuy nhiên, các cải cách theo mô hình “số hóa mặt định” có thể tạo ra rào cản tiếp cận các dịch vụ này khi bắt buộc người sử dụng phải thực hiện, thao tác trên nền tảng số. Bài viết này phân tích quyền được ngoại tuyến, được hiểu là quyền tự do của cá nhân không bị buộc phải sử dụng các công

* The publication metadata in Vietnamese is presented as submitted by the author.

nghe dựa trên nền tảng internet để thực hiện quyền hoặc hoàn thành các nghĩa vụ thường nhật. Nghiên cứu thực hiện phân tích các nền tảng chuẩn tắc của quyền này, bao gồm tự chủ cá nhân, bình đẳng và không phân biệt đối xử, với sự chú ý đặc biệt đến nhóm người cao tuổi cũng như nguy cơ của sự phân biệt tuổi tác trong môi trường số. Nghiên cứu so sánh giữa Việt Nam và Châu Âu trong bối cảnh số hóa đang diễn ra nhanh chóng và do nhà nước dẫn dắt tại Việt Nam với các tiêu chuẩn đang được phát triển tại Liên minh châu Âu về bao trùm số và “quyền lựa chọn số”.

Phương pháp: Bài viết áp dụng phương pháp nghiên cứu định tính kết hợp giữa phân tích học thuyết pháp lý và so sánh luật học. Nghiên cứu kết hợp phân tích các văn bản pháp luật với việc so sánh cách thức hệ thống pháp luật của Việt Nam và EU giải quyết vấn đề tiếp cận dịch vụ công và tư pháp trong bối cảnh cải cách “số hóa mặc định”. Các nguồn tài liệu được phân tích bao gồm luật, chính sách và các văn bản hướng dẫn thi hành, cùng với các công trình học thuật và báo cáo chính sách liên quan. Các phân tích xã hội – pháp lý được sử dụng nhằm cung cấp bối cảnh dựa trên các tài liệu đã công bố; nghiên cứu không tiến hành khảo sát hay phỏng vấn thực nghiệm.

Kết quả và Kết luận: Phân tích cho thấy khuôn khổ pháp lý của Việt Nam tạo điều kiện thuận lợi cho các giao dịch điện tử và định danh số, nhưng chưa có quy định rõ ràng bảo đảm quyền tiếp cận dịch vụ theo hình thức ngoại tuyến. Việc yêu cầu xác thực tài khoản định danh điện tử ngay cả đối với các thủ tục ngoại tuyến, cùng với các mô hình “không giấy” ở cấp địa phương, cho thấy quá trình số hóa có thể dẫn tới sự bắt buộc trên thực tế. Người cao tuổi gặp nhiều khó khăn trong việc sử dụng các nền tảng số quan trọng, làm gia tăng nguy cơ phân biệt đối xử gián tiếp và phân biệt tuổi tác trong môi trường số. Trong khi đó, tại EU, các công cụ chính sách nhấn mạnh tính bao trùm và quyền tự do lựa chọn, nhưng luật EU hiện hành chưa ghi nhận một quyền ngoại tuyến có thể được thực thi trước tòa; do đó mức độ bảo vệ còn không đồng đều và phụ thuộc nhiều vào việc thực thi của các quốc gia thành viên. Phân tích so sánh cho thấy mặc dù có khác biệt về cách thức điều chỉnh, cả hai bối cảnh đều đối mặt với một nguy cơ chung: sự suy giảm bình đẳng thực chất và khả năng tiếp cận công lý hiệu quả khi các lựa chọn ngoại tuyến không được bảo đảm bằng pháp luật. Bài viết kết luận rằng việc bảo vệ khả năng tiếp cận ngoại tuyến cần được coi là một điều kiện cốt lõi của quản trị số tôn trọng quyền con người, và đề xuất: (i) ghi nhận quyền tiếp cận ngoại tuyến trong pháp luật; (ii) bắt buộc cung cấp dịch vụ theo nhiều kênh khác nhau; (iii) áp dụng đánh giá tác động về bao trùm số; và (iv) chống lại sự phân biệt tuổi tác trong môi trường số thông qua thiết kế dịch vụ bao trùm, đào tạo và các chế độ hỗ trợ tiếp cận.

Từ khóa: Quyền được ngoại tuyến; chuyển đổi số; dịch vụ công; cản trở số; sự phân biệt tuổi tác; nghiên cứu pháp lý so sánh EU-Vietnam.

Research Article

CORRUPTION AS A SOCIO-LEGAL CONSTRAINT ON ACCESS TO JUSTICE: A COMPARATIVE INTEGRITY REVIEW OF KAZAKHSTAN AND SELECTED EASTERN EUROPEAN JURISDICTIONS (2019–2025)

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DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000188>

Date of submission: 18 Oct 2025

Date of acceptance: 15 Feb 2026

Online First Publication: 30 Mar 2026

Last Publication: 20 May 2026

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ABSTRACT

Background: *In post-socialist legal systems in Kazakhstan and several Eastern European states, corruption continues to pose a systemic challenge to the rule of law and to effective access to justice. In this article, corruption is treated as a socio-legal phenomenon sustained by recurring administrative and judicial decision-making routines and societal patterns of legality, including trust in institutions. These mechanisms jointly condition how rights are enforced in practice and whether courts are perceived as credible. When judicial independence is weakened and civic-legal consciousness is low, corruption does not mechanically determine outcomes, but it increases the probability that informal influence can enter decision-making routines and erode procedural equality, predictability, and the credibility of adjudication. While some governance systems may partially offset this risk through*

effective controls in adjacent institutions, the justice sector is less amenable to compensation, as courts constitute the final enforcement and rights-protection forum. Therefore, the analysis focuses on the judiciary not as the sole locus of corruption, but as the critical channel through which corruption converts into practical constraints on access to justice via reduced predictability, weaker procedural equality, and lower credibility of adjudication. Understanding corruption through the prism of access to justice requires attention to its legal, cultural, and institutional foundations.

Methods: *The study applies a socio-legal (law-and-society) analytical review combining comparative legal analysis with mechanism-oriented socio-legal synthesis and qualitative content analysis. The evidence base consists of national legislation, international anti-corruption and rule-of-law instruments (UNCAC, OECD, GRECO), selected judicial practice, and analytical reports of Transparency International and the UNDP. A structured comparison of Kazakhstan with the Eastern European jurisdictions of Poland, Lithuania, and the Czech Republic is conducted to assess how legal culture, institutional autonomy, and civic oversight affect corruption control and access to justice.*

Results and Conclusions: *The findings reveal a direct relationship between the level of corruption, the operational legal culture, and the practical accessibility of justice. Where judicial safeguards are operational and externally verifiable, transparency becomes actionable: reasoned decisions are publicly accessible, and participation channels are usable. Under these conditions, tolerance of corruption declines and trust in courts is more likely to increase. The article introduces the Socio-Legal Integrity Framework, which integrates legal education, cultural transformation, and institutional accountability as interconnected mechanisms shaping anti-corruption legal consciousness. For Kazakhstan, the analysis underscores the need to strengthen the autonomy of anti-corruption bodies, enhance external oversight of the judiciary, expand meaningful digital transparency, and embed value-oriented legal education. In contrast, several Eastern European states demonstrate more advanced preventive approaches grounded in participatory governance and enforceable judicial ethics. The study concludes that effective anti-corruption policy requires not only formal legal reform but also a systemic reconfiguration of legal culture to ensure genuine access to justice.*

1 INTRODUCTION

Corruption represents one of the most significant threats to the modern rule-of-law state, undermining its fundamental principles, the supremacy of law, justice, and equality of citizens before the law. It distorts the system of justice, impedes the realisation of rights and freedoms, and diminishes public trust in the judiciary and law enforcement institutions. In this context, corruption must be regarded not merely as a legal offence but as a complex socio-legal phenomenon that destroys the relationship between the state and society.

In this article, corruption is analysed as a socio-legal phenomenon, meaning a pattern that is simultaneously normatively defined by legal rules and prohibitions, institutionally reproduced through routine decision-making and enforcement practices (appointments, procurement controls, investigations, adjudication, and asset-recovery follow-through), and socially sustained by expectations of legality, trust, and tolerance. Accordingly, “socio-legal” does not refer to a separate discipline but to an analytical lens that links normative design (what the law prescribes) with institutional operation (how rules are applied) and societal legitimacy (why citizens comply or circumvent).

In many countries, including the Republic of Kazakhstan and Eastern European countries, a comprehensive anti-corruption legal framework has been established; however, its effectiveness remains limited. The contradiction between formally high legislative standards and weak law enforcement indicates structural dysfunctions within the public administration system. Corruption thus becomes not an accidental deviation but a stable element of social practice, sustained by patronage and clientelist mechanisms.

The international community views the fight against corruption as a fundamental prerequisite for sustainable development and genuine access to justice. Key international frameworks including the United Nations Convention against Corruption (UNCAC),¹ the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials,² and the recommendations of the Group of States against Corruption (GRECO)³ underscore not only the need for stricter sanctions but also the critical importance of enhancing institutional transparency. As noted by Transparency International⁴ and the World Justice Project,⁵ the prevalence of corruption is closely linked to the overall quality of the judicial system and the level of public trust in state institutions.

For Kazakhstan and Eastern European countries, the problem is further exacerbated by shared post-socialist conditions, weak institutional capacity, legal nihilism, and judicial dependence. At the same time, variations in the level of legal culture and the civic oversight capacity determine the effectiveness of national anti-corruption strategies. Consequently, the present review adopts a socio-legal, mechanism-oriented analytic stance (law-and-society) rather than a generic “interdisciplinary” framing. The law is analysed together with

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- 1 United Nations Convention against Corruption (UNCAC) (adopted 31 October 2003) [2007] UNTS 2349/41.
 - 2 OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD/LEGAL/0293, OECD 2025).
 - 3 Group of States against Corruption (GRECO), ‘Fourth Evaluation Round: Prevention of Corruption in Respect of Members of Parliament, Judges and Prosecutors’ (Council of Europe, 2025) <<https://www.coe.int/en/web/greco/evaluations>> accessed 10 October 2025.
 - 4 ‘Corruption Perceptions Index’ (Transparency International, 2020–2024) <<https://www.transparency.org/en/cpi/2024>> accessed 10 October 2025.
 - 5 ‘Rule of Law Index’ (World Justice Project, 2021–2025) <<https://worldjusticeproject.org/rule-of-law-index/global/2025>> accessed 10 October 2025.

its institutional operation and the social meanings that sustain compliance or tolerance, allowing doctrinal materials, monitoring evidence, and observable implementation signals to be synthesised within a single comparative protocol.

In this article, corruption is treated as a socio-legal governance risk that operates through institutional incentives and routine decision practices, rather than as a single type of offence. The paper's substantive focus is bounded: it examines how corruption becomes legally consequential for access to justice, i.e., how integrity deficits affect the predictability, usability, and perceived neutrality of remedies, with the judiciary analysed as the final rights-enforcement forum rather than the exclusive locus of corruption.

To avoid conceptual ambiguity, the following working definitions apply throughout. Maturity of legal culture denotes an operational bundle of internalisation of legality and willingness to rely on lawful procedures, civic-legal agency (readiness to complain, appeal, and report), and credibility of institutional feedback (observable, predictable institutional responses). The maturity of civil society refers to the capacity of autonomous civic actors (NGOs, media, professional communities) to sustain oversight via usable participation channels and stable feedback loops. A structural barrier to effective access to justice denotes systemic impediments that predictably prevent people from translating formal rights into effective remedies (e.g., institutional dependence, procedural opacity, fear of retaliation, and low expected effectiveness of litigation), as emphasised in classic access-to-justice scholarship.

Finally, legal education is used in a broad socio-legal sense as value-oriented legal socialisation (not only formal instruction), encompassing practical knowledge of rights and procedures, as well as integrity norms that shape the willingness to use lawful channels. Post-socialist refers to jurisdictions whose contemporary legality expectations and institutional practices are shaped by the interaction of socialist administrative legacies and transition reforms, producing hybrid governance patterns and contested enforcement credibility.

The term post-socialist is used here as a scope condition for case selection, referring to jurisdictions shaped by the interaction of socialist administrative legacies and transition reforms. It does not imply institutional uniformity. Instead, it signals a shared set of transition constraints, high discretion in administration, vertical accountability traditions, and contested legality expectations, within which integrity safeguards and civic oversight may develop unevenly across cases.

The following working definitions are used throughout the paper:

- Legal culture (operational) denotes internalisation of legality, civic-legal agency, and credible institutional feedback (complaints and reasoning lead to predictable outcomes).

- Civic-legal consciousness refers to citizens' readiness to rely on lawful procedures, reject informal payments, and use complaint and or appeal mechanisms.
- A structural barrier to effective access to justice means a system-level impediment embedded in institutional design and routine practices (opacity, dependence, fear of retaliation, cost and delay, weak enforceability) that predictably prevents people from translating formal rights into remedies.

The relevance of this research lies in the need to identify both legal-institutional determinants (rules, enforcement incentives, oversight) and socio-cultural determinants (value orientations and legal socialisation) that shape tolerance towards corruption.

In post-socialist legal systems, corruption should be understood not only as an administrative or financial offence, but also as a governance condition that can undermine the practical effectiveness of legal remedies. Where judicial independence is fragile and civic-legal capacity is limited, this does not automatically entail unfair adjudication in every case; rather, it increases the likelihood that informal influence can permeate decision-making routines and that procedural safeguards will be applied inconsistently. Some systems may partially offset integrity risks through strong controls in adjacent institutions. However, compensation is structurally limited in the justice sector, as courts function as the final enforcement and rights-protection forum: if adjudication is perceived as dependent or unpredictable, citizens rationally reduce reliance on lawful remedies even when other agencies perform comparatively better. Under these conditions, corruption constrains access to justice not only by producing occasional biased outcomes but by reshaping expectations of legality, reducing willingness to litigate, weakening procedural trust, and lowering the perceived credibility of adjudication.

Accordingly, the access-to-justice lens is used here as a bounded analytical entry point into a wider governance phenomenon. The focus is justified not by an assumption that corruption is primarily judicial, but by a mechanism claim: corruption becomes a structural barrier to effective remedies when it weakens predictability, procedural equality, and the perceived neutrality of the institution that ultimately validates and enforces rights. Other institutions may partially compensate for integrity deficits (through auditing, administrative controls, or service digitalisation), but compensation is inherently limited once disputes reach adjudication and enforcement stages, where the legitimacy of outcomes depends on impartial decision-making and publicly verifiable reasoning.

For the ordinary citizen, this transformation has tangible consequences. Low levels of legal culture and persistent legal nihilism reduce trust in courts and discourage individuals from seeking judicial protection, particularly in disputes involving public authorities. Corruption thus operates as a mechanism of indirect exclusion, whereby individuals refrain from asserting their rights because judicial outcomes are perceived as unpredictable or biased. As a result, corruption affects not only public finances but also the substantive realisation of the right to a fair hearing and the effectiveness of judicial protection.

The subject of this review is the set of socio-legal mechanisms through which corruption translates into practical constraints on access to justice (predictability of adjudication, procedural equality, enforceability and recovery follow-through, and perceived neutrality of courts). The object is not corruption “in general”, but the justice-related segment of integrity governance in Kazakhstan and selected Eastern European EU jurisdictions during 2019–2025, as captured in legal design, monitoring outputs, governance indicators, and accessible judicial practice materials. The paper, therefore, does not claim to develop a universal integrity theory or a comprehensive anti-corruption toolkit; it provides a bounded comparative synthesis focused on mechanisms relevant to access to justice.

This article treats access to justice as the point where anti-corruption policy becomes socially consequential: formal rights matter only to the extent that individuals can predictably obtain remedies through lawful procedures. Corruption does not automatically produce unfair outcomes in every case. However, when integrity safeguards are weak, the probability increases that informal influence can penetrate decision-making routines and distort procedural equality through selective scheduling, opaque evidentiary handling, inconsistent sanctioning, or weakened enforcement follow-through. Although some governance systems can partially offset risks through controls in adjacent institutions, the justice sector is less amenable to compensation, as courts constitute the final forum for rights protection. If adjudication is perceived as dependent or unpredictable, citizens rationally reduce their reliance on lawful remedies, thereby converting corruption into a structural barrier to effective access to justice. The judiciary is, therefore, analysed not as the sole locus of corruption, but as the institutional channel through which corruption is most likely to translate into practical constraints on rights enforcement.

1.1. Degree of Scientific Development of the Problem

The issues concerning the nature and mechanisms of corruption have received extensive and sustained attention in global academic literature; however, the character, drivers and evolving dynamics of this phenomenon continue to provoke active scholarly debate. Within the economic approach, represented by the works of Klitgaard, corruption is interpreted as the result of an imbalance between monopoly power, discretionary authority and insufficient accountability.⁶ His well-known formula *Corruption = Monopoly + Discretion – Accountability* became a conceptual reference point for a wide range of subsequent economic–legal models.⁷ The ethical–legal approach, developed by Rose-Ackerman, concentrates on the moral dilemmas embedded in public service and the institutional conditions that shape an individual’s choice between personal gain and the public good.⁸ The scholar consistently emphasises that combating corruption is impossible without an

6 Robert Klitgaard, *Controlling Corruption* (University of California Press, 1988).

7 *ibid* 75.

8 Susan Rose-Ackerman and Bonnie J Palifka (eds), *Corruption and Government: Causes, Consequences, and Reform* (CUP 2016) doi:10.1017/CBO9781139962933.

ethical reorientation of public administration and the cultivation of citizens' legal consciousness. Huberts and other representatives of the institutional school, view corruption as a violation of the principles of integrity management, underlining the central importance of transparency, accountability and control mechanisms as the foundation of a sustainable legal system.⁹ Instead of focusing on post-Soviet informal practices, this study relies on the work of Svensson and Collier, who examined patterns of informal governance in countries with strong institutional reform trajectories and demonstrated how improvements in legal culture and civic values could systematically reduce opportunities for corruption.¹⁰ The cultural-legal dimension, developed by a number of scholars including Kachur et al., Bakirov et al., Mungiu-Pippidi, and Peters, links the persistence of corruption to low levels of legal culture, insufficient legal education and the continued influence of patronage-based social relations.¹¹ Taken together, these studies illustrate that legal consciousness and public values determine not only society's general attitude towards the law, but also the extent of social tolerance for corrupt practices.

Nonetheless, certain "white spots" persist in the scholarly discourse. The socio-cultural roots of corruption remain insufficiently explored, particularly in post-socialist societies where traditional values, patronage systems, and legal nihilism form a stable cognitive model of tolerance toward corruption. Furthermore, there remains a lack of interdisciplinary approaches integrating jurisprudence, sociology, and ethics, hindering a holistic understanding of corruption as part of a broader social system.

1.2. Scientific Novelty and Research Contribution

The present study contributes by reframing corruption through a socio-legal lens that connects legal design with cultural norms and civic-legal agency. Rather than treating corruption solely as a breach of legal rules, the review interprets it as an operational signal of how legal culture functions in practice and how credible institutional accountability appears to citizens. This integrative framing enables corruption to be analysed as a socially

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- 9 LWJC Huberts, 'Integrity: What it is and Why it is Important' (2018) 20(1) Public Integrity 18, doi:10.1080/10999922.2018.1477404
 - 10 Jakob Svensson, 'Eight Questions about Corruption' (2005) 19(3) Journal of Economic Perspectives 19, doi:10.1257/089533005774357860; Paul Collier, 'The Political Economy of State Failure' (2009) 25(2) *Oxford Review of Economic Policy* 219, doi:10.1093/oxrep/grp013.
 - 11 Vira Kachur and others, 'The Role of Legal Culture in Maintaining Social Stability and Countering Separatist Movements: Case of Ukraine' (2020) 9(1) *European Journal of Sustainable Development* 294, doi:10.14207/ejsd.2020.v9n1p294; Darkhan Bakirov and others, 'Legal Culture and Legal Consciousness in Kazakhstan: An Analysis of the Annual Reports of the Ombudsman for Human Rights and Legal Acts' (2025) 8(3) *Access to Justice in Eastern Europe* 278, doi:10.33327/AJEE-18-8.3-a000105; Alina Mungiu-Pippidi, *The Quest for Good Governance: How Societies Develop Control of Corruption* (CUP 2015) doi:10.1017/CBO9781316286937; Anne Peters, *Corruption as a Violation of International Human Rights* (MPIL Research Paper Series no 2016-18, Max Planck Institute for Comparative Public Law & International Law 2016) doi:10.2139/ssrn.2805099.

embedded governance pattern shaped by the interaction of law, institutional routines, and public legal consciousness within the bounded set of jurisdictions examined.

The authors' conceptual framework is structured around the literature and evidence to present a mechanism-oriented framework that links legal culture, civic-legal consciousness, institutional accountability, and access to justice. The framework is proposed as a comparative synthesis tool rather than as a validated causal model. The model is oriented toward transforming value orientations and fostering sustainable behavioural patterns that are incompatible with corrupt practices.

Moreover, the research contribution consists of conducting a comparative analysis of Kazakhstan and Eastern European countries in the context of cultural-legal determinants of corruption. This approach enables the identification of common patterns of post-socialist transformation and the determination of specific national factors influencing the perceptions and practices of corruption.

Given that the evidence base is primarily normative and monitoring-based, this manuscript is framed as an analytical socio-legal review rather than an empirical study aimed at hypothesis testing. Accordingly, the comparative component is used to trace recurrent governance mechanisms within a purposively bounded set of post-socialist jurisdictions, without implying the existence of a single, uniform "Eastern European model". All cross-country statements are therefore presented as within-sample, case-bound inferences grounded in triangulated sources and explicitly qualified by documented institutional heterogeneity.

Throughout the paper, 'institutional practices' denotes routine decision-making and enforcement operations in public administration, prosecution, anti-corruption bodies, and courts (appointments, discipline, procurement controls, adjudication, and asset-recovery follow-through).

This article is grounded in the socio-legal tradition of sociological jurisprudence and contemporary law-and-society scholarship. Within this school, law is examined not only as a system of formal norms but as a set of socially embedded practices whose meaning is revealed through implementation routines, institutional incentives, and citizens' expectations of legality. Accordingly, the term "socio-legal" in this paper denotes an analytical perspective that connects normative design (legal rules and safeguards) with institutional operation (enforcement and judicial practice) and societal legitimacy (legal consciousness, trust, and tolerance of corruption). The review focuses on how corruption functions as a constraint on access to justice through these interacting mechanisms.

The article's contribution lies not in the construction of a universal theory of corruption, but in a mechanism-oriented socio-legal framework tested through bounded cross-case comparison. Accordingly, the theoretical claims are formulated as within-sample inferences tied to the selected jurisdictions and triangulated sources.

2 METHODOLOGY

The purpose of this analytical review is to examine corruption as a socio-legal barrier to access to justice in Kazakhstan in comparison with selected Eastern European EU jurisdictions over the period 2019–2025. The study draws on triangulated normative and monitoring evidence to identify recurrent governance mechanisms, highlight case-specific differences, and assess how these factors shape judicial credibility and the enforceability of legal rights. The review also compares integrity safeguards across jurisdictions through a commensurable analytical framework and formulates practice-oriented implications for Kazakhstan within the defined access-to-justice domain, including judicial safeguards, enforcement credibility, transparency functionality, and civic oversight.

The review is guided by several interrelated objectives. First, it seeks to clarify the nature of corruption as a socio-legal phenomenon operating across three analytical levels: institutional design and enforcement practice, socio-cultural patterns of legal compliance, and integrity norms in public service and judicial conduct. Second, it develops the corruption–access-to-justice nexus through a commensurable Integrity Matrix (D1–D6). Third, it synthesises cross-country evidence from Kazakhstan and selected Eastern European jurisdictions by triangulating legal acts, monitoring outputs, governance indices, and publicly accessible judicial practice for the period 2019–2025. Finally, it derives practice-oriented implications focused on judicial safeguards, enforcement credibility, including asset recovery, and mechanisms that reinforce civic-legal consciousness.

This manuscript is designed as an analytical socio-legal review rather than as a causal explanatory study. It does not estimate statistical effects or test formal hypotheses. Instead, it advances a guiding analytical proposition for comparative synthesis: where corruption is more widespread and social tolerance of corrupt practices is higher, legal culture tends to be weaker, civic-legal consciousness less developed, and the credibility of accountability institutions more fragile. Together, these conditions constrain effective access to justice. This proposition is examined through cross-case pattern matching and triangulation across legal texts, monitoring materials, governance indicators, and publicly accessible judicial practice within a clearly bounded set of jurisdictions.

In this context, the term empirical is used in a limited and precise sense. It refers not to primary data collection, experiments, or hypothesis testing, but to triangulated secondary evidence and observable implementation signals drawn from normative and monitoring sources.

2.1. Literature review

The problem of corruption has accompanied the development of law throughout human history. Its earliest forms were recorded in Roman law, where *corrumpere* meant “to spoil” or “to distort the norm”. As early as that period, the bribery of officials was regarded as an

act undermining public trust in authority and in the very idea of justice. Later, within the European legal tradition, corruption came to be understood as the abuse of entrusted power, a concept that has been consolidated in contemporary international legal doctrine.¹²

Modern scholars interpret corruption as a dual phenomenon, at once a legal violation and a social pathology.¹³ On the one hand, it manifests itself in concrete forms such as abuse of office, bribery, lobbying, and conflict of interest; on the other, it results from systemic distortions within the structure of social relations, in which personal benefit and patronage replace the legal principles of equality and justice. Psychological and cultural factors play a crucial role in shaping corrupt behaviour. Studies by Johnston demonstrate that in societies with a low level of institutional trust and the dominance of informal norms, corruption is often perceived as a socially acceptable survival strategy.¹⁴ Under such conditions, corruption tolerance emerges, rooted in legal nihilism, a persistent distrust toward institutions and the conviction of their inefficacy.

Ukrainian socio-legal scholarship provides a particularly relevant reference point for post-socialist integrity debates because it conceptualises corruption not merely as episodic bribery but as a stable governance pattern sustained by institutional incentives, legal culture deficits, and weak enforcement credibility. Ye. Nevmerzhytskyi's foundational analysis of corruption in Ukraine emphasises causal chains linking discretionary authority, informal patronage, and enforcement fragility to long-term societal costs and declining trust in justice institutions.¹⁵ Complementing this approach, O. Vasyliiev highlights practical institutional vulnerabilities and the operational conditions under which preventive measures lose effectiveness when oversight remains formal rather than functional.¹⁶ More recently, O. Panasiuk developed the socio-legal dimension by examining corruption through the lens of social and legal determinants in national and international settings, reinforcing the argument that sustainable prevention depends on value-based legal consciousness and credible integrity safeguards rather than on punitive tools alone.¹⁷ Together, these contributions strengthen the regional analytical grounding of the present review and support its core premise that access to justice deteriorates when legal norms are not internalised and when institutions fail to deliver predictable, impartial enforcement.

12 'Corruption Perceptions Index' (n 4).

13 Huberts (n 9); Rose-Ackerman (n 8).

14 Michael Johnston, *Corruption, Contention and Reform: The Power of Deep Democratization* (CUP 2014) doi:10.1017/CBO9781139540957.

15 Yevhen V Nevmerzhytskyi, *Corruption in Ukraine: Causes, Consequences, Countermeasures* (KNT 2008).

16 OB Vasyliiev, 'Current Trends of the Transformation of the Phenomenon of Corruption' (2023) 2 Bulletin of the National University of Civil Defense of Ukraine. Series: Public Administration 122, doi:10.52363/2414-5866-2023-2-13.

17 OP Panasiuk, 'Corruption and Socio-Legal Leaders in the National and International Context' (2025) 90(1) Uzhhorod National University Herald. Series: Law 117, doi:10.24144/2307-3322.2025.90.1.16.

In the publication “Current Issues of Legal Culture Formation”, A. Akhmetov, V. Zhamuldinov, and O. Komarov further develop the conceptual connection between legal education, anti-corruption awareness, and civic responsibility.¹⁸ They define legal culture as a multifaceted system combining law, morality, and public consciousness, in which education functions as a key mechanism for cultivating intolerance toward corruption and strengthening the rule of law. The authors propose a comprehensive model of legal education that promotes active citizen participation, combats legal nihilism, and builds a sustainable legal consciousness as the foundation for an independent and democratic state.¹⁹

Consequently, the fight against corruption requires not only the improvement of legislation but also the transformation of value systems that determine an individual’s attitude toward the law, justice, and social responsibility.

The establishment of global standards in anti-corruption policy has become one of the defining vectors of international law in the Twenty-First Century. The United Nations Convention against Corruption (2003) remains the central normative instrument, articulating a comprehensive architecture of prevention, transparency, accountability, and multi-stakeholder cooperation.²⁰ Importantly, UNCAC shifts the emphasis from exclusively punitive responses toward the creation of robust preventive mechanisms, including ethical standards for public officials, financial and asset-control procedures, and institutionalised participation of civil society. A second cornerstone of the global framework is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), which establishes binding obligations for states to criminalise foreign bribery and ensure corporate liability.²¹ Recent OECD integrity guidance (2022) frames the private sector as a duty bearer under an integrity-and-compliance logic: firms are expected to operationalise transparency through enforceable controls, strengthen internal accountability, and implement preventive measures that deter illicit practices.²²

Equally significant is the role of the Council of Europe’s Group of States against Corruption (GRECO), which provides a structured system of peer monitoring and compliance assessment. In its evaluation rounds and annual reports, the organisation analyses the extent to which member states implement recommendations concerning judicial independence, conflict-of-interest regulation, the integrity of public administration,

18 Arman Serikovich Akhmetov, Victor Nikolaevich Zhamuldinov and Oleg Evgenievich Komarov, ‘Current Issues of Legal Culture Formation’ (2018) 9(7) *Journal of Advanced Research in Law and Economics* 2218, doi:10.14505//jarle.v9.7(37).02.

19 Arman Serikovich Akhmetov, Victor Nikolaevich Zhamuldinov and Oleg Evgenievich Komarov, ‘Legal Culture and its Role in Civil Society Formation’ (2018) 9(5) *Journal of Advanced Research in Law and Economics* 1534, doi:10.14505//jarle.v9.5(35).03.

20 UNCAC (n 1).

21 OECD, *Convention* (n 2).

22 ‘OECD Public Integrity Indicators’ (OECD, 2022) <<https://oecd-public-integrity-indicators.org/?country1=PRT&country2=AVG>> accessed 10 October 2025.

and the transparency of political finance.²³ Comparative findings indicate differentiated progress: Kazakhstan demonstrates consistent adaptation of UNCAC and GRECO standards through digitalisation of public services and institutional oversight reforms; Poland and the Czech Republic focus on strengthening judicial review and procedural guarantees in anti-corruption investigations; Lithuania prioritises public-sector transparency and broad civil-society participation; while Hungary faces ongoing challenges related to safeguarding judicial independence, as noted in GRECO's 2023 assessments.²⁴

Thus, international legal mechanisms not only establish universal standards for combating corruption but also serve as indicators of national legal systems' capacity to foster legal consciousness, in which the effectiveness of implementation largely depends on the level of legal culture and social trust.

The concept of legal culture is fundamental to understanding both the persistence of corruption and the means of overcoming it. Classic research on legal socialisation has long emphasised that a stable legal order is impossible without citizens' internal acceptance of the law and its legitimacy.²⁵ In contemporary scholarship, legal culture is understood as the totality of legal knowledge, values, and behavioural models that determine the attitude of individuals and society toward the law.²⁶ Studies by Huberts and Kachu et al. confirm that a high level of legal culture and civic identity contributes to the formation of intolerance toward corruption and strengthens the rule of law.²⁷ Public trust in state institutions is regarded as a key indicator of the effectiveness of anti-corruption policy: where the state operates transparently, citizens tend to cooperate rather than seek to circumvent the law.²⁸

The formation of anti-corruption consciousness requires a comprehensive influence on the cognitive, motivational, and value dimensions of the individual. Legal education, the role of mass media, and the development of civil society institutions play a decisive role in this process. As shown in the research of Mungiu-Pippidi, Selçuk et al., and Peters, strengthening legal literacy and expanding citizens' participation in public oversight mechanisms significantly reduces tolerance for corrupt practices and increases sensitivity

23 GRECO, 'Fourth Evaluation Round' (n 3).

24 Arman Serikovich Akhmetov, Victor Nikolaevich Zhamuldinov and Oleg Evgenievich Komarov, 'Corruption as a Social Phenomenon: Problems and Prospects for Combating Corruption' (2018) 9(5) Journal of Advanced Research in Law and Economics 1539, doi:10.14505//jarle.v9.5(35).04

25 Tom R Tyler, *Why People Obey the Law* (Princeton UP 2006) doi:10.1515/9781400828609.

26 ID Khlebnikov and others, 'The Civic Identity of Graduates (11th Grade Students) of Secondary Schools at the Current Historical Stage of Kazakhstan's Development: The Results of a Quantitative Study' (2025) 30(2) Bulletin of the Karaganda University. History, Philosophy Series 181, doi:10.31489/2025hph2/181-194; Huberts (n 9).

27 Huberts (n 9); Kachur and others (n 11).

28 Bo Rothstein, *The Quality of Government: Corruption, Social Trust, and Inequality in International Perspective* (University of Chicago Press, 2011).

to violations of the rule of law.²⁹ The concept of legal consciousness serves as the theoretical core of anti-corruption culture. According to Kachur et al., the development of legal consciousness and municipal legal culture is a prerequisite for the effective protection of human rights and the consolidation of democratic governance at the local level. In this logic, legal consciousness forms an individual's internal readiness to perceive the law as a morally binding regulator of behaviour rather than merely as an external instrument of coercion.³⁰ Consequently, effective anti-corruption measures are possible only through a combination of legal mechanisms and the cultivation of a legal culture that promotes values of honesty, justice, and social responsibility.

Thus, corruption appears not only as a legal violation but also as a reflection of the state of societal legal consciousness. While international legal standards establish the framework for systemic control, the real effectiveness of anti-corruption policy is determined by cultural and cognitive factors, the level of public trust, civic institutionalised legal culture, and the degree of internal legitimacy of law within collective consciousness.

"Maturity of legal culture" in this review denotes an operational bundle of three observable features:

- 1) legal literacy and internalisation of legality (willingness to rely on lawful procedures rather than informal exchange);
- 2) civic-legal agency (readiness to report abuse and use complaint and or appeal mechanisms);
- 3) institutional feedback credibility (citizens observe that complaints, disciplinary actions, and court reasoning produce predictable outcomes).

The concept is therefore used as a mechanism-oriented proxy linking societal norms of legality to the practical accessibility of justice.

2.2. Research Design

This manuscript is designed as an analytical socio-legal review with a structured comparative protocol. The design is appropriate because the evidence base is predominantly normative and monitoring-oriented, and the purpose is mechanism identification rather than hypothesis testing. Comparative statements are therefore treated as bounded within-sample inferences tied to the selected jurisdictions and validated through triangulation across independent source types.

29 Mungiu-Pippidi (n 11); Seyhan Selçuk, Nesibe Kurt Konca and Serkan Kaya, 'AI-driven Civil Litigation: Navigating the Right to a Fair Trial' (2025) 57 *Computer Law & Security Review* 106136, doi:10.1016/j.clsr.2025.106136; Peters (n 11).

30 Kachur and others (n 11).

Accordingly, the term “empirical” in this paper refers to triangulated secondary evidence (monitoring outputs, indicators, and judicial practice materials), not to primary data collection or statistical hypothesis testing.

The cross-country comparison is framed as an analytical socio-legal review because descriptive narratives often imply ‘regional models’ without a shared analytical grid. The purpose of comparison is to identify recurrent governance mechanisms across a bounded set of post-socialist jurisdictions and to qualify them with documented heterogeneity.

Analytical tools used in the review are explicitly limited to those applied in the manuscript: doctrinal analysis of legal texts and institutional mandates; structured comparative analysis using the Integrity Matrix (D1–D6); qualitative content analysis of monitoring reports and standards (UNCAC, OECD, GRECO, EU Rule of Law Reports); and (iv) mechanism-oriented cross-case pattern matching supported by a triangulation rule (claims retained only when corroborated by at least two independent source types).

A phenomenology-informed lens is used descriptively to interpret “legal consciousness” as a meaning-based orientation toward legality observable through reliance on formal procedures and a willingness to complain or report. A synergetic view is used as a configurational heuristic: integrity outcomes are assessed as the joint effect of safeguards, enforcement, transparency, and civic oversight rather than as the product of a single factor.

The methodological stance follows sociological jurisprudence: legal norms are assessed through their institutionalised application and societal effects, rather than treated as self-sufficient textual prescriptions.

Where the literature uses terms such as “phenomenological” or “synergetic,” this manuscript does not treat them as standalone methodological procedures. Instead, it incorporates their substantive intuition in a limited way: the analysis attends to lived legality and perceived institutional credibility (as meanings that shape behaviour), and examines how legal, institutional, and cultural mechanisms interact rather than operate in isolation.

2.3. Case Selection and Scope Conditions

The case set was selected purposively to balance comparability with analytically meaningful variation. Kazakhstan is treated as the focal case due to its post-socialist baseline and ongoing reform trajectory. Poland, Lithuania, the Czech Republic, and Hungary were included as post-socialist EU member states with broadly comparable administrative legacies, yet different integrity trajectories documented in monitoring cycles and governance benchmarks. This design supports mechanism-oriented comparison under comparable transition constraints while avoiding claims of a single “Eastern European model”.

2.4. Data Sources and Time Window

The review focuses on 2019–2025 to align the evidence base with recent reform cycles, monitoring rounds, and updated governance benchmarks. Four source types were used: (a) domestic legislation and implementing regulations; (b) international standards and monitoring outputs (UNCAC materials, OECD instruments, GRECO evaluations, and OECD/ACN diagnostics); (c) cross-country indicators (Transparency International CPI and the World Justice Project Rule of Law Index); and (d) publicly accessible judicial practice materials where available.

2.5. Key Concepts and Operational Definitions

To avoid conceptual ambiguity, this review fixes the meaning of several recurrent terms used throughout the manuscript. Civic-legal capacity of legal culture is understood in the socio-legal sense as the stable set of shared ideas, values, and expectations about law and legal institutions that shape how legality is perceived and practised in everyday interactions. In this article, “legal-consciousness formation capacity” is treated not as an abstract normative label but as an observable configuration: (i) internalisation of legality (readiness to rely on lawful procedures rather than informal exchange), (ii) civic-legal agency (willingness to complain, appeal, and report), and (iii) credibility of institutional feedback (citizens observe that complaints and judicial reasoning produce predictable outcomes).

Legal-consciousness formation capacity of civil society denotes the degree to which autonomous civic actors (associations, NGOs, media, professional communities) are able to participate in public oversight and sustain collective action based on trust-based networks and norms of reciprocity; in this review it is operationalised through the availability and usability of participation channels, watchdog capacity, and the presence of functioning feedback loops between citizens and institutions.

Structural barriers to access to justice are systemic (not individual) impediments that predictably prevent people from translating formal rights into effective remedies, such as institutional dependence, procedural opacity, costs, fear of retaliation, and low trust that makes litigation appear futile. This usage follows classic access-to-justice scholarship and contemporary rule-of-law diagnostics, emphasising that barriers are often embedded in institutional design and routine decision practices rather than in the absence of legal rules.

Legal education is used broadly to refer to value-oriented legal socialisation (not only to formal instruction). It includes the formation of practical knowledge of rights, procedures, integrity standards, and civic responsibility, with the purpose of strengthening law-abiding motivation and intolerance toward corruption; in this sense, it is treated as a preventive integrity mechanism rather than a purely pedagogical variable.

Finally, post-socialist refers to jurisdictions whose contemporary institutional and legal development is shaped by the interaction of socialist administrative legacies and subsequent transition reforms, producing hybrid governance patterns and contested legality expectations.

2.6. Operationalization: Integrity Matrix and Observable Indicators

To translate rule-of-law requirements into commensurable comparative dimensions, the study applies an Integrity Matrix aligned with the Venice Commission Rule of Law Checklist.³¹ Six dimensions are assessed: D1 autonomy and oversight of anti-corruption bodies; D2 judicial integrity safeguards; D3 enforcement consistency; D4 preventive integrity instruments; D5 digital transparency infrastructure; and D6 civic oversight capacity. Each dimension is assessed through observable indicators (e.g., appointment and removal safeguards, publication of judicial reasoning, conflict-of-interest controls, verification of asset declarations, usability of open registries and complaint channels, and the presence of feedback loops). Digital instruments (including AI-assisted analytics or tamper-evident registries) are treated here as implementation supports for D5–D6, not as independent causal drivers of integrity (Table 1).

Table 1. Comparative analytical framework and operational indicators

Dimension	What is assessed	Observable indicators (examples)	Why it matters (mechanism)
D1. Autonomy & oversight of anti-corruption bodies	Independence from executive influence	Reporting line; appointment/removal safeguards; parliamentary oversight; budget autonomy	Higher autonomy reduces selective enforcement and increases credible deterrence
D2. Judicial integrity safeguards	Protection of judicial independence and integrity	Appointment/discipline rules; publication of reasoning; conflict-of-interest controls	Strong safeguards increase predictability and reduce informal pressure
D3. Enforcement consistency	Whether sanctions are predictable and proportional	Sentencing patterns; use of disqualification; appeal stability; sanction dispersion	Consistency raises expected costs of corruption and reduces “impunity expectations”

31 European Commission for Democracy through Law (Venice Commission), *The Rule of Law Checklist* (Council of Europe 2016).

Dimension	What is assessed	Observable indicators (examples)	Why it matters (mechanism)
D4. Preventive instruments	Controls that reduce opportunity structures	Asset declarations; COI regulation; procurement auditing; whistleblower protection	Prevention lowers discretion and blocks rent-extraction channels
D5. Digital transparency infrastructure	Whether transparency is operational, not symbolic	Open registries; access to decisions; usable complaint channels; feedback loops	Visibility increases detection probability and enables oversight
D6. Civic oversight capacity	Whether society can monitor and act	Public councils; NGO monitoring; investigative journalism environment	Oversight raises reputational costs and reduces tolerance

Table 1 converts the comparison from narrative description into a commensurable analytic grid. Integrity improves when institutional autonomy, enforceable safeguards, and operational transparency jointly increase the expected cost of corruption and reduce discretionary concealment.

For the Integrity Matrix synthesis, an ordinal 0–2 scale is used to distinguish (0) absence or purely declarative regulation, (1) partial or formal implementation with limited operational effect, and (2) functioning implementation supported by consistent practice, external oversight, and observable integrity outputs.

2.7. Coding Protocol and Triangulation Rule

Documents were coded using a rule-based codebook mapped to D1–D6. Statutes and regulations were used to capture formal institutional design (mandates, competencies, procedural safeguards), whereas monitoring materials and case-related sources were used to capture implementation signals (recurring deficiencies, compliance assessments, enforcement outputs, and transparency functionality). A robustness rule was applied: a comparative claim was retained only when corroborated by at least two independent source types (e.g., statutory safeguards plus monitoring findings; monitoring findings plus index trends; or judicial practice plus external assessments). Where evidence did not converge, findings were reported as indicative signals rather than definitive conclusions (Table 2).

Table 2. Triangulation map (how claims are validated)

Claim type	Minimum evidence rule	Example of acceptable triangulation
“Institution is autonomous”	Law + monitoring	Statutory safeguards + GRECO/OECD assessment
“Enforcement is consistent”	Practice + monitoring or indices	Sentencing patterns + OECD/ACN enforcement diagnostics
“Transparency is operational”	Platform features + usage signals	Open registry existence + documented accessibility/feedback

The structured comparative protocol and the case selection logic are presented in Figure 1 and Table 3, which operationalise the review workflow and the bounded cross-case design.

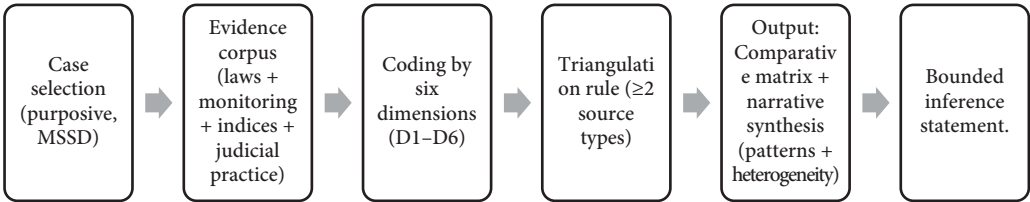


Figure 1. Analytical review workflow and structured comparative protocol

Figure 1 shows how the study moves from heterogeneous materials to commensurable cross-case results. The protocol makes the inference logic transparent and directly addresses concerns about descriptive case selection.

Table 3. Case selection logic and comparability criteria (why these countries)

Case	Shared baseline (comparability)	Expected variation (analytical leverage)	Evidence availability (why feasible)
Kazakhstan (focal)	Post-socialist governance legacy; ongoing reforms	Transition constraints; enforcement credibility gap	National law; monitoring materials; indices; accessible court portal materials

Case	Shared baseline (comparability)	Expected variation (analytical leverage)	Evidence availability (why feasible)
Poland	Post-socialist + EU legal harmonisation	Stronger oversight capacity; institutional consolidation	Monitoring rounds; open legal sources; indices
Lithuania	Post-socialist + EU integrity agenda	High transparency orientation; civic participation	Monitoring; open registries; indices
Czech Republic	Post-socialist + EU legal environment	Institutional strengthening; judicial practice visibility	Monitoring; legal databases; indices
Hungary	Post-socialist + EU framework	Documented challenges on safeguards; divergence case	Monitoring; indices; comparative assessments

The sample is purposive and bounded. It is designed to maximise comparability (shared post-socialist legacies) while preserving meaningful variation (different integrity trajectories) and ensuring that claims can be triangulated using comparable sources.

2.8. Measurement Caveats and Limitations

Perception-based and experience-based indicators (such as CPI and bribery prevalence) are sensitive to survey design and reporting incentives, and do not directly measure enforcement consistency or the quality of judicial reasoning. Accordingly, indices are used as contextual benchmarks rather than as stand-alone proof of institutional performance. The review design supports mechanism identification and bounded inference, but it does not provide statistical generalisation to all Eastern European jurisdictions, nor does it capture sector-specific or subnational variations in full. These limitations are mitigated by triangulation and by separating formal rules from implementation signals throughout the analysis.

Experience-based survey measures and perception indices are sensitive to question wording, exposure patterns, and underreporting incentives; they are therefore interpreted directionally and always alongside institutional and enforcement signals.

3 RESULTS - CORRUPTION AND ACCESS TO JUSTICE: INSTITUTIONAL INTEGRITY AS A CONDITION OF FAIR TRIAL GUARANTEES

This subsection does not posit a unified “Eastern European model”. Instead, it reports a structured cross-case comparison across the selected Eastern European EU member states examined in this review. Results are presented as convergent patterns observed across multiple cases and case-specific differences that qualify general statements about judicial safeguards and normative consistency. Accordingly, claims about institutional operational legal culture are framed as bounded inferences supported by triangulated evidence rather than as region-wide conclusions.

Results are reported as a structured synthesis aligned with the comparative protocol specified in the Methodology. Instead of inferring a single “Eastern European model”, the analysis identifies convergent patterns and documented divergences across the selected Eastern European EU member states examined in this review (Poland, Lithuania, the Czech Republic, and Hungary), and contrasts them with Kazakhstan, the focal case. Empirical claims in this section rely on triangulation across at least two independent source types (legal texts, monitoring materials, internationally comparable indices, and publicly accessible judicial practice). Where the evidence is not convergent, the findings are presented as indicative signals rather than definitive cross-regional conclusions.

According to the Corruption Perceptions Index, Kazakhstan scored 40 out of 100 points, its highest score since the Index was introduced. This marks a slight positive trend (“in the plus”) in comparison with previous years, when the score remained below 39, indicating a gradual improvement in transparency and anti-corruption efforts in 2024 (Table 4).³²

Table 4. Kazakhstan’s Corruption Perceptions Index (CPI) dynamics (2020–2024)

Year	CPI score (0–100)	Interpretation (direction)
2020	38	baseline (pre-reform acceleration)
2021	37	slight decline
2022	36	continued decline
2023	39	rebound (partial recovery)
2024	40	incremental improvement

Between 2020 and 2024, Kazakhstan’s CPI score fluctuated within a narrow corridor (36–40), with a two-year dip (2021–2022) followed by recovery (2023–2024). This pattern is consistent with the article’s claim that formal reforms can improve perceived integrity only

32 ‘Corruption Perceptions Index’ (n 4) Kazakhstan.

when implementation becomes predictable and externally verifiable; otherwise, improvements remain incremental and reversible (Table 5).³³

Table 5. Kazakhstan’s WJP Rule of Law Index dynamics (2021–2025)

Year	Overall score (0–1)	Global rank	Note
2021	0.52	66	stagnation near mid-range
2022	0.53	65	marginal improvement
2023	0.53	65	Plateau
2024	0.54	65	incremental gain
2025	0.54	66	score stable; rank slightly weaker

The rule-of-law trajectory shows a slow, positive drift (0.52-0.54) with a near-stable ranking. This supports a stricter inference than the current narrative: Kazakhstan’s governance indicators improve at the margin, but the pace is insufficient to generate a decisive shift in comparative position, an empirical signal of institutional inertia rather than consolidation of judicial autonomy.

Perception and rule-of-law indices are used here as contextual benchmarks rather than as direct measures of enforcement quality. Substantive claims in the Results section rely on triangulation with monitoring findings and enforcement outputs, including judicial practice and asset-recovery signals.

Kazakhstan’s CPI score provides a useful benchmark for perceived public-sector integrity; however, perception-based indices do not directly measure enforcement consistency or the quality of judicial reasoning. To strengthen interpretive validity, the CPI trend is read alongside rule-of-law performance. In the 2025 World Justice Project Rule of Law Index, Kazakhstan scored 0.54 and ranked 66th out of 143 countries, indicating that integrity reforms have not yet translated into a decisive improvement in institutional constraints and judicial safeguards. In the CPI 2024, Kazakhstan scored 40/100 and ranked 88/180, reflecting modest progress but continued structural vulnerability in high-discretion areas of public administration.

Consequently, the results below focus not only on formal legal reforms, but also on whether enforcement and accountability mechanisms generate predictable deterrence and credible public trust.

Although the state has undertaken consistent legislative reforms and measures to enhance governmental accountability in recent years, the practical outcomes in law enforcement and

33 ‘Rule of Law Index’ (n 5) Kazakhstan.

judicial practice remain limited. The OECD Report “Confiscation Measures and Sanctions in Corruption Cases in Kazakhstan” records an extremely low rate of accountability among individuals involved in high-level corruption schemes: over a three-year period, only one conviction for money laundering of corruption proceeds was registered. Furthermore, as the report highlights, Kazakhstan lacks a stable practice of asset confiscation of illicitly acquired property, and judicial decisions in corruption-related cases are rarely followed by subsequent property recovery measures.³⁴ This indicates that, while a criminal law framework exists, its implementation remains fragmented and dependent on political and administrative will. At the same time, the Baseline Report of the Fifth Round of Monitoring of Anti-Corruption Reforms in Kazakhstan underscores certain progress: Kazakhstan has formally implemented a number of GRECO and UNCAC recommendations, particularly in the areas of public procurement transparency and income declaration.³⁵ However, monitoring of reform implementation revealed persistent institutional weaknesses, including limited engagement of civil society, insufficient judicial autonomy, and the absence of effective mechanisms for external oversight of anti-corruption bodies.

Asset recovery and confiscation function as the “credibility test” of anti-corruption enforcement: when illicit gains remain protected, sanctions lose their deterrent effect and corruption becomes economically rational. The OECD report on confiscation measures and sanctions in Kazakhstan documents persistent gaps in the application and execution of confiscation orders and highlights weaknesses in judicial practice that limit recovery outcomes.³⁶ Therefore, the observed enforcement deficit should be interpreted not as an absence of criminal-law tools, but as a weak implementation chain linking investigation, adjudication, and post-conviction recovery.

In practice, this means that even the enacted legal innovations fail to ensure the proper level of independence of investigative and judicial authorities. According to the World Justice Project, Kazakhstan ranks 65th out of 142 countries, with an overall index score of 0.54, while the average for Eastern European countries exceeds 0.60.³⁷ Particularly weak performance is observed in the sub-indices “Constraints on Government Powers” and “Absence of Corruption”, reflecting systemic dependence of the judiciary on the executive branch. Sociological surveys conducted by UNDP demonstrate that only about 31% of Kazakhstan’s citizens perceive the judicial system as fair and independent. The low level of public trust in the judiciary reduces citizens’ willingness to seek legal protection and fosters the growth of legal nihilism. As a result, corruption becomes not only a legal but also a socio-psychological phenomenon, undermining expectations of justice and creating an effect of “normalised violation”.³⁸

34 OECD, *Confiscation Measures and Sanctions in Corruption Cases in Kazakhstan* (OECD Publishing 2025) doi:10.1787/60159d3f-en.

35 OECD, *Baseline Report of the Fifth Round of Monitoring of Anti-Corruption Reforms in Kazakhstan: The Istanbul Anti-Corruption Action Plan* (OECD Publishing 2024) doi:10.1787/c9652173-en.

36 OECD, *Confiscation Measures* (n 34).

37 ‘Rule of Law Index 2024’ (n 5) Kazakhstan.

38 *ibid*

Thus, corruption in Kazakhstan manifests not as an isolated deviation from the law but as a systemic pathology that disrupts the interconnection between law, trust, and civic participation. It limits access to justice, erodes the legitimacy of the judiciary, and obstructs the formation of a culture of legality. Despite ongoing legislative reforms and strategic programs, the gap between the normative framework and actual enforcement practices remains significant, necessitating revisions to institutional accountability mechanisms and greater civil society involvement in monitoring and evaluating the effectiveness of anti-corruption measures.

3.1. Comparative Analysis of Anti-Corruption Systems in Kazakhstan and Eastern Europe

This comparison does not treat Eastern Europe as institutionally uniform. Instead, it applies the same six analytical dimensions to each selected jurisdiction and reports results as convergent design features observed across multiple cases and case-specific differences that qualify regional generalisations. Consequently, claims about judicial independence, oversight autonomy, and normative consistency are presented as bounded inferences supported by triangulated evidence rather than as region-wide statements.

In the Czech Republic, preventive integrity instruments are anchored, inter alia, in the Act No. 340/2015 Coll. (Register of Contracts),³⁹ which operationalises publication duties for public contracting, and in the public procurement framework (Act No. 134/2016 Coll.),⁴⁰ which structures competitive procedures and review mechanisms. Together with the freedom-of-information regime (Act No. 106/1999 Coll.),⁴¹ these instruments expand verifiability of public decision-making and reduce discretion hidden from scrutiny.

The comparative assessment of Poland, Hungary, and the Czech Republic is further substantiated by the EU Annual Rule of Law Reports (2024–2025), which provide a comprehensive and practice-oriented evaluation of judicial independence, integrity safeguards, and effective access to justice across EU member states.⁴² Unlike perception-based indices, these reports focus on institutional design, implementation dynamics,

39 Act of the Czech Republic No 340/2015 Coll ‘On the Register of Contracts’ (adopted 24 November 2015) [in Czech] <<https://www.e-sbirka.cz/sb/2015/340>> accessed 10 October 2025.

40 Act of the Czech Republic No 134/2016 Coll ‘On Public Procurement’ (adopted 19 April 2016) [in Czech] <<https://www.e-sbirka.cz/sb/2016/134>> accessed 10 October 2025.

41 Act of the Czech Republic No 106/1999 Coll ‘On Free Access to Information’ (adopted 11 May 1999) [in Czech] <<https://www.e-sbirka.cz/sb/1999/106>> accessed 10 October 2025.

42 Directorate-General for Justice and Consumers, ‘2024 Rule of Law Report’ (European Commission, 24 July 2024) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle/2024-rule-law-report_en> accessed 10 October 2025; Directorate-General for Justice and Consumers, ‘2025 Rule of Law Report’ (European Commission, 8 July 2025). Directorate <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle/2025-rule-law-report_en> accessed 10 October 2025.

and documented risks affecting the everyday functioning of courts, thereby offering a more granular understanding of how corruption-related vulnerabilities translate into barriers to justice.

The reports reveal both convergent trends and persistent divergences within Eastern Europe. In Poland and the Czech Republic, recent monitoring cycles highlight gradual improvements in judicial transparency, publication of reasoned decisions, and procedural safeguards aimed at protecting litigants' rights.⁴³ At the same time, the reports acknowledge ongoing tensions surrounding judicial governance reforms, particularly debates over the balance between political accountability and judicial autonomy.

In contrast, the EU Rule of Law Reports on Hungary consistently identify structural vulnerabilities linked to constraints on judicial independence, concentration of executive influence, and the limited effectiveness of external oversight mechanisms.⁴⁴ Importantly, these deficiencies are framed not merely as constitutional concerns, but as issues with direct implications for access to justice. Where judicial safeguards are weakened, ordinary litigants are disproportionately affected: legal remedies become less predictable, procedural equality is compromised, and public trust in courts declines.

From this study's perspective, the significance of the EU assessments lies in their explicit articulation of the link between judicial integrity and access to justice. By demonstrating how governance deficits translate into concrete obstacles for court users, the EU reports reinforce the analytical premise that anti-corruption effectiveness must be evaluated through its capacity to secure fair trial guarantees and reliable judicial protection.

A comparison of the anti-corruption systems of Kazakhstan and Eastern European countries reveals differences that are not only institutional but also cultural and legal. In Eastern European countries such as Poland, Lithuania, the Czech Republic, and Slovakia, anti-corruption policy is grounded in the principles of multi-level accountability, autonomy of oversight bodies, and systematic integration of public control into law enforcement processes. In Kazakhstan, by contrast, the anti-corruption infrastructure remains largely verticalised and dependent on the executive branch. To ensure analytical transparency, the comparative assessment presented in Table 6 uses an ordinal three-point scale (0–2) to capture not only the formal existence of integrity mechanisms but also their practical effectiveness. A score of 0 indicates the absence of the relevant mechanism or purely declarative regulation without operational effect. A score of 1 reflects formal or partial implementation, where institutional arrangements exist but remain limited in enforcement capacity or independence. A score of 2 denotes effective and functioning implementation, supported by consistent practice, external oversight, and measurable integrity outcomes.

43 *ibid*, Czechia, Poland.

44 *ibid*, Hungary.

This scale enables nuanced comparisons across jurisdictions and avoids binary classifications that obscure differences between formal compliance and substantive effectiveness.

Table 6. Comparative Integrity Matrix (structured cross-case results; 0–2 scale)

Country	D1 Autonomy	D2 Judicial safeguards	D3 Enforcement consistency	D4 Preventive instruments	D5 Digital transparency	D6 Civic oversight
Kazakhstan	1	1	1	1	1	1
Poland	2	2	2	2	2	2
Lithuania	2	2	2	2	2	2
Czech Republic	2	2	2	2	2	2
Hungary	1	1	1	1	1	1

Table 6 prevents “model” claims by making heterogeneity visible. The matrix supports graded interpretation: convergence is reported only where multiple cases share higher scores on the same dimensions, while divergence (e.g., Hungary vs Lithuania) is treated as an empirical qualifier rather than ignored.

According to the OECD Report “Anti-Corruption Trends in Eastern Europe and Central Asia”,⁴⁵ Poland and Lithuania ensure the stable operation of anti-corruption bureaus that are subject to parliamentary oversight and possess the authority to initiate criminal proceedings against high-ranking officials. In particular, Poland’s Central Anti-Corruption Bureau (CBA) enjoys functional independence, while Lithuania’s Special Investigation Service (STT) operates under the principle of dual accountability, to both parliament and the president, thereby excluding pressure from the executive. These agencies not only investigate corruption-related offences but also undertake systematic preventive measures, including conflict-of-interest monitoring, procurement audits, and anti-corruption education initiatives.

In Kazakhstan, similar functions are carried out by the Agency for Combating Corruption (Antikor), established in 2019. However, as noted in the OECD Integrity Review of Kazakhstan,⁴⁶ the agency’s institutional autonomy remains limited: it is accountable to both

⁴⁵ OECD, *Anti-Corruption Trends in Eastern Europe and Central Asia: Strategic Frameworks and Business Integrity* (OECD Publishing 2025) doi:10.1787/69c92037-en.

⁴⁶ OECD, *OECD Integrity Review of Kazakhstan: Advancing Integrity for Economic Development* (OECD Public Governance Reviews, OECD Publishing 2025) doi:10.1787/d705d02f-en.

the President and the Government, which reduces its independence in investigating cases involving senior officials. Furthermore, the Kazakhstani model is predominantly reactive and punitive, whereas Eastern European countries implement preventive and educational strategies to cultivate an anti-corruption culture.

Digitalisation matters only when it changes the opportunity structure for corruption. Open registries, accessible court decisions, and usable reporting channels increase the probability of detection and reduce discretion hidden from public scrutiny. However, if platforms do not provide feedback loops, data completeness, and practical accessibility, they remain symbolic rather than preventive instruments. Therefore, the comparative focus here is not on the existence of e-government tools as such, but on whether they operationalise transparency and enable civic oversight.

One key distinction lies in the levels of digitalisation and civic engagement. Lithuania and Poland maintain advanced online platforms for anonymous corruption reporting, public registries of officials' income declarations, and open-access databases of judicial decisions. Kazakhstan operates the Ashyq Ükimet (Open Government) system and the E-gov portal; however, the UN E-Government Survey (2024) indicates that citizen engagement in anti-corruption digital initiatives remains low.⁴⁷ This is attributed to both limited legal awareness among users and restricted access to comprehensive information about governmental decisions.

According to GRECO's Fourth Evaluation Round,⁴⁸ Eastern European countries exhibit a higher level of institutional accountability due to transparency in judicial appointments, prosecutorial independence, and the mandatory publication of financial disclosures. For Kazakhstan, these standards remain only partially implemented. For instance, an electronic declaration system exists, but the verification of data accuracy is limited and lacks a public auditing mechanism.

Thus, the comparative analysis demonstrates that the Eastern European model of anti-corruption governance is characterised by high institutional maturity, democratic accountability, and a culture of civic participation, while Kazakhstan remains in a transitional stage, shifting from a formally legislative to a culturally and institutionally embedded phase of anti-corruption policy.

To achieve a sustainable anti-corruption effect, Kazakhstan must strengthen the institutional independence of anti-corruption agencies, develop mechanisms of external oversight, expand digital transparency, and promote civic engagement. These measures would enable the country to move from combating the consequences of corruption toward its systematic prevention.

47 UN Department of Economic and Social Affairs, *E-Government Survey 2024: Accelerating Digital Transformation for Sustainable Development: With the addendum on Artificial Intelligence* (UN 2024).

48 GRECO, 'Fourth Evaluation Round' (n 3).

3.2. Legal Consciousness and Anti-Corruption Behaviour of Citizens

An analysis of public perceptions of corruption demonstrates that in post-Soviet countries, including Kazakhstan, citizens' legal consciousness remains a key factor sustaining corruption. To operationalise "legal consciousness" empirically, this subsection treats it as a behaviourally observable construct reflected in:

- citizens' willingness to comply without informal payments,
- readiness to report abuse,
- perceived legitimacy of legal procedures.

The most policy-relevant indicator in this logic is the experienced bribery rate: in Kazakhstan, 17% of public-service users report having paid a bribe in the previous twelve months, indicating that informal exchange remains a recurrent coping mechanism in state-citizen interactions.⁴⁹ Mechanistically, a higher tolerance of corruption sustains demand-side incentives: when bribes are viewed as a predictable "transaction cost", reporting declines, social stigma weakens, and officials face fewer reputational and legal risks. In contrast, where legal norms are internalised and supported by credible oversight, bribery becomes less rational because the probability of exposure and the social cost increase. Therefore, anti-corruption education and civic oversight affect corruption not as abstract "awareness", but by changing expected payoffs in everyday administrative encounters, reducing citizens' readiness to pay and increasing the likelihood of complaints and public scrutiny.

Data from the Global Corruption Barometer for Europe and Central Asia show that⁵⁰ 17% of public service users in Kazakhstan⁵¹ reported paying a bribe within the previous twelve months, which suggests that corruption continues to shape everyday interactions with public institutions.

For comparison, public trust in anti-corruption policy stands at approximately 53% in Poland and 48% in Lithuania. These differences reflect not so much deficiencies in legislation as disparities in the level of legal awareness and in the perception of legality as a shared social value.⁵² The UNDP Report "Public Integrity and Civic Trust in Central Asia" emphasises that perceptions of corruption are closely linked to cultural context and the level of legal literacy. In Kazakhstan and neighbouring Central Asian states, corruption is often perceived not as a legal violation but as a form of "social exchange" that compensates for the

49 'Corruption Perceptions Index' (n 4) CPI 2024, Kazakhstan.

50 *ibid*

51 GR Absattarov, 'Relative unity and differences of legal and moral norms in Kazakhstani society: Political science aspects' (2021) 76(4) *Bulletin of Abai Kazakh National Pedagogical University, Series: Sociological and Political Sciences* 20, doi:10.51889/2021-4.1728-8940.11.

52 Roberto Martinez B Kukutschka, *Global Corruption Barometer European Union 2021: Citizens' Views and Experiences of Corruption* (Transparency International 2021) 14.

lack of institutional trust.⁵³ In contrast, in Eastern European countries, there is a gradual emergence of a civic responsibility ethic, in which compliance with the law is viewed as an element of personal honour and collective trust.

The level of education plays a decisive role in shaping anti-corruption behaviour. According to OECD, respondents with higher education are two to three times more likely to view corruption as unacceptable and to report instances of bribery.⁵⁴ In Kazakhstan, surveys conducted by the Antikor Agency show that approximately 40% of citizens with higher education expressed a willingness to cooperate with anti-corruption authorities, compared to less than 20% among those with incomplete secondary education.⁵⁵ This clearly demonstrates that improving legal literacy directly reduces tolerance for corruption and enhances personal legal responsibility.

Cultural differences are also evident in patterns of legal thinking. While in Eastern European countries the prevailing value model is grounded in the rule of law, the supremacy of law as the foundation of the social contract, in Kazakhstan and other Central Asian states, elements of paternalistic legal consciousness persist, where the law is perceived as an instrument of power rather than a mechanism of equal responsibility. Reports by the OECD Anti-Corruption Network⁵⁶ and GRECO⁵⁷ note that in contexts characterised by low trust in the judiciary and limited predictability of court decisions, citizens tend to rely not on legal norms but on personal connections and informal arrangements. This phenomenon of “social adaptability” transforms corruption into a means of compensating for institutional inefficiency and weakens internal moral barriers against legal violations.

Therefore, the development of sustainable anti-corruption behaviour requires not only legislative reform but also a fundamental rethinking of the cultural foundations of legal consciousness. Enhancing legal literacy, integrating anti-corruption education into general and professional training, supporting civic initiatives, and strengthening mechanisms of public accountability are not optional but essential conditions for transforming legal consciousness from a reactive stance into an active mechanism of societal self-regulation.

A methodological caveat is warranted. Experience-based survey measures (such as bribery prevalence) are sensitive to question wording, sectoral exposure, and underreporting incentives; therefore, single-point comparisons across countries should be treated as

53 United Nations Development Programme (UNDP), *Tackling Corruption, Transforming Lives: Accelerating Human Development in Asia and the Pacific* (Macmillan 2008) 38.

54 OECD, *Anti-Corruption and Integrity Outlook 2024* (OECD Publishing 2024) doi:10.1787/968587cd-en.

55 Agency of the Republic of Kazakhstan for Anti-Corruption, 'National Anti-Corruption Report 2022' (*Anti-Corruption Service of the National Security Committee*, 2023) <<https://www.gov.kz/memleket/entities/anticorruption/documents/details/494573?lang=en>> accessed 4 March 2026.

56 OECD, *Anti-Corruption Network for Eastern Europe and Central Asia: 2023 Annual Report* (OECD Publishing 2024).

57 GRECO, 'Fourth Evaluation Round (n 3).

directional rather than definitive. For this reason, the analysis triangulates citizen experience with governance context (rule-of-law constraints) and enforcement outputs, avoiding claims of a uniform regional pattern.

3.3. Legal Precedents and Judicial Practice

Judicial practice is one of the key indicators of the effectiveness of anti-corruption policy and the level of the judiciary's institutional independence. To move beyond descriptive case illustrations, judicial practice is interpreted through a coding-oriented analytic lens that captures five observable dimensions in court outcomes:

- 1) sanction severity and predictability;
- 2) quality of judicial reasoning (explicit public-harm assessment and proportionality logic);
- 3) use of disqualification and integrity-related restrictions;
- 4) treatment of proceeds of crime (confiscation, restitution, freezing); and
- 5) transparency of adjudication (publication and accessibility of decisions). This framework is consistent with the OECD's enforcement-focused diagnostics, in which weak confiscation practices and limited follow-through on recovery measures reduce the deterrent effect, even when formal criminalisation exists.

Accordingly, the core comparative question is not whether corruption is criminalised across jurisdictions (it is), but whether courts and enforcement bodies produce repeatable, dissuasive outputs that raise the expected cost of corruption while restoring public losses through asset recovery. Significant differences can be observed between Kazakhstan and Eastern European countries in the judicial response to abuses of power by public officials: from the limited accountability practices in Kazakhstan to the more developed systems of judicial oversight and preventive justice in Poland, Lithuania, and the Czech Republic.

According to the official portal of the Supreme Court of the Republic of Kazakhstan, between 2021 and 2024, courts of first instance reviewed more than 1,300 criminal cases related to corruption, of which approximately 65% resulted in convictions.⁵⁸ Most of these cases concern abuse of official authority (Article 361 of the Criminal Code of Kazakhstan) and bribery (Article 366 of the Criminal Code of Kazakhstan).⁵⁹ However, as noted in the OECD ACN Report "Monitoring of Anti-Corruption Reforms in Kazakhstan", only 15–17% of sentences involved imprisonment, while the majority consisted of fines or restrictions of

58 Judicial decisions in corruption-related cases 2021–2024, see in *Supreme Court of the Republic of Kazakhstan: Official judicial portal* <<https://sud.gov.kz/eng>> accessed 10 October 2025.

59 Act of the Czech Republic No 40/2009 Coll 'Criminal Code' (adopted 8 January 2009) [in Czech] <<https://www.e-sbirka.cz/sb/2009/40>> accessed 10 October 2025.

liberty.⁶⁰ This reduces the deterrent effect of punishment and perpetuates a culture of tolerance toward corruption within the civil service.

A revealing example can be found in corruption cases related to public procurement (2022–2023), where courts imposed minimal prison terms despite significant financial damage to the State. In the decision of the Supreme Court of Kazakhstan dated February 17, 2023 (Case No. 600308-22-00-2), the court upheld the lower court's ruling and replaced a prison sentence with a fine, citing the defendant's "positive character references".⁶¹ This case illustrates the problem of disproportionate sanctions, a concern also reflected in the GRECO Fourth Evaluation Round Report, which notes the "excessive leniency of judicial decisions and a lack of reasoning regarding public harm".⁶² Furthermore, Kazakhstan still lacks a consistent practice of asset confiscation as an instrument of restorative justice. The OECD Report "Confiscation Measures and Sanctions in Corruption Cases" highlights that in recent years, there have been no recorded cases of final confiscation of property belonging to high-ranking officials, even when convictions were handed down.⁶³ Nevertheless, in 2023, the Supreme Court began introducing compensatory recovery measures in several cases, notably, in proceedings involving a former head of the Department of Health of Shymkent, which may be viewed as a step towards strengthening institutional judicial responses to corruption.

Judicial practice in Eastern Europe

In Eastern European countries, the judicial response to corruption-related crimes demonstrates a much higher degree of independence and normative consistency. The Constitutional Court of Poland, in its ruling of May 12, 2022 (Case K 6/21),⁶⁴ upheld the constitutionality of provisions requiring public officials to disclose information about their spouses' income, emphasising that "the principle of transparency in public service is the foundation of societal trust in law". In Lithuania, the Supreme Court in 2023 reviewed a series of cases involving abuses within municipal authorities and issued several precedent-setting judgments, establishing a direct link between administrative corruption and the violation of principles of integrity (Case 2K-256/2023).⁶⁵ These decisions are widely cited in GRECO and Council of Europe reports (2024) as examples of a moral–legal approach that integrates legal evaluation with ethical accountability.

In the Czech Republic, the institutional handling of serious corruption and economic crime has become more centralised since NCOZ operates as a nationwide police unit specialising,

60 OECD, *Baseline Report* (n 35).

61 Case No 600308-22-00-2 (Supreme Court of Kazakhstan, 17 February 2023).

62 GRECO, 'Fourth Evaluation Round' (n 3).

63 OECD, *Confiscation Measures* (n 34).

64 Case K 6/21 (Constitutional Tribunal of the Republic of Poland, 12 May 2022).

65 Case 2K-256/2023 (Supreme Court of Lithuania, 12 December 2023).

inter alia, in corruption and serious economic crime.⁶⁶ High-level corruption cases are typically investigated by NCOZ (or, where not assumed by NCOZ, by regional police directorates) under prosecutorial supervision.⁶⁷ In terms of judicial sanctions, Czech criminal law provides for a prohibition of activity (including the performance of certain positions or functions) as a punitive measure where the offence is connected to the relevant activity. The criminal-law baseline for corruption offences is provided by the Czech Criminal Code (Act No. 40/2009 Coll.), while transparency and preventive controls are reinforced through the Register of Contracts Act (No. 340/2015 Coll.) and the Conflict-of-Interest regime (Act No. 159/2006 Coll., as amended).⁶⁸

The comparison of judicial practice in Kazakhstan and Eastern Europe reveals several systemic differences. First, the Eastern European model is characterised by the institutional independence of the judiciary, in which constitutional and supreme courts function not only as law enforcement bodies but also as normative guarantors of public morality. Second, sanctioning policy in these countries is more predictable and stringent: penalties for corruption-related crimes serve a genuine deterrent purpose rather than a symbolic one. Third, the transparency of judicial proceedings ensures public oversight: the publication of court decisions, live broadcasting of hearings, and mandatory disclosure of the reasoning sections of judgments all contribute to building societal trust in the judiciary.

Importantly, these patterns should be read as within-sample contrasts among selected post-socialist jurisdictions rather than as attributes of an undifferentiated “Eastern Europe”. The selected EU cases display materially different integrity baselines (e.g., Lithuania’s CPI 2024 score is 63, the Czech Republic’s is 56, Poland’s is 53, while Hungary’s is 41), which cautions against single-model claims and supports a graded interpretation of judicial and institutional consolidation.

For Kazakhstan, these practices hold significant potential for adaptation. The gradual introduction of judicial integrity principles and institutional mechanisms for external oversight of the judiciary could enhance public confidence in the justice system and strengthen anti-corruption standards. However, the key prerequisite remains the genuine independence of judges from the executive branch, transparency in judicial appointments, and the institutionalisation of the principle of “no impunity for abuse of power”.

66 ‘Národní centrála proti organizovanému zločinu SKPV (NCOZ)’ (*Police of the Czech Republic*, 2016) <<https://policie.gov.cz/clanek/narodni-centrala-proti-organizovanemu-zlocinu-skpvp.aspx>> accessed 4 March 2026.

67 European Commission, ‘2023 Rule of Law Report - input from Member States: Czechia’ (*European Commission*, 5 July 2023) 3 <https://commission.europa.eu/publications/2023-rule-law-report-input-member-states_en> accessed 4 March 2026 (noting that high-level corruption cases are investigated by NCOZ or regional directorates).

68 Act of the Czech Republic No 40/2009 Coll ‘Criminal Code’ (n 59); Act of the Czech Republic No 340/2015 Coll (n 39); Act of the Czech Republic No 159/2006 Coll ‘On Conflict of Interest’ (adopted 16 March 2006) [in Czech] <<https://www.e-sbirka.cz/sb/2006/159>> accessed 10 October 2025.

Thus, judicial practice demonstrates that the fight against corruption cannot be limited to merely enacting laws: it requires a culture of accountability, consistent sanctions, and civic oversight of the judiciary as an institution of justice.

3.4. Judicial Practice and Integrity Outcomes

Judicial ethics constitute a central normative barrier against corruption within the justice system and a foundational condition for effective access to justice. Ethical standards do not merely regulate individual conduct; they shape institutional expectations of impartiality, independence, and integrity that determine whether courts can function as credible forums for the protection of rights. Where ethical norms are weakly institutionalised or selectively enforced, corruption risks increase, and judicial protection becomes unreliable for ordinary litigants.

This understanding is reflected in the Bangalore Principles of Judicial Conduct, which articulate independence, impartiality, integrity, propriety, equality, and competence as core judicial values.⁶⁹ These principles frame judicial ethics not as aspirational ideals, but as operational guarantees of the right to a fair trial. Importantly, the Bangalore Principles emphasise that public confidence in justice depends not only on the absence of actual corruption, but also on the perception that judges are insulated from improper influence and personal interests.

The normative role of judicial ethics is further developed in Opinion No. 21 (2018) of the Consultative Council of European Judges (CCJE), which explicitly links corruption prevention within the judiciary to access to justice. The CCJE stresses that ethical standards must be supported by transparent appointment procedures, proportionate and independent disciplinary mechanisms, and effective external oversight.⁷⁰ Where disciplinary systems are controlled by the executive or lack procedural safeguards, ethical regulation may itself become an instrument of pressure rather than a means of accountability.

The jurisprudence of the European Court of Human Rights (ECtHR) provides authoritative guidance on how deficiencies in judicial ethics and independence translate into violations of the right to a fair trial under Article 6 of the European Convention on Human Rights. In *Oleksandr Volkov v. Ukraine* (2013), the Court held that arbitrary disciplinary proceedings against judges undermine judicial independence and erode public trust in the justice system. The judgment underscores that access to justice is compromised when judges operate under constant threat of removal or sanction based on politically influenced procedures.⁷¹

69 UNODC, *The Bangalore Principles of Judicial Conduct* (UN 2018).

70 CCJE Opinion No 21 (2018) 'On the Prevention of Corruption Among Judges' <<https://rm.coe.int/0900001680902e15>> accessed 10 October 2025.

71 *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) <<https://hudoc.echr.coe.int/eng?i=001-115871>> accessed 10 October 2025.

In *Ástráðsson v. Iceland* (2020), the Grand Chamber further clarified that the lawful procedure of judicial appointment constitutes a substantive safeguard against corruption. The Court emphasised that irregularities in appointment processes affect not only individual judges, but the legitimacy of the entire judicial system. From the perspective of access to justice, unlawfully appointed judges weaken the predictability and authority of judicial decisions, thereby diminishing citizens' confidence in legal remedies.⁷²

The decision in *Baka v. Hungary* (2016) highlights another critical dimension of judicial ethics: protection of judges' freedom of expression in matters concerning the administration of justice. The Court found that the retaliatory dismissal of a court president for publicly criticising judicial reforms violated Article 10 of the Convention and indirectly impaired judicial independence. Such practices, the Court noted, create a chilling effect that discourages judges from defending ethical standards and institutional integrity, ultimately affecting litigants' right to impartial adjudication.⁷³

The ECtHR has also addressed the relationship between corruption allegations and public confidence in the justice system. In *Xenophontos and Others v. Cyprus* (2022), the Court examined how unresolved allegations of judicial corruption and inadequate institutional responses can undermine trust in the judiciary. The judgment confirms that when states fail to address corruption risks transparently and effectively, access to justice suffers because courts lose their perceived neutrality.⁷⁴

Finally, in *Denisov v. Ukraine* (2018), the Court demonstrated how administrative pressure within judicial governance structures may interfere with judges' professional status and independence. The case illustrates that even indirect forms of institutional control can distort judicial behaviour, reinforcing the perception that justice is contingent on loyalty rather than legality. Such conditions disproportionately affect ordinary citizens, who are less equipped to navigate informal power dynamics within the legal system.⁷⁵

Taken together, international ethical standards and ECtHR case law converge on a single principle: corruption within the judiciary is not merely a problem of individual misconduct, but a systemic threat to access to justice. Ethical norms, judicial independence, and transparent governance mechanisms function as interdependent safeguards. Where they operate effectively, courts can fulfil their role as guarantors of rights; where they fail, corruption becomes normalised and legal protection loses its credibility.

72 *Guðmundur Andri Ástráðsson v. Iceland* App no 26374/18 (ECtHR, 1 December 2020) <<https://hudoc.echr.coe.int/eng?i=001-206582>> accessed 10 October 2025.

73 *Baka v. Hungary* App no 20261/12 (ECtHR, 23 June 2016) <<https://hudoc.echr.coe.int/eng?i=001-163113>> accessed 10 October 2025.

74 *Xenophontos and Others v. Cyprus* Apps nos 68725/14, 74339/16 and 74359/16 (ECtHR, 25 October 2022) <<https://hudoc.echr.coe.int/eng?i=001-220184>> accessed 10 October 2025.

75 *Denisov v. Ukraine* App no 76639/11 (ECtHR, 25 September 2018) <<https://hudoc.echr.coe.int/eng?i=001-186216>> accessed 10 October 2025.

3.5. Authors' Model of Anti-Corruption Legal Consciousness Formation

The analysis of theoretical and empirical data demonstrates that combating corruption cannot be reduced to criminal-legal regulation or administrative control measures alone. Sustainable resistance to corruption is possible only through the formation of an integrated anti-corruption legal consciousness that encompasses cognitive, value-based, and behavioural dimensions. On this foundation, the author developed the conceptual model “Socio-Legal Integrity Framework”, which unites cultural, legal, and politico-educational mechanisms aimed at shaping anti-corruption behaviour among both citizens and public officials (Figure 2).

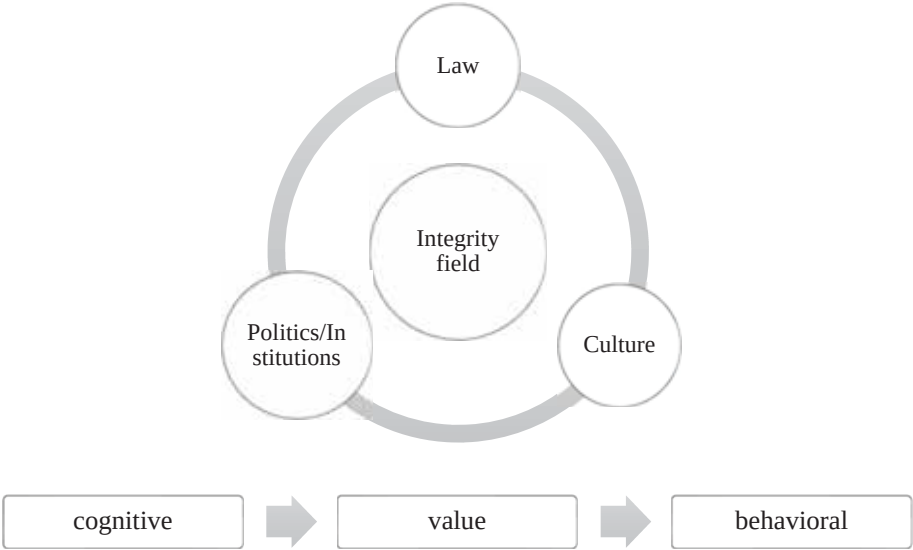


Figure 2. Socio-Legal Integrity Framework: interaction of law, culture, and institutional politics in shaping anti-corruption legal consciousness

The framework specifies a mechanism: institutional rules (law) become effective when they are internalised through legal culture and implemented via credible institutional channels. Integrity emerges in the overlap where transparency and oversight raise expected costs of corruption and reduce tolerance.

The central element of the model is legal education as an instrument of personal socialisation, fostering law-abidingness and civic responsibility. Studies by the OECD and UNESCO (2023) confirm that the level of civic engagement and understanding of the principles of the rule of law directly correlate with reduced tolerance toward corruption.⁷⁶

76 OECD, *Anti-Corruption and Integrity* (n 54).

In Kazakhstan, the introduction of university courses such as “Anti-Corruption Culture” and “Fundamentals of Law and Ethics of Civil Service” represented an important step toward the institutionalisation of anti-corruption education.⁷⁷ However, the effectiveness of these courses largely depends on their practical orientation: the analysis of real-life case studies, modelling of conflicts of interest, and discussion of ethical dilemmas foster a conscious perception of corruption as a moral evil rather than merely a legal offence.

Civic culture, in turn, provides the value-based foundation for legal consciousness. As Khlebnikov et al. note, “legal culture is a measure of an individual’s internal responsibility toward society, not merely fear of sanction”.⁷⁸ Within this logic, legal consciousness functions not as a tool of subordination but as an expression of mature civic self-awareness. Thus, legal education and civic culture mutually reinforce each other, forming the foundation for sustainable anti-corruption behaviour.

The second component of the model reflects the institutional channels through which anti-corruption norms are disseminated. Educational institutions shape the primary foundations of law-abiding behaviour, particularly through the incorporation of interactive teaching methods such as role-playing, debates, and the analysis of judicial precedents. The UNDP Report emphasises that the implementation of such practices in Eastern European schools has reduced the level of petty corruption in the education sector by 20–25%.⁷⁹

The mass media serve dual functions: public oversight and enlightenment. According to Transparency International, countries with a high degree of media independence demonstrate significantly lower levels of perceived corruption, on average, 15 points higher in the CPI than countries with restricted media environments.⁸⁰ However, the role of the media should not be limited to exposing corruption; it should also focus on promoting positive models of professional conduct based on openness, honesty, and accountability.

Non-governmental organisations (NGOs) serve as intermediaries between citizens and the state, transforming anti-corruption norms from abstract principles into practical forms of civic participation. A notable example is the Kazakhstani movement Adildik Zholy,⁸¹ which conducts programs for public monitoring of government services, as well as Lithuania’s Transparency School platform,⁸² an effective model for training students

77 Decree of the President of the Republic of Kazakhstan No 802 of 2 February 2022 ‘Concept of Anti-corruption policy of the Republic of Kazakhstan for 2022-2026’ <<https://adilet.zan.kz/kaz/docs/U2200000802>> accessed 10 October 2025.

78 Khlebnikov and others (n 26).

79 Ana Arsenijevic Momčilović, *Anti-Corruption Education in South-Eastern Europe – Compendium of Good Practices and Experiences* (UNODC 2024).

80 ‘Corruption Perceptions Index’ (n 4) CPI 2018.

81 GRECO, *Joint First and Second Round Evaluation: Compliance Report on Kazakhstan* (Greco RC-I/II (2024) 1E, Council of Europe 2024) 3, 5.

82 *Transparency International School on Integrity: Website* <<https://transparencyschool.org/>> accessed 10 October 2025.

and young professionals in the principles of ethical leadership. These examples confirm that sustainable anti-corruption behaviour emerges at the intersection of law, education, and civic engagement.

The authors' model is grounded in the premise that anti-corruption legal consciousness is the outcome of the systemic interaction of three interdependent spheres: law, culture, and politics.

The Socio-Legal Integrity Framework conceptualises anti-corruption capacity as a condition for effective access to justice. Within this model, legal education and civic culture shape citizens' willingness to rely on lawful procedures, while institutional autonomy and judicial integrity determine whether such reliance is justified in practice. Access to justice emerges where these elements intersect: when courts are independent, procedures transparent, and legal norms internalised as socially binding rather than externally imposed.

Law establishes the normative foundation of laws, sanctions, and mechanisms of accountability.

Culture provides a value-based framework for ethics in public service, respect for the law, and societal trust.

Politics ensures the institutional implementation of transparent procedures, independent courts, and mechanisms of public accountability.

At the intersection of these three domains arises an integrity field, a zone of integration where both personal and institutional intolerance toward corruption is formed.

The model envisions the progressive development of three interconnected levels:

Cognitive level – acquisition of knowledge about anti-corruption norms and procedures;

Value level – recognition of honesty and justice as fundamental societal ideals;

Behavioural level – readiness to act in accordance with the law, even in the absence of external control.

The practical implementation of this framework requires strong institutional support: systemic anti-corruption education, promotion of legal awareness, development of a media culture of responsibility, and the strengthening of civil institutions engaged in monitoring government accountability.

The comparative results should be interpreted within the limits of an analytical review design. While triangulation strengthens robustness, the study does not claim statistical representativeness for the whole of Eastern Europe. Instead, it identifies governance mechanisms that recur across the selected cases and evaluates their transferability to Kazakhstan under comparable post-socialist transition constraints.

To broaden the comparative perspective beyond Kazakhstan and the Visegrád countries, the experience of Ukraine and Moldova is particularly instructive. Both jurisdictions have pursued deep anti-corruption and judicial reforms aimed at restoring public trust and improving access to justice. In Ukraine, the restructuring of judicial governance, integrity vetting of judges, and the establishment of specialised anti-corruption courts were explicitly framed as measures to safeguard fair trial guarantees and reduce executive influence over adjudication.

Moldova's reform trajectory similarly illustrates the importance of combining institutional redesign with civic oversight and international monitoring. These cases demonstrate that meaningful progress against corruption requires not only legislative change, but also sustained engagement with judicial ethics, transparency of appointments, and societal participation in oversight mechanisms.

4 DISCUSSION

4.1. Corruption as a Socio-Legal Constraint on Access to Justice

This section discusses the implications of the empirical and comparative findings, focusing on how corruption affects judicial integrity and access to justice in post-socialist legal systems.

The findings of this study confirm that corruption in post-socialist legal systems cannot be adequately explained or addressed solely through the lens of criminal law or administrative enforcement. Instead, corruption emerges as a socio-legal phenomenon that directly shapes the conditions under which access to justice is either enabled or constrained. Where legal culture remains weak and judicial institutions lack effective safeguards of independence, corruption functions as an informal regulator of legal outcomes, substituting lawful procedures with discretionary and opaque practices.

4.2. Procedural Justice, Predictability, and the Citizen's Willingness to Litigate

From the perspective of access to justice, the most consequential effect of corruption lies in its capacity to erode procedural fairness and legal predictability. Even where formal rights to judicial protection are constitutionally guaranteed, their practical realisation depends on citizens' confidence that courts operate impartially and independently. The empirical evidence examined in this study, ranging from governance indicators to judicial practice, demonstrates that when corruption risks persist within the judiciary, individuals are less likely to seek legal remedies, particularly in disputes involving public authorities. This dynamic transforms access to justice into a selective rather than universal entitlement.

4.3. Comparative Implications: Integrity Safeguards and Institutional Credibility

The comparative analysis reinforces this conclusion. In the Eastern European jurisdictions examined, improvements in judicial integrity, transparency, and external oversight are closely associated with higher levels of public trust and more consistent enforcement outcomes. Conversely, where executive influence over judicial governance remains pronounced, as illustrated by monitoring reports and ECtHR case law, access to justice is weakened not through explicit denial, but through uncertainty, delay, and the perceived futility of legal action. These findings underscore that access to justice is not merely a procedural guarantee, but a systemic outcome dependent on institutional credibility.

4.4. Judicial Ethics and Human-Rights Standards as Interpretative Anchors

Judicial ethics and European human rights jurisprudence provide a crucial interpretative framework for understanding this relationship. The Bangalore Principles and CCJE standards conceptualise ethical integrity as a functional prerequisite for fair trial guarantees, while ECtHR case law demonstrates how deficiencies in judicial independence translate into violations of Article 6 of the European Convention on Human Rights. Together, these sources confirm that corruption within judicial institutions constitutes a structural threat to access to justice, even in the absence of overt bribery.

4.5. Kazakhstan: The Implementation Gap and Its Consequences for Legal Consciousness

In Kazakhstan, the persistence of an implementation gap between formal anti-corruption reforms and judicial practice remains a central challenge. While legislative and institutional measures signal a commitment to integrity, their limited impact on enforcement consistency and asset recovery undermines their credibility in the eyes of citizens. As a result, corruption continues to shape expectations of justice, reinforcing legal nihilism and discouraging lawful dispute resolution. The findings suggest that without strengthening judicial autonomy, external oversight, and civic engagement, anti-corruption policy risks remaining reactive rather than transformative.

4.6. Policy Implications: Integrating Law, Education, and Transparency Instruments

Building on the Kazakhstan-specific implementation gap discussed above, this subsection translates the review's comparative patterns into practice-oriented policy implications.

In this section, education is used in three distinct senses: civic education (values and civic competence), legal education or legal literacy (rights, procedures, and integrity norms), and professional integrity training (skills-based training for judges and public officials). This distinction avoids treating 'education' as a single undifferentiated driver of anti-corruption outcomes.

The conducted research convincingly demonstrates that corruption in contemporary society functions not only as a legal offence but as an indicator of the state of legal culture and the operational legal culture of public legal consciousness. Within the legal system of Kazakhstan, as in most post-socialist states, the struggle against corruption is hindered not by the absence of legislation (its normative base is sufficiently developed), but by the weakness of institutional and cultural mechanisms that ensure the internal acceptance of anti-corruption norms. Corruption reflects a deficit of legal identity and institutional trust, making it not merely a juridical problem but also an anthropological one that affects the worldview and ethical orientation of the citizen.

The international experience analysed in comparative perspective clearly shows that effective anti-corruption policy is impossible without transforming public legal consciousness. In Eastern European countries, such as Poland, Lithuania, the Czech Republic, and Hungary, the implementation of transparency programs, digital justice systems, and civic oversight mechanisms has created institutional guarantees of integrity rooted in social ethics and public trust. In these states, legal consciousness has ceased to function merely as a reaction to sanctions; it has evolved into an internal disposition towards legal honesty, in which compliance with the law is perceived as a form of participation in strengthening democracy. For Kazakhstan, this experience is particularly significant: it confirms that the law becomes truly effective only when it aligns with society's moral choice.

At the same time, international standards such as the UNCAC, the OECD Anti-Bribery Convention, and GRECO recommendations require thoughtful adaptation rather than mechanical replication. Without considering cultural codes, civic mentality, and models of interaction between state and society, anti-corruption norms lose their effectiveness. Therefore, the key objective of Kazakhstan's anti-corruption strategy must be the formation of a new type of legal culture, grounded in the values of transparency, justice, and public service, in which legal consciousness is not a product of state coercion but an expression of inner civic maturity.

Achieving a sustainable anti-corruption effect requires integrating educational, legal, and technological tools into a unified strategy to cultivate a culture of integrity. The recommendations developed in this research aim to strengthening legal awareness, increase transparency in the judicial system, and enhance public engagement in mechanisms of governmental oversight. They are grounded in the principles of adaptive governance and reflect best practices from Eastern European countries, where institutional reforms were accompanied by profound cultural transformations.

Proposals concerning the creation of a specialised anti-corruption ombuds-type institution should be read as an exploratory governance option rather than a call for immediate constitutional redesign. Given the sensitivity of institutional architecture in Kazakhstan, the feasibility, mandate boundaries, and political-constitutional implications of such an office

require separate analysis (comparative constitutional review, stakeholder assessment, and implementation scenarios). Accordingly, this article treats the ombuds-type model as a direction for further research and as an optional statutory design that could be piloted within existing oversight frameworks.

References to blockchain and AI in this article are deliberately instrumental. They are treated as auxiliary governance tools that can improve traceability, auditability, and the usability of transparency channels, thereby supporting enforcement credibility and civic oversight. However, they cannot serve as substitutes for the foundational determinants identified in this review: judicial independence, accountable institutions, and the civic-legal capacity of legal culture. Without value-based legal socialisation, reliable safeguards, and externally verifiable accountability, digital systems risk remaining symbolic or may even reproduce discretionary bias in a new technical form. Therefore, the proposed digital instruments should be interpreted as support mechanisms embedded in a broader socio-legal reform package rather than as standalone anti-corruption solutions.

From a politico-legal perspective, an ombuds-type integrity institution is justified only to the extent that it does not duplicate investigative or judicial powers and serves a narrow function: improving transparency, processing complaints, and ensuring structured parliamentary reporting on integrity risks. In post-socialist contexts, such offices are typically justified as mechanisms that bridge the gap between citizens and enforcement systems, especially when trust deficits reduce reporting and litigation. Nevertheless, in Kazakhstan, the institutional choice must prioritise compatibility with existing constitutional arrangements, which is why the present recommendation is framed as a statutory and pilotable option subject to separate feasibility assessment.

The table below presents structured recommendations tailored for implementation within the framework of Kazakhstan's anti-corruption policy. Each item represents a combination of normative and educational measures designed to ensure a balance between legal rigour and cultural sustainability (Table 7).

Table 7. Policy recommendations for strengthening anti-corruption awareness

Problem	Proposed Solution	Responsible Institutions
Low level of legal literacy and civic responsibility	Introduce a mandatory module “Anti-Corruption Culture and Legal Consciousness” in all training programs for public officials and in university curricula in law, education, and public administration. Promote interactive forms of legal learning (debates, moots, case analysis).	Ministry of Science and Higher Education of the Republic of Kazakhstan; Antikor Agency; Higher Education Institutions; NCPD “Өрлеу”

Problem	Proposed Solution	Responsible Institutions
Corruption practices in the judiciary and disproportionate sentencing	Develop a digital audit system for court rulings with elements of artificial intelligence (AI Legal Integrity Monitor) to monitor judicial reasoning, ensure consistency of sanctions, and detect recurring procedural errors.	Ministry of Justice of the Republic of Kazakhstan; Supreme Court of the Republic of Kazakhstan; Agency for Digital Development
Public distrust in state and judicial institutions	Strengthen external accountability through one of two institutionally realistic routes: (a) expand the mandate of the existing Human Rights Ombudsman or another statutory oversight body by adding a specialised anti-corruption integrity function (monitoring, annual reporting to Parliament, public recommendations); or (b) establish a statutory (non-constitutional) Anti-Corruption Ombudsman or Integrity Commissioner with clearly delimited powers focused on transparency, complaints review, and coordination of public oversight. This instrument is designed to complement, not replace, prosecutorial and judicial functions, and must operate under parliamentary reporting and procedural safeguards.	Parliament of the Republic of Kazakhstan; Agency for Combating Corruption; Office of the Ombudsman
Insufficient civic participation and public oversight	Launch a national online Adaldyq Platform for crowdsourcing information on corruption risks, publishing regional integrity indices, and monitoring the effectiveness of public services.	Antikor Agency; NGOs; Public Councils; Media Outlets
Media inactivity and weak anti-corruption education	Create a grant program for investigative journalism and documentary projects that promote values of open governance and ethical public service.	Ministry of Information and Social Development of the Republic of Kazakhstan; Union of Journalists of Kazakhstan

Problem	Proposed Solution	Responsible Institutions
Non-transparent public procurement and tender procedures	Introduce tamper-evident audit trails for procurement and tender documentation (including blockchain-based solutions where justified) to strengthen ex post verification and reduce opportunities for document manipulation. This measure is effective only when combined with enforceable procurement oversight, sanctions, and meaningful public access to data.	Ministry of Digital Development; Accounts Committee; Financial Monitoring Agency

In this paper, AI and blockchain are referenced only as support tools that may enhance auditability and transparency. They cannot replace the socio-legal foundations of integrity, legal culture, judicial independence, and credible accountability.

These recommendations emphasise the interdependence of legal modernisation and cultural transformation. By combining institutional transparency, civic empowerment, and technological innovation, Kazakhstan can transition from reactive anti-corruption measures toward a proactive system of integrity governance, where compliance with the law becomes both a civic norm and a shared social value.

The implementation of the proposed measures will require not only political will but also a profound institutional reorientation of the legal system. It is essential that these steps be accompanied by the formation of a new ethics of public service, grounded in intrinsic motivation and personal responsibility rather than in the fear of formal punishment. Only under this condition can anti-corruption policy evolve from an external administrative mechanism into a self-regulating system of social norms, where honesty and law-abiding behaviour are perceived as natural and internally motivated forms of conduct.

From the perspective of access to justice, corruption undermines the very foundations of fair trial guarantees. Judicial dependence, selective enforcement, and inconsistent sanctioning undermine the principle of equality of arms and compromise the impartiality of adjudication. Even where formal procedural safeguards exist, their practical value diminishes if judicial reasoning lacks transparency or if outcomes depend on informal influence rather than legal merit.

In this sense, corruption should be conceptualised as a violation of procedural justice. It does not merely accompany individual cases of bribery, but restructures expectations of legality by normalising informal solutions to legal disputes. This dynamic is particularly damaging in systems characterised by low legal culture, where citizens internalise the belief that justice is inaccessible through lawful means.

4.7. Prospects for Further Research

Finally, the limitations identified in this review, along with observed evidence gaps, suggest several directions for further research, particularly the development of primary data collection designs.

Future directions of scholarly inquiry in the field of anti-corruption policy are closely tied to the exploration of emerging socio-technical realities and ethical dilemmas of digital justice. Foremost among these is the need for in-depth analysis of the formation of digital ethics and anti-corruption algorithms designed to balance technological transparency with the protection of personal rights. Particular attention should be devoted to the integration of artificial intelligence into judicial systems – from predictive analytics of judgments to automated detection of corruption patterns – which challenges jurisprudence to rethink the fundamental principles of procedural fairness.

An equally important research trajectory concerns the evolution of legal culture in the digital era, when trust in institutions is increasingly shaped not by direct interpersonal experience but by digital interfaces through which citizens interact with the state. In this context, it is crucial to examine how e-justice, open data, and online civic education foster new forms of civic identity and social accountability. Additional scholarly interest lies in regional integrity studies aimed at identifying correlations among cultural codes, levels of education, economic development, and the resilience of anti-corruption practices in Eastern Europe and Central Asia.

The combination of these directions forms the foundation for a transition from classical jurisprudence to an integrative model of anti-corruption law, one that synthesises legal, ethical, and technological dimensions. Such an approach not only broadens the horizons of legal scholarship but also strengthens its social mission: to serve as an instrument of public integrity and a guarantor of trust in justice.

5 CONCLUSION

This article has demonstrated that corruption in post-socialist contexts should be understood not only as a violation of legal norms but as a socio-legal condition that fundamentally affects access to justice. Drawing on a structured comparative analysis and triangulated evidence from international standards, monitoring reports, judicial practice, and ECtHR jurisprudence, the study identifies legal culture, institutional accountability, and judicial integrity as key determinants of whether formal rights to justice translate into effective protection in practice.

The findings confirm that access to justice deteriorates where corruption undermines judicial independence, enforcement consistency, and public trust. In such environments,

courts lose their role as neutral arbiters and become perceived as contingent institutions, accessible primarily through informal influence. In contrast, jurisdictions that combine institutional autonomy, operational transparency, ethical safeguards, and civic oversight demonstrate greater resilience against corruption and higher levels of public confidence in judicial protection.

The principal conceptual contribution of the study, the Socio-Legal Integrity Framework, clarifies how anti-corruption capacity emerges at the intersection of law, culture, and institutional politics. Within this framework, legal education and civic culture are not peripheral instruments, but mechanisms that shape citizens' willingness to rely on courts, while judicial ethics and institutional safeguards determine whether such reliance is justified. Access to justice arises where these elements converge, transforming legal norms from formal declarations into lived social practices.

For Kazakhstan, the analysis indicates that the next phase of anti-corruption reform should prioritise institutional credibility over additional formalisation. Strengthening the judiciary's functional independence, enhancing the effectiveness of external oversight mechanisms, and embedding value-based legal education are mutually reinforcing steps towards restoring public trust. Technological instruments, including digital transparency tools, can support this process only if they operate as accountability facilitators rather than symbolic innovations.

The study's conclusions are bounded by its analytical design. While the comparative approach allows for the identification of recurrent governance mechanisms across selected jurisdictions, it does not claim statistical generalisation. Future research should therefore extend the analysis through primary empirical methods, including surveys of court users and interviews with judges, lawyers, and civil society actors, as well as through regional-level studies of access to justice within Kazakhstan.

Ultimately, sustainable anti-corruption reform depends on whether legal systems can ensure that justice is not merely promised, but reliably delivered. Where courts operate with integrity and independence, access to justice becomes a shared social expectation rather than an uncertain privilege. Under these conditions, anti-corruption policy evolves from episodic control into a durable culture of legality that reinforces the rule of law and public trust.

This article has argued that corruption in post-socialist contexts should be treated not only as a criminal-law category but as a socio-legal phenomenon embedded in legal culture, institutional incentives, and everyday patterns of state–society interaction. Using an analytical-review design and a structured comparative protocol, the study synthesised evidence from national legislation, international standards and monitoring outputs (UNCAC, OECD instruments, GRECO), cross-country governance indicators (CPI and the WJP Rule of Law Index), and accessible judicial practice materials for 2019–2025. This approach enables moving beyond illustrative case narratives and identifying mechanisms that repeatedly shape corruption risks and anti-corruption capacity across the selected cases.

The findings support the central proposition that the prevalence and social tolerance of corruption are closely linked to the institutionalised legal culture of legal consciousness and to the credibility of institutional accountability. In Kazakhstan, recent improvements in perceived integrity and ongoing legislative reforms signal movement in the right direction; however, the evidence also points to a persistent implementation gap between formal standards and enforcement outcomes. Where judicial safeguards remain fragile, sanctions are perceived as inconsistent, and asset recovery is weak, anti-corruption policy risks becoming reactive: it addresses visible violations while leaving the incentive structure that sustains informal exchanges largely intact. In this setting, corruption functions as a predictable “solution” to institutional uncertainty, thereby reproducing legal nihilism and weakening citizens’ willingness to rely on legal remedies.

The comparative synthesis across selected Eastern European EU member states examined in this review indicates that integrity governance tends to consolidate when several elements operate together rather than in isolation. Institutional autonomy of oversight bodies, transparency that is operational (not symbolic), predictable sanctioning, and meaningful civic oversight collectively raise the expected cost of corruption and reduce the perceived need for informal transactions. Importantly, the study does not claim a single “Eastern European model”. The evidence instead shows a graded landscape of institutional consolidation and heterogeneity across cases, which cautions against region-wide generalisations and reinforces the need for bounded, mechanism-oriented inference.

The article’s main conceptual contribution is the Socio-Legal Integrity Framework, which clarifies how anti-corruption capacity emerges at the intersection of law, culture, and institutional politics. The framework treats legal education and civic culture not as peripheral “awareness” instruments but as mechanisms that change behavioural incentives by shaping intolerance toward corruption, lowering demand for informal payments, and strengthening the legitimacy of legal procedures. At the institutional level, the framework emphasises that enforcement credibility depends on the integrity of the full implementation chain, from investigation and adjudication to post-conviction asset recovery, because confiscation and restitution are not merely technical measures but visible signals that corruption is not economically rational.

From a policy standpoint, the study suggests that Kazakhstan’s next reform stage should prioritise institutional credibility over additional formalisation. Strengthening the practical autonomy of anti-corruption bodies, expanding civic oversight through usable digital platforms with feedback loops, improving transparency of judicial reasoning, and institutionalising value-based legal education are mutually reinforcing steps. Their joint effect is to reduce discretion hidden from scrutiny, increase detectability, and align legal norms with internalised civic expectations of fairness. Technological tools, including AI-assisted integrity monitoring, can support this agenda only if implemented with due-process safeguards, transparency of algorithms, and human-in-the-loop decision rules that protect procedural fairness and prevent automated arbitrariness.

The study's conclusions should be interpreted in light of its design. As an analytical review based on triangulated secondary sources, it supports structured within-sample comparison and mechanism identification, but it does not provide statistical generalisation to all Eastern European jurisdictions, nor does it fully capture sector-specific or subnational variation. Future research should therefore validate the proposed mechanisms through primary data, surveys and interviews with public service users, judges, investigators, and civil society actors, while also extending the analysis to regional integrity mapping within Kazakhstan. A second promising direction is the governance of digital anti-corruption instruments, where the normative challenge is to balance transparency and accountability with rights protection and procedural justice.

Overall, the results converge on a practical yet demanding implication: sustainable anti-corruption change requires more than legal drafting and punitive intent. It depends on whether institutions reliably translate formal rules into predictable enforcement and visible recovery of illicit gains, and whether society internalises integrity as a shared legal and moral expectation. Only under these conditions can anti-corruption policy evolve from episodic control to a stable culture of legality that strengthens judicial legitimacy, expands access to justice, and consolidates the rule of law.

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Corresponding author, Investigation; Data Curation; Resources; Writing – Original Draft; Visualization; Project Administration.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

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EDITORS

Managing editor – Dr. Olena Terekh. **English Editor** – Robert Reddin.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Zhamuldinov V and Akhmetov A, 'Corruption as a Socio-Legal Constraint on Access to Justice: A Comparative Integrity Review of Kazakhstan and Selected Eastern European Jurisdictions (2019–2025)' (2026) 9(2) Access to Justice in Eastern Europe 88-138 <<https://doi.org/10.33327/AJEE-18-9.2-a000188>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000188>

Summary: 1. Introduction. – 1.1. Degree of scientific development of the problem. – 1.2. Scientific novelty and research contribution. – 2. Methodology. – 2.1. Literature review. – 2.2. Research design. – 2.3. Case selection and scope conditions. – 2.4. Data sources and time window. – 2.5. Key concepts and operational definitions. – 2.6. Operationalization: Integrity Matrix and observable indicators. – 2.7. Coding protocol and triangulation rule. – 2.8. Measurement caveats and limitations. – 3. Results – corruption and access to justice: institutional integrity as a condition of fair trial guarantees. – 3.1. Comparative analysis of anti-corruption systems in Kazakhstan and Eastern Europe. – 3.2. Legal consciousness and anti-corruption behavior of citizens. – 3.3. Legal precedents and judicial practice. – 3.4. Judicial practice and integrity outcomes. – 3.5. Authors' model of anti-corruption legal consciousness formation. – 4. Discussion. – 4.1. Corruption as a socio-legal constraint on access to justice. – 4.2. Procedural justice, predictability, and the citizen's willingness to litigate. – 4.3. Comparative implications: integrity safeguards and institutional credibility. – 4.4. Judicial ethics and human-rights standards as interpretative anchors. – 4.5. Kazakhstan: the implementation gap and its consequences for legal consciousness. – 4.6. Policy implications: integrating law, education, and transparency instruments. – 4.7. Prospects for further research. – 5. Conclusion.

Keywords: corruption; socio-legal phenomenon; rule of law; legal culture; legal consciousness; institutional accountability; judicial independence; enforcement consistency; asset recovery; public integrity; civic engagement; transparency; anti-corruption governance.

DETAILS FOR PUBLICATION

Date of submission: 18 Oct 2025

Date of acceptance: 15 Feb 2026

Online First Publication: 30 Mar 2026

Last Publication: 20 May 2026

Was the manuscript fast tracked? – No

Number of reviewer reports submitted in first round: 3 reports

Number of revision rounds: 3 rounds with minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

**КОРУПЦІЯ ЯК СОЦІАЛЬНО-ПРАВОВИЙ ЧИННИК ОБМЕЖЕННЯ ДОСТУПУ ДО ПРАВОСУДДЯ:
ПОРІВНЯЛЬНИЙ АНАЛІЗ ДОБРОЧЕСНОСТІ КАЗХСТАНУ
ТА ОКРЕМИХ ЮРИСДИКЦІЙ СХІДНОЇ ЄВРОПИ
(2019–2025)**

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АНОТАЦІЯ

Вступ. У постсоціалістичних правових системах, зокрема в Казахстані та кількох державах Східної Європи, корупція продовжує створювати системний виклик верховенству права та ефективному доступу до правосуддя. У цій статті корупція розглядається як соціально-правове явище, що підтримується повторюваними практиками ухвалення рішень в адміністративних органах і судах та суспільними моделями ставлення до законності, включно з довірою до інституцій. Ці механізми разом визначають, як права забезпечуються на практиці, та чи сприймаються суди як такі, що заслуговують на довіру. Коли незалежність судової влади ослаблена, а громадянсько-правова свідомість низька, корупція не визначає результати автоматично, але збільшує ймовірність того, що неформальний вплив може проникнути в процедури ухвалення рішень та підірвати процесуальну рівність, передбачуваність та довіру до судового розгляду. Хоча деякі системи управління можуть частково компенсувати цей ризик за допомогою ефективного контролю в суміжних інституціях, сектор правосуддя менш схильний до компенсації, оскільки суди є остаточною інстанцією для того, щоб забезпечити виконання та захист прав. Тому аналіз зосереджується на судовій системі не

як на єдиному осередку корупції, а як на критичному каналі, через який корупція перетворюється на практичні обмеження доступу до правосуддя – через знижену передбачуваність, слабку процесуальну рівність та нижчу довіру до судових рішень. Розуміння корупції крізь призму доступу до правосуддя вимагає уваги до її правових, культурних та інституційних основ.

Методи. У дослідженні застосовується соціально-правовий (право та суспільство) аналітичний огляд, що поєднує порівняльно-правовий аналіз з соціально-правовим аналізом, що виявляє причинно-наслідкові механізми, та якісним контент-аналізом. Доказова база складається з національного законодавства, міжнародних антикорупційних документів та документів про верховенство права (UNCAC, OECD, GRECO), вибраної судової практики та аналітичних звітів Transparency International та ПРООН. Структуроване порівняння Казахстану з вибраними східноєвропейськими юрисдикціями (Польщею, Литвою та Чеською Республікою) проводиться для оцінки того, як правова культура, інституційна автономія та громадський нагляд впливають як на контроль корупції, так і на доступ до правосуддя.

Результати та висновки. Отримані дані виявляють прямий зв'язок між рівнем корупції, операційною правовою культурою та практичним доступом до правосуддя. Там, де судові гарантії діють та піддаються зовнішній перевірці, прозорість стає реальною: обґрунтовані рішення є публічно доступними, а канали участі – придатними для використання. За цих умов толерантність до корупції знижується, а довіра до судів, швидше за все, зростає. У статті представлено Соціально-правову систему доброчесності, яка інтегрує правову освіту, культурну трансформацію та інституційну підзвітність як взаємопов'язані механізми формування антикорупційної правосвідомості. Для Казахстану аналіз підкреслює необхідність зміцнення автономії антикорупційних органів, посилення зовнішнього нагляду за судовою системою, розширення змістовної цифрової прозорості та впровадження ціннісно-орієнтованої юридичної освіти. На противагу цьому, кілька східноєвропейських держав демонструють більш просунуті превентивні підходи, засновані на партисипативному управлінні та правовій етиці, що підлягає виконанню. У дослідженні було зроблено висновок, що ефективна антикорупційна політика вимагає не лише формальної правової реформи, але й системної реконфігурації правової культури для забезпечення справжнього доступу до правосуддя.

Ключові слова. Корупція; соціально-правове явище; верховенство права; правова культура; правова свідомість; інституційна підзвітність; незалежність судової влади; послідовність правозастосування; повернення активів; публічна доброчесність; громадянська активність; прозорість; антикорупційне управління.

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a0001973>

Date of submission: 24 Jan 2026

Date of acceptance: 14 Apr 2026

Publication: 20 May 2026

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Research Article

JUDICIAL EFFICIENCY IN THE ERA OF DIGITAL ASSETS: PERSPECTIVES ON SMART TECHNOLOGIES

Konstantinos Papachristou-Dimitras

ABSTRACT

Background: The expansion of digital assets increasingly challenges the effectiveness of judicial protection mechanisms traditionally designed for tangible goods. Cryptocurrencies, smart technologies, and digitally controlled environments disrupt established notions of possession, enforcement and interim relief.

Method: The research employs a doctrinal and comparative legal methodology, focusing on selected jurisdictions (Germany, Greece, and the United Kingdom), alongside relevant EU law. It examines how these systems conceptualise possession, regulate interim judicial protection, and address digital control in technologically mediated environments.

Results and Conclusions: The analysis demonstrates that traditional possessory protection offers a useful but only partially adaptable framework for digital assets. While common law jurisdictions show greater flexibility in recognising cryptocurrencies and NFTs as property subject to interim protection, civil law systems remain more constrained by the requirement of tangibility. However, all examined systems increasingly rely on functional equivalents of possession, particularly through access-based control.

The article argues that effective judicial protection of digital assets requires a reconceptualisation of possession as control over access rather than physical detention. Interim judicial measures can provide adequate protection, provided that courts are willing to intervene through orders directed at intermediaries and technological infrastructures. The study concludes that future doctrinal development and legislative clarification at the EU level are necessary to ensure legal certainty and cross-border effectiveness in digital asset disputes.

1 INTRODUCTION

Property law has traditionally been grounded in the protection of tangible possessions, with the Germanic concept of *possessorische Besitzschutz*¹ providing a robust legal mechanism to safeguard possession against unlawful interference. Yet, the rapid expansion of digital technologies, including cloud computing, blockchain-based assets, and the metaverse, challenges classical notions of possession. Digital assets such as non-fungible tokens (NFTs), cryptocurrencies, and virtual real estate defy physicality, are often controlled through cryptographic keys, and can be transferred instantly across borders.

This transformation raises a central legal question: can traditional mechanisms of interim judicial protection effectively safeguard digital possession? More specifically, should possession be reconceptualised as a form of access-based factual control in order to remain functionally relevant in the digital era?

To address these questions, this article adopts a doctrinal and structured comparative approach. It focuses on selected jurisdictions representing both civil law and common law traditions, namely Germany, Greece, and the United Kingdom, while also incorporating relevant developments at the level of European Union law. These jurisdictions have been selected due to their doctrinal significance, the availability of case law on digital assets, and their differing approaches to possession and interim protection.

The comparative analysis is structured around three core dimensions: (i) the concept of possession, (ii) the availability and function of interim judicial measures, and (iii) the treatment of digital assets and access-based control. By examining how these elements interact in different legal systems, the article seeks to identify both structural limitations and emerging doctrinal adaptations.

The article proceeds as follows. Section 2 outlines the methodological framework and explains the comparative approach adopted. Section 3.1. analyses the concept of possession in the context of digital assets, highlighting the shift from physical control to access-based control. Section 3.2. examines the role of interim judicial protection across the selected jurisdictions, with particular emphasis on its adaptability to digital disputes. Section 3.3. explores the boundaries between judicial protection and technological self-

1 The German concept of “*possessorischer Besitzschutz*”, referring to possessory protection of possession.

help. Section 3.4. provides a comparative synthesis and evaluates cross-border enforcement issues. Finally, Section 4 presents the conclusions concerning the future development of civil procedural law in the digital era.

2 METHODOLOGY

This research follows a doctrinal, comparative, and functional methodological approach, focusing on the operation of possessory protection and interim judicial measures within contemporary civil procedural law. Instead of referring broadly to multiple jurisdictions, the analysis focuses on three legal systems, Germany, Greece and the United Kingdom, which represent distinct doctrinal traditions, whereas the United Kingdom reflects a more flexible common law approach, particularly in recognising digital assets as property. The comparison is based on specific criteria: i) the legal concept of possession, ii) the availability and scope of interim measures, iii) the treatment of digital assets within existing legal categories, and iv) the role of courts in addressing technologically mediated forms of control. This doctrinal analysis aims to identify the structural assumptions underlying traditional concepts of possession and to assess their suitability for digitally mediated forms of control.

In parallel, the study undertakes a case-law analysis at both national and supranational levels. Judicial decisions of the Court of Justice of the European Union and the European Court of Human Rights are examined alongside selected judgments from national courts and common law jurisdictions. This jurisprudential analysis illustrates how courts conceptualise possession, self-help, and interim protection in the context of digital assets, smart technologies, and remote-control mechanisms. The comparative dimension of the methodology consists of juxtaposing traditional possessory remedies with legal responses to digital assets, smart objects, and platform-based environments.

Finally, the study adopts a functional and normative perspective to evaluate whether existing procedural instruments, particularly interim measures, can provide effective and timely protection in cross-border and digital contexts. This assessment informs the article's conclusions on the adaptability of civil procedural law and the conditions under which interim judicial protection may evolve to address contemporary technological developments.

3 RESULTS AND DISCUSSION WITH ANALYSIS OF LEGAL ISSUES

3.1. Possession of Digital Objects

The concept of possession in relation to tangible goods has always been fundamental in legal thought, with its earliest records dating back to the Stone Age, when humanity defined its

identity through the ownership of objects.² In this early phase of legal development, possession was a pre-legal condition, preceding the institutionalised regulatory framework of ownership. The protection of possession (and later, ownership) has consistently been part of legal history, and specifically codified in the Roman *interdicta*.

It is notable that, despite the recognition of possession as an institution across all European legal systems,³ fundamental differences are observed between the traditions of civil law and common law. At the core of these differences, systems distinguish between actions for the protection of ownership (petitory actions) and actions for the protection of possession (possessory actions), and ultimately provide measures for both definitive and interim judicial protection, such as interim measures for possession or ownership.

The notion of physical possession (*possessio naturalis*), following the *res corporales* of Roman law, is deeply rooted in legal theory and pertains primarily to tangible goods, notably real property and movable items. In civil law countries, objects are traditionally understood to be solely tangible items,⁴ i.e., corporeal things capable of human control.

Similarly, in the common law tradition, in the famous case *Colonial Bank v Whinney* (1885), the principle was established that all personal or movable property could be categorised into one of two states: a) in possession, or b) in action, with the famous phrase:

All personal things are either in possession or in action. The law knows no tertium quid between the two.⁵

This rigid dichotomy, however, has increasingly come under pressure in the context of efforts to develop a more coherent and harmonised European approach to property law,

2 Riccarda Feldman, *Der possessorische Besitzschutz und sein Verhältnis zum petitorischen Recht: Eine materiellrechtliche und zivilprozessuale Betrachtung* (Mohr Siebeck 2020) 1. See also, Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 3; Konstantinos Papachristou-Dimitras, 'Cadastral Systems and the Registration of Immovable Property in the European Legal Order: The Perspective of a Model European Cadastre' in Aristotle University of Thessaloniki, *Comparative Cadastral Law* (Sakkoulas 2021) 871 [in Greek].

3 Therese Müller, *Besitzschutz in Europa: Eine rechtsvergleichende Untersuchung über den zivilrechtlichen Schutz der tatsächlichen Sachherrschaft* (Mohr Siebeck 2010) doi:10.1628/978-3-16-167477-8.

4 See, for example, Greek Civil Code 'Αστικός Κώδικας' (adopted 24 October 1984, amended 27 February 2026) art 947 <<https://www.kodiko.gr/nomothesia/document/437467/p.d.-456-1984>> accessed 28 February 2026; German Civil Code 'Bürgerliches Gesetzbuch' (BGB) (effective 1 January 1900, amended 10 August 2021) § 90 <https://www.gesetze-im-internet.de/englisch_bgb/index.html> accessed 15 January 2026; French Civil Code 'Code Civil' (effective 21 March 1804, amended 1 January 2026) art 516 <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/> accessed 15 January 2026. See also Mario Martini and Jonas Botta, 'Der Staat und das Metaversum' (2023) 26 MMR: Zeitschrift für IT-Recht und Recht der Digitalisierung 890.

5 This category refers to rights involving claims against others, such as for the return of a chattel or the payment of a debt. A debt or money claim may constitute a right *in action*, where the holder has no immediate possession but must seek judicial enforcement.

particularly in light of emerging forms of intangible and digital assets.⁶ A noteworthy attempt in this direction is reflected in the *Draft Common Frame of Reference* (DCFR), Book VIII, on acquisition and loss of ownership of goods (Chapter 6),⁷ which, however, never acquired binding legal force. The initial intent was to offer a model legal system for Member States, which could be adopted voluntarily or serve as a foundation for reforms in national legal orders. Despite these early efforts, harmonisation in the field of possession has remained limited.

Apart from the above, in the context of the digital revolution, serious issues arise, such as whether access codes to social media accounts (often professional and lucrative), emails, banking details, cryptocurrencies, and other digital contents (e.g., books, music, videos) can be considered objects in the sense of civil law, and whether they fit into one of the two categories of property recognized in common law systems.⁸ This question arises because, in this new environment, physical contact with the goods is no longer a necessary. In this respect, the jurisprudence of the ECtHR may offer a broader functional understanding of “possessions”, which is particularly relevant in the context of intangible and digital assets. At the supranational level, Article 1 of Protocol No. 1 to the European Convention on Human Rights already provides that:

*Everyone has the right to own property and to enjoy its possessions.*⁹

This provision declares the right of every natural or legal person to the peaceful enjoyment of their possessions (biens, in the French version). As the United Kingdom’s representative noted during the drafting of the ECHR, the term “possessions” was unfamiliar in the English legal language. Nonetheless, it was adopted to mirror the meaning of the French term bien. Despite the somewhat vague formulation of the provision, the ECtHR¹⁰ has made it clear that:

By recognising that everyone has the right to the peaceful enjoyment of their possessions, Article 1 essentially guarantees the right to property.

6 Feldman (n 2) 233; Eveline Ramaekers, *European Union Property Law: From Fragments to a System* (Intersentia 2013) 1.

7 Study Group on a European Civil Code, *Draft Common Frame of Reference* (DCFR) (Sellier 2009). See also, Müller (n 3) 202.

8 Nicolas Philip Sander, *Besitz(schutz) smarter Sachen* (Mohr Siebeck 2024) 4, doi:10.1628/978-3-16-163922-7. Vividly describes this legal uncertainty as a “digitalen Wilden Westens” [‘digital Wild West’].

9 Council of Europe, *European Convention on Human Rights: as amended by Protocols Nos 11, 14 and 15; supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECtHR 2013).

10 *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) para 63 <<https://hudoc.echr.coe.int/fre?i=001-57534>> accessed 15 January 2026; *Beyeler v Italy* App no 33202/96 (ECtHR, 5 January 2000) para 100 <<https://hudoc.echr.coe.int/eng?i=001-58832>> accessed 15 January 2026; *Fabris v France* App no 16574/08 (ECtHR, 7 February 2013) para 50 <<https://hudoc.echr.coe.int/eng?i=001-116716>> accessed 15 January 2026.

Thus, the ECtHR, by adopting a broad,¹¹ autonomous interpretation of the concept, has held that “possessions” include all forms of economic interests, whether present or future. These encompass, inter alia, claims sufficiently established under domestic law,¹² shares and other financial and business-related assets,¹³ commercial licences,¹⁴ intellectual property rights,¹⁵ and more.

These dilemmas are likely to engage both domestic and foreign jurisprudence in the years to come. Legal theories on possession and detention are called upon to undergo substantial re-evaluation and reform to accommodate contemporary developments, as is already underway in both common law and civil law jurisdictions.

In this context, the scientific discourse surrounding the concept of “property” is being reignited at the international level, potentially inaugurating a new form of “digital possession and ownership”, which would relate to the concept of possessing or controlling digital goods or data (*digitalen Besitz*, also “*Besitz an Daten*”).¹⁶ New legislative initiatives are on the horizon to incorporate modern digital assets and rights. Already, in EU law, Directives 2019/770,¹⁸ concerning certain aspects of contracts for the supply of digital content and digital services, and 2019/771,¹⁹ regarding contracts for the sale of goods, have led to significant modifications in sales law. This is due to the Civil Code’s

- 11 *Gasus Dosier- und Fördertechnik GmbH v Netherlands* App no 15375/89 (ECtHR, 23 February 1995) para 53 <<https://hudoc.echr.coe.int/eng?i=001-57918>> accessed 15 January 2026.
- 12 *Radomilja and Others v Croatia*, App nos 37685/10 and 22768/12 (ECtHR, 20 March 2018) para 142 <<https://hudoc.echr.coe.int/fre?i=001-181591>> accessed 15 January 2026; *Grbac v Croatia*, App no 64795/19 (ECtHR, 16 December 2021) para 86 <<https://hudoc.echr.coe.int/fre?i=001-214019>> accessed 15 January 2026.
- 13 *Mamatas and Others v Greece* App nos 63066/14, 64297/14 and 66106/14 (ECtHR, 21 July 2016) para 90 <<https://hudoc.echr.coe.int/eng?i=001-164969>> accessed 15 January 2026; *Pannon Plakát Kft v Hungary* App no 39859/14 (ECtHR, 6 December 2022) paras 42, 44 <<https://hudoc.echr.coe.int/eng?i=001-221253>> accessed 15 January 2026; *Sebeleva and Others v Russia* App no 42416/18 (ECtHR, 1 March 2022) para 39 <<https://hudoc.echr.coe.int/eng?i=001-216223>> accessed 15 January 2026.
- 14 *Malik v United Kingdom* App no 23780/08 (ECtHR, 13 March 2012) para 90 <<https://hudoc.echr.coe.int/fre?i=001-109541>> accessed 15 January 2026; *Vékony v Hungary* App no 65681/13 (ECtHR, 13 January 2015) para 29 <<https://hudoc.echr.coe.int/eng?i=001-149201>> accessed 15 January 2026; *NIT S.R.L. v Moldova* App no 28470/12 (ECtHR, 5 April 2022) para 235 <<https://hudoc.echr.coe.int/eng?i=001-216872>> accessed 15 January 2026.
- 15 *Anheuser-Busch Inc v Portugal*, App no 73049/01 (ECtHR, 11 January 2007) para 72 <<https://hudoc.echr.coe.int/eng?i=001-78981>> accessed 15 January 2026.
- 16 Contra the notion of ‘Eigentum an Daten’ see, Sander (n 8) 7.
- 17 *ibid.* See also Fabian Michl, “Datenbesitz” – ein grundrechtliches Schutzgut? (2019) 38 *Neue Juristische Wochenschrift* 2729; Tomas Hoeren, ‘Datenbesitz statt Dateneigentum’ (2019) 1 *MMR: Zeitschrift für IT-Recht und Recht der Digitalisierung* 5.
- 18 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.
- 19 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain Aspects Concerning Contracts for the Sale of Goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

frequent failure to equate intangible goods with tangible property, thereby creating a legal hybrid akin to the forces of nature.

The distinction between intangible intellectual property (e.g., a digital image) and the physical medium that conveys it into the realm of the senses results in two parallel levels of protection: one for the work as an intangible asset and the other for the material unit that embodies it.²⁰ In fact, legal relations concerning the material medium are primarily governed by civil law provisions, while relations concerning the work as an intangible asset are governed by intellectual property law. The protection of the intangible work continues to exist, regardless of whether the (potential) material medium changes.²¹ In an era where we transition from the delivery of a specific storage medium (e.g., CD or USB) to a non-material transfer via downloading (e.g., via iCloud), Apple customers do not possess the data medium from which ownership of images or videos could arise. Thus, the creation of an NFT through programming does not provide the developer with ownership in the traditional sense of property law, but rather, with the help of a private key, the tokens can be technically controlled, though they are not physically tangible.²²

A further challenge is posed by the new digital world of *Metaverse Real Estate*, where users can interact, create, and own virtual goods and property.²³ The purchase of property in the metaverse represents a new form of investment and business activity, significantly different from traditional real estate, as understood under the Civil Code. Virtual property ownership is primarily confirmed through blockchain technology²⁴ and NFTs, which essentially serve as proof of ownership, acting as a "digital identity" and falling within the category of intangible assets. Therefore, if one holds the NFT (i.e., has access to it), one is considered to also own the virtual property. However, the question remains unresolved as to whether possession of a token supported by assets equates to actual

20 Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* (CJEU, 19 December 2019) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62018CJ0263>> accessed 15 January 2026.

21 Case C-419/13 *Art & Allposters International BV v Stichting Pictoright* (CJEU, 22 January 2015) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62013CJ0419>> accessed 15 January 2026.

22 Lisa Marleen Guntermann, 'Non-Fungible Token als Herausforderung für das Sachenrecht' (2022) 19 *Recht Digital* 204.

23 Matthew Ball, 'The Metaverse: What It Is, Where to Find It, and Who Will Build It' (*Epyllion*, 13 January 2020) <<https://www.matthewball.vc/all/themetaverse>> accessed 15 January 2026; Kimon Saitakis, 'Legal Challenges Stemming from Investing in Metaverse Real Estate' in *Investing in Digital Assets: The EU Law Approach*, vol 1 (Sakkoulas 2024) 47; Henrike Strobl, 'Virtuelle Welten, reale Rechte: Die Durchsetzung des Urheberrechts' (2023) 7 *Zeitschrift für Urheber- und Medienrecht* 492.

24 Evelyse Carvalho Ribas, 'NFTs – Digital Certificate, License of Use, Ownership' (*Artlaw.club*, 18 October 2021) <<https://artlaw.club/en/artlaw/nfts-digital-certificate-license-of-use-ownership-1>> accessed 15 January 2026; Wanja Johannes Kleiber, 'NFT – eine Einordnung' (2022) 4 *MMR: Zeitschrift für IT-Recht und Recht der Digitalisierung* 445; Thomas Hoeren and Wolfgang Prinz, 'Das Kunstwerk im Zeitalter der technischen Reproduzierbarkeit – NFTs (Non-Fungible Tokens) in rechtlicher Hinsicht' (2021) 8 *Computer und Recht* 565; Saitakis (n 23) 58.

ownership of the virtual property, or merely represents a license granted by the corresponding metaverse platform. In this case, the contractual (rather than proprietary) nature of the right appears to prevail,²⁵ even though the very concept of virtual land is designed to provide the holder of virtual land with a role similar to that of an owner.²⁶ These developments demonstrate that traditional concepts of possession, grounded in physical control, are increasingly inadequate in the digital environment, thereby necessitating a functional reconceptualisation of possession as control over access.

3.2. Interim Protection of Possession and Provisional Regulation of Status

In this context, it appears that interim measures for the protection of possession or detention have limited application to purely intangible goods. Instead, alternative legal mechanisms may prove more suitable, such as those found in intellectual property law. Moreover, digital files containing clients' personal data are protected under the General Data Protection Regulation (GDPR).²⁷ In the event of a breach of such data, severe sanctions may be imposed under the regulatory framework.

Nevertheless, the concept of possession, when adapted to the peculiarities of intangible goods, could potentially encompass the exercise of a form of control over the good analogous to physical control (*corpus possessionis*); this control, when exercised with the *animus domini*, establishes a legal condition equivalent to traditional possession. It is noteworthy that in *AA v Persons Unknown*,²⁸ the High Court of England and Wales issued an interim proprietary injunction to safeguard cryptocurrencies. The court specifically recognised that cryptocurrencies (in this case, Bitcoin) possess characteristics that justify their treatment as property,²⁹ in accordance with the common law criteria. This

25 Saitakis (n 23) 56.

26 See, Gita Radhakrishna, 'Legal Issues with Real Estate in the Metaverse' (International Conference on Law and Digitalization ICLD 2022) 77, doi:10.2991/978-2-494069-59-6_7; Fabian Reinholz, 'Metaverse und Recht: Das Recht des Metaverse – ein Überblick' (2023) 16-17 *Gewerblicher Rechtsschutz und Urheberrecht in der Praxis* 479; Saitakis (n 23) 56.

27 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

28 *AA v Persons Unknown* [2019] EWHC 3556 (Comm); *Tulip Trading Ltd v Van Der Laan* [2023] EWHC 83 (Ch); Amy Castor, 'UK's High Court Ruling on NFTs as "Property" Has Been Called a Landmark—But It May Not Actually Change Much' (*Artnet*, 4 May 2022) <<https://news.artnet.com/market/uk-high-recognizes-nfts-as-property-2108605>> accessed 15 January 2026.

29 British professor Goode argues that cryptocurrencies have "realised commercial value". See, Roy Goode, 'What is Property?' (2023) 139 *Law Quarterly Review* 1, doi:10.3316/agispt.20230116081971. See also, Kelvin FK Low and Ernie GS Teo, 'Bitcoins and Other Cryptocurrencies as Property?' (2017) 9(2) *Law, Innovation and Technology* 235, doi:10.1080/17579961.2017.1377915; David Fox and Sarah Green (eds), *Cryptocurrencies in Public and Private Law* (OUP 2019) 139, doi:10.1093/law/9780198826385.001.0001; Jiabin Lai, 'Possession of Cryptoassets' (2023) 1 *Journal of Business Law* 41,

recognition enabled the granting of interim injunctions to prevent the further transfer or dissipation of the assets.

Following this reasoning, the case of Ozone Networks Inc trading as OpenSea [2022] EWHC 1021,³⁰ reaffirmed the tendency of the common law judiciary to adapt to emerging technologies and digital property. The court accepted that NFTs (Non-Fungible Tokens) may also be regarded as property, and consequently approved the issuance of an interim injunction preventing their further transfer or disposal by a third party. More specifically, it was accepted that courts may issue *freezing orders* to “freeze” unlawfully transferred cryptocurrencies or NFTs, thereby ensuring the preservation of such digital assets during pending litigation.

In line with this judicial evolution, the New Bill to Clarify Crypto’s Legal Status was introduced before the UK Parliament in September 2024,³¹ upon the recommendation of the UK Law Commission. The Bill aims to clarify the legal classification of cryptocurrencies and other digital assets by establishing a third category of property, distinct from *things in possession* (tangible property) and *things in action* (intangible rights).

Within the framework of EU law, a landmark judgment regarding cryptocurrencies is the CJEU’s *Skatteverket v David Hedqvist*,³² which held that cryptocurrencies do not constitute

doi:10.2139/ssrn.4860851. Similarly, in Australia and Singapore, cryptocurrencies are treated as assets. See, *Janesh s/o Rajkumar v Unknown Person* (“CHEFPIERRE”) [2022] SGHC 264, which, among other things, stated: “to characterise NFTs as mere information would ignore the unique relationship between the encoded data and the blockchain system, which enables the transfer of this encoded data from one user to another in a secure and verifiable fashion.” See also Jamie Crawley, ‘NFTs Can Be Considered Property, According to Singapore High Court Ruling’ (*CoinDesk*, 24 October 2022) <<https://www.coindesk.com/policy/2022/10/24/nfts-can-be-considered-property-according-to-singapore-high-court-ruling>> accessed 15 January 2026; Thomas Choo and Zhen Guang Lam, ‘Singapore High Court Recognises NFTs as a Form of Property’ (*Clyde & Co LLP*, 21 November 2022) <<https://www.clydeco.com/en/insights/2022/11/singapore-high-court-recognises-nfts-as-a-form-of>> accessed 15 January 2026. See also, Saitakis (n 23) 60. On the other hand, some consider the view of cryptocurrencies as property to be unfortunate. A notable example is Robert Stevens, ‘Crypto is Not Property’ (2023) 139 *Law Quarterly Review* 615, doi:10.2139/ssrn.4416200, who argues: “The moon and the fish in the sea are things, but they are not ‘property’. Nobody has ever identified any right in relation to crypto, nor how it would be vindicated. Therefore, it is not property.” See also Florent Thouvenin and Alfred Früh, *Zuordnung von Sachdaten: Eigentum, Besitz und Nutzung bei nicht-personen-bezogenen Daten* (ITSL 2020) 16-7.

30 *Ozone Networks Inc trading as OpenSea* [2022] EWHC 1021 (Comm).

31 UK Law Commission, *Digital Assets: Final Report* (Law Com No 412, HH Associates Ltd 2023) para 1.3. In which it is stated: [1.3] “The term digital asset is extremely broad. It captures a huge variety of things including digital files, digital records, e-mail accounts, domain names, in-game digital assets, digital carbon credits, crypto-tokens and NFTs. The technology used to create or manifest those digital assets is not the same. Nor are the characteristics or features of those digital assets.”

32 Case C-264/14 *Skatteverket v David Hedqvist* (CJEU, 22 October 2015) EU:C:2015:718 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62014CJ0264>> accessed 15 January 2026. See also, Philippe Jouglaux, *Special Forms of Contracts in Cypriot Law* (Sakkoulas 2024) 19-20.

tangible property, as their sole purpose is to serve as a means of payment. According to the CJEU (para. 55):

It is not disputed, however, that the virtual currency 'bitcoin' does not constitute a share or other security conferring ownership rights in legal persons, nor does it constitute a similar financial instrument.

Consequently, it remains doubtful whether a court could, for instance, order the return of digital assets to the lawful owner in the event of the theft of private keys to a cryptocurrency wallet.

It is worth noting that within the European Union, the Markets in Crypto-Assets Regulation (MiCA) aims to establish a harmonised regulatory framework for cryptocurrencies and digital assets. In particular, MiCA³³ addresses security and transparency issues for crypto-asset service providers, stablecoins, and issuers of digital currencies, with the goal of protecting investors and ensuring consistency across EU markets.

This raises the question: in cases where someone unlawfully obtains a private key or access code to a digital service or bank account and thereby gains access to assets without any physical contact, can such a form of disturbance be remedied under the legal framework of interim possession measures? A core difficulty is that an access code, as an intangible item not subject to physical control, cannot be "possessed" in the traditional legal sense. A sound interpretation holds that the "holder" of a digital asset is the person who has access to it. Thus, the possession of a password or private key appears more as a matter of access control and use authorisation than of legal ownership.³⁴

Consequently, the object of possession might be construed as the public address of a digital wallet used to store cryptocurrencies, or the private keys enabling access and management of these assets. From this perspective, a suitable interim measure in the event of a violation would be to restore access and control over the digital object. In practice, a court ruling on provisional measures could oblige the third party to return or disclose access credentials, transfer account management rights, or, for example, in the event of a hacked bank account, order the immediate resetting of credentials and reinstatement of control to the rightful owner. Such orders, however, resemble more closely a temporary regulatory injunction than a classic possession-based interim measure.

33 European Parliament, Proposal for a Regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (COM/2020/593 final, 24 September 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0593>> accessed 15 January 2026. See also, Francesco Paolo Patti, 'Europäische Perspektiven' in Florian Möslin and Sebastian Omlor, *Kryptoaktien: Erweiterung des eWpG durch das Zukunftsfinanzierungsgesetz* (Mohr Siebeck 2024) 21, doi:10.1628/978-3-16-163488-8.

34 Markus Kaulartz and Robin Matzke, 'Die Tokenisierung des Rechts' (2018) 45 *Neue Juristische Wochenschrift* 3278; Saitakis (n 23) 56.

In common law jurisdictions, when an individual unlawfully seeks to take possession of real property or obstruct another's possession, the actual possessor is entitled to seek **injunctive relief** from the court.³⁵ Specifically, two main types of injunctions may be granted³⁶: *prohibitory (negative) injunctions*, which restrain a party from undertaking a particular act, and *mandatory injunctions*, which compel a party to act. It is, after all, a well-established principle in common law that interim judicial protection should preserve the *status quo*³⁷ between the parties, rather than anticipate or substitute the final determination of rights.

Regarding interim protection under German law, the Zivilprozessordnung (ZPO)³⁸ provides two general forms of provisional judicial relief under §§ 935 and 940.³⁹ A distinction is made⁴⁰ between *Arrest*, which secures future enforcement of monetary (or potentially monetary) claims (§ 917(1) ZPO), and *einstweilige Verfügung*, which safeguards other rights (§ 935 ZPO) or seeks to temporarily regulate a disputed legal situation (§ 940 ZPO).⁴¹ The former (935) addresses threats to the future satisfaction of a non-monetary claim, while the latter (940) permits the temporary resolution of contested circumstances.⁴² Historically, § 940 ZPO is rooted in the *possessorium summarissimum*,⁴³ the precursor to modern possession-based interim remedies. Notably, the German ZPO does not contain specific provisions for interim protection of possession per se, unlike the Greek Code of Civil Procedure (Article 734), but rather emphasises the preservation of existing conditions, similar to the Swiss ZPO⁴⁴ (cf. §§ 261–269). More analogous to the

35 Dimitrios Tsirikas, 'Preliminary Judicial Protection' in Peter Gottwald (ed), *Litigation in England and Germany: Legal Professional Services, Key Features and Funding* (Gieseking E u W 2010) § 17, 107. On replevin, cf. Müller (n 3) 195-6.

36 Heinrich Nagel and Peter Gottwald, 'Internationaler einstweiliger Rechtsschutz' in *Internationales Zivilprozessrecht* (7 auf, Verlag Dr Otto Schmidt 2013) 798, doi:10.9785/ovs.9783504383510.798.

37 Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell 2013) 398.

38 German Code of Civil Procedure 'Zivilprozessordnung' (ZPO) (adopted 12 September 1950, amended 8 December 2025) <<https://www.gesetze-im-internet.de/zpo/BJNR005330950.html>> accessed 15 January 2026.

39 See also, Müller (n 3) 60.

40 Fritz Baur, *Studien zum einstweiligen Rechtsschutz* (Mohr Siebeck 1967) 46; Dieter Leipold, *Grundlagen des einstweiligen Rechtsschutzes* (Beck 1971) 62; Bernhard Wieczorek and Rolf A Schütze, *Zivilprozessordnung: Kommentar* (4th edn, De Gruyter 2019) before § 916, para 8; Hans-Joachim Musielak and Walter Voit (eds), *Zivilprozessordnung: ZPO* (Beck 2023) § 935, paras 2, 4; Gerhard May, *Die Schutzschrift im Arrest- und Einstweiligen-Verfügungs-Verfahren* (De Gruyter 1983).

41 Leipold (n 40) 75; Stephan Wendt, *Die einstweilige Räumungsverfügung des § 940a Abs 2 ZPO* (Mohr Siebeck 2015) doi:10.1628/978-3-16-167828-8.

42 Rekha R Thomas and Hans Putzo, *Zivilprozessordnung ZPO: Kommentar* (45th edn, Beck 2024) § 935, para 3.

43 BGB (n 4) §§ 861, 862; ZPO (n 38) § 940; Feldman (n 2) 91; see also, Leipold (n 40) 75; Nagel and Gottwald (n 36).

44 Isaak Meier, *Grundlagen des einstweiligen Rechtsschutzes im Schweizerischen Privatrecht und Zivilverfahrensrecht* (Schulthess Juristische Medien 1983) 298; Nicolas Fuchs, *Die Besitzschutzzklagen nach Art 927 ff ZGB* (Dike 2018) 104; Emil Stark and Barbara Lindenmann, *Berner Kommentar: Zivilgesetzbuch: Der Besitz, Art 919-941 ZGB* (4 Auf, Stämpfli 2016) 209.

Greek provisions are the Austrian ZPO §§ 454–459,⁴⁵ which govern possession-related interim measures in a targeted and detailed manner.

In Greek law, interim protection of possession and detention is governed by a specific procedural framework under Article 734 of the Greek Code of Civil Procedure (GrCCP),⁴⁶ which provides for a distinct category of provisional regulation of status. This provision constitutes a specialised form of interim judicial protection, explicitly designed to safeguard possession (*νομή*) and detention (*κατοχή*) against unlawful disturbance or dispossession.⁴⁷ Unlike general interim measures, Article 734 GrCCP reflects the particular importance of possessory relations within the Greek legal order by enabling courts to intervene swiftly and restore the factual control of the possessor or detentor without requiring a prior determination of substantive rights.

However, despite its procedural flexibility, the application of Article 734 GrCCP remains conceptually anchored in the traditional understanding of possession as physical control over a tangible object. As a result, its direct applicability to digital assets is not straightforward, given that such assets lack corporeality and are instead characterised by access-based control mediated through technological systems. While it may be argued that access to a digital account or control over cryptographic keys could functionally approximate the notion of possession, Greek procedural law has not yet explicitly recognised such forms of control as falling within the scope of Article 734. Consequently, the protection of digital assets under this provision would require a doctrinal extension, shifting from a strictly material conception of possession towards a broader understanding centred on effective control over access. Such an interpretative development would align Greek law with emerging trends in other jurisdictions, where courts increasingly prioritise functional control over formal classification in the context of interim judicial protection.

In this light, the effectiveness of interim protection in digital asset disputes depends less on the ontological classification of the asset and more on the court's ability to restore and preserve control over access. Unlike traditional possessory measures, digital interim relief must prioritise reversibility, as irreversible technical effects may, in effect, predetermine the outcome of the main proceedings. Consequently, procedural law requires targeted adaptations, including: explicit recognition of access-based control as a protectable factual situation capable of interim protection and cross-border coordination mechanisms for digital enforcement, acknowledging the inherently transnational nature of digital assets and

45 Eric Descheemaeker, *The Consequences of Possession* (Edinburgh UP 2014) 176–7. On Austrian law, cf Georg Kodek, *Die Besitzstörung: materielle Grundlagen und prozessuale Ausgestaltung des Besitzschutzes* (Manz 2002) 18; Müller (n 3) 94.

46 Greek Code of Civil Procedure ‘Κώδικας Πολιτικής Δικονομίας’ (adopted 24 October 1985, amended 28 July 2025) <<https://www.kodiko.gr/nomothesia/document/388111/p.d.-503-1985>> accessed 15 January 2026.

47 Konstantinos Papachristou-Dimitras, *Provisional Measures of Possession or Detention* (Sakkoulas 2025) [in Greek].

blockchain-based systems. Interim judicial protection must evolve from a possession-centred paradigm to a control-centred one, capable of responding to the realities of digital interaction. In doing so, procedural law remains faithful to its fundamental mission: preventing irreparable harm and containing arbitrary interference, whether through physical force or digital code.

Procedural fairness and judicial control cannot be achieved through technological self-help mechanisms, such as remote lockouts or automated enforcement. On the contrary, efficiency must be pursued within a framework of judicial supervision. First of all, it has been argued that interim measures can effectively protect digital asset holders, provided that courts are willing to recognise digital control as a form of legally relevant possession. This includes the temporary restoration of access rights, judicial orders addressed to platform intermediaries, and a cautious integration of technological tools under strict procedural safeguards.

Beyond doctrinal adaptation, technological tools may also enhance the effectiveness of interim judicial protection. In particular, artificial intelligence may be legitimately employed across a broad range of supportive judicial functions, provided that it neither substitutes judicial reasoning nor independently determines the outcome of proceedings. Indicatively, it may be used in electronic filing⁴⁸ and case management through AI-based systems, in the analysis of statistical data (predictive analytics) to map the course and duration of proceedings, in the automated drafting of pleadings through natural language processing tools, in algorithmic case-law research and the detection of conflicting judgments,⁴⁹ as well as in the assistance of litigants through digital legal assistants (“legal chatbots”) offering guidance, for example, on procedural matters. In this way, AI-assisted systems could facilitate the rapid identification of technically feasible interim measures, assess risks of asset dissipation, and map cross-border enforcement pathways.

48 CEPEJ, *Guidelines on Electronic Court Filing (e-Filing) and Digitalisation of Courts* (Council of Europe 2021).

49 Noteworthy is the Delfos system, an AI-based legal research environment enabling natural-language search of case law, judicial documents, and procedural materials. Delfos operates on a pilot basis and is fully interoperable with Fortuny, the central case-management system of the Spanish judiciary. Through this interoperability, judges and prosecutors may search not only jurisprudential databases but also pending and completed case files. Users may also upload their own documents, which are automatically processed and incorporated into the search corpus, facilitating cross-referencing and comparative analysis. A particularly significant feature is the automated summarisation of judicial documents, aimed at reducing administrative burden and enabling rapid comprehension of complex texts. The use of natural language enhances transparency and usability by enabling more direct, secure interaction with AI capabilities. See, ‘Spain: AI Rolled Out in Justice System as Part of the Digitalisation Strategy’ (*Oxford Institute of Technology and Justice*, September 2025) <<https://www.techandjustice.bsg.ox.ac.uk/research/spain>> accessed 15 January 2026.

3.3. The Boundaries Between Self-Help and Provisional Judicial Protection

Beyond the inherent impossibility of physical control over intangible assets, legal practice is increasingly confronted with cases of remote interference and obstruction of the possessor's powers through a wide range of smart devices,⁵⁰ such as smartphones or smart locks installed on residential doors or vehicles. For instance, a smart lock may automatically block a tenant's access to a rented apartment with a simple click, without any physical contact with the object, in the event of rent default, or may prevent a vehicle from being recharged. Additionally, so-called "starter interrupt devices," as well as embedded GPS and kill-switch systems,⁵¹ enable vehicle lessors to remotely prevent a car from being started in the event of unpaid instalments.

The German Federal Supreme Court (Bundesgerichtshof, BGH) has already ruled on such matters in its decision dated 26 October 2022,⁵² declaring unlawful the remote blocking of an electric car battery's charging capability and invalidating the relevant contractual clause authorising such action.

According to this clause, Renault reserved the right, upon premature termination of the contract and the lapse of a fourteen-day period, to block battery recharging via digital means. The BGH, affirming prior judgments of the Düsseldorf Regional Court (Landgericht)⁵³ and Higher Regional Court (Oberlandesgericht),⁵⁴ held that this remote action constituted an arbitrary disturbance of possession, amounting to prohibited self-help.

Thus, in the digital environment, provisional protection of possession or detention is increasingly called upon to bridge the gap between impermissible self-help and the demand for swift dispute resolution. In such a scenario, the tenant has a legitimate interest in securing the continued performance of the lease contract, for example, by seeking a rent reduction due to defects in the leased property, without risking the landlord unilaterally terminating the contract and locking the premises remotely. In this case, moreover, the smart device itself constitutes the object of possession, given that the software, while instrumental to the operation or control of the object, is not considered an asset subject to physical possession. In general, there are two main ways to examine software: either as an independent object [Software als Sache im Sinne], according to the German Civil Code (Article 90), or as part of a physical object [Sachqualität der Software aus der Sachqualität der Hardware bzw. der smarten Sache], which one can own. In this context, software is considered to depend on the physical object (such as a car or a mobile phone) that contains or uses it.⁵⁵

50 Linda Kuschel, 'Digitale Eigenmacht: Digitale Eingriffe in vernetzte Sachen als Herausforderung für den possessorischen Besitzschutz' (2020) 220(1) *Archiv Für Die Zivilistische Praxis* 98; Sander (n 8).

51 Sander (n 8) 30.

52 Case XII ZR 89/21 (Renault) (BGH, 26 October 2022); Sander (n 8) 118.

53 Case 12 O 63/19 (LG Düsseldorf, 11 December 2019).

54 Case I 20 U 116/20 (OLG Düsseldorf, 7 October 2021).

55 According to Sander (n 8) 132, the quality of the software object depends on the physical object (hardware) to which it is embedded or through which it operates.

3.4. Cross-Border Effect and Enforcement of Orders for Possessory or Detentive Provisional Measures

Under Articles 36–39 of the Brussels Ia Regulation (Regulation 1215/2012),⁵⁶ judgments given *inter partes* are recognised and enforced automatically in another Member State, without the need for any special procedure. However, even in the absence of international jurisdiction, courts of the Member State of origin may issue provisional measures in order to prevent irreparable harm to the applicant. In such instances, however, the provisional measure will have no cross-border effect and shall remain effective solely within the territory of the Member State of the issuing court.⁵⁷ Moreover, as is clear from the combined reading of Article 2(a) and Recital 33 of Regulation 1215/2012, ‘*only a measure ordered by a court which has jurisdiction as to the substance of the matter may be regarded as a ‘judgment’ the free circulation of which must be ensured under this Regulation.*’⁵⁸

Consequently, for the purposes of Regulation 1215/2012, the term “judgment” encompasses only provisional measures and interim orders that are granted by a court having international jurisdiction over the substance of the case. It follows, therefore, that provisional measures ordered by a court lacking such jurisdiction are devoid of cross-border effect and remain enforceable exclusively within the Member State of origin.⁵⁹

Although the Brussels Ia Regulation appears to restrict the cross-border enforceability of provisional measures, inasmuch as such measures must originate from a court having jurisdiction as to the merits in order to be capable of transnational recognition, it simultaneously broadens the concept of a recognisable and enforceable “judgment” to include also *ex parte* orders for provisional measures. This results from the amended Article 2(a), second subparagraph, of Regulation 1215/2012. Thus, *ex parte* provisional measures may now be recognised and enforced in other Member States, provided that the issuing court possesses jurisdiction under the Regulation as to the substance of the matter, and further, that the order has been served upon the defendant prior to its enforcement. In such cases, both positive and negative provisional *res judicata* may arise.

56 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.

57 Ibid, art 2(a), recital 33.

58 Ibid, Case C-581/20 *Skarb Państwa Rzeczypospolitej Polskiej reprezentowany przez Generalnego Dyrektora Dróg Krajowych i Autostrad v TOTO SpA - Costruzioni Generali and Vianini Lavori SpA* (CJEU, 6 October 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CJ0581>> accessed 15 January 2026.

59 Regulation (EU) No 1215/2012 (n 56) recital 33; also, art 27(3). See also, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1, art 34(3).

It should also be noted that Regulation 1215/2012⁶⁰ provides for specific exceptions where recognition or enforcement of a judgment issued in another Member State may be refused, as set out in Articles 45 (recognition) and 46 (enforcement). In particular, Article 45(1)(c) provides that, upon application by any interested party, recognition shall be refused “if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed.” As a result, the judgment rendered in the Member State of recognition or enforcement shall take precedence, regardless of whether it precedes or follows the judgment whose recognition or enforcement is sought.

Lastly, where the dispute involves non-EU States or concerns specific categories of matters that fall outside the scope of Regulation 1215/2012, other international instruments may apply, such as the Lugano Convention (in relation to EEA States), and bilateral treaties on judicial cooperation concluded between the States concerned.

4 CONCLUSIONS

This study has examined the capacity of traditional civil procedural mechanisms to respond to disputes involving digital assets, with particular emphasis on interim judicial protection and the concept of possession. The analysis has demonstrated that classical possessory frameworks, while still relevant, are insufficient when applied to purely digital environments characterised by access-based control and technological mediation.

The comparative analysis reveals a clear divergence between legal systems. Common law jurisdictions, particularly the United Kingdom, display greater doctrinal flexibility in recognising cryptocurrencies and other digital assets as property capable of protection through interim measures. In contrast, civil law systems, such as Germany and Greece, remain more closely tied to the requirement of tangibility, which limits the direct application of traditional possessory remedies. Nevertheless, even within civil law frameworks, there is a growing functional shift toward protecting forms of control that resemble possession in their practical effects.

The central finding of this article is that effective judicial protection in the digital era depends less on the formal classification of assets and more on the court’s ability to restore and preserve control over access. Interim measures can fulfil this function, provided that they are adapted to address digital realities, including the involvement of intermediaries, the reversibility of technical actions, and the cross-border nature of digital assets.

At the same time, the analysis highlights structural limitations, particularly in relation to cross-border enforcement and the fragmentation of legal approaches within the European

60 Regulation (EU) No 1215/2012 (n 56) art 27(3). See also, Council Regulation (EC) No 44/2001 (n 59) art 34(3).

legal space. These challenges underline the need for greater doctrinal clarity and, potentially, legislative intervention at the EU level.

In this context, the reconceptualisation of possession as access-based factual control is a necessary step to maintain the functional relevance of civil procedural law. Such an approach allows courts to respond effectively to digital interference while preserving the fundamental principles of procedural fairness and judicial oversight. Ultimately, the evolution of interim judicial protection must ensure that legal systems remain capable of preventing irreparable harm, whether in physical or digital form.

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Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that their opinion and views expressed in this manuscript are free of any impact from any organisations.

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EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** –Robert Reddin.
Ukrainian language Editor – Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Papachristou-Dimitras K, ‘Judicial Efficiency in the Era of Digital Assets: Perspectives on Smart Technologies’ (2026) 9(2) Access to Justice in Eastern Europe 139-60 <<https://doi.org/10.33327/AJEE-18-9.2-a0001973>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a0001973>

Summary: 1. Introduction. – 2. Methodology. – 3 Results and Discussion with Analysis of Legal Issues. – 3.1. *Possession of Digital Objects*. – 3.2. *Interim Protection of Possession and Provisional Regulation of Status*. – 3.3. *The Boundaries Between Self-Help and Provisional Judicial Protection*. – 3.4. *Cross-Border Effect and Enforcement of Orders for Possessory or Detentive Provisional Measures*. – 4. Conclusion.

Keywords: *Interim measures, Civil procedural law, Possession, Digital possession, Possessorische Besitzschutz, Metaverse*

DETAILS FOR PUBLICATION

Date of submission: 24 Jan 2026

Date of acceptance: 14 Apr 2026

Publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in the first round: 3 reports

Number of revision rounds: 1 round with major revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

This article was prepared with the assistance of AI tools. Specifically, ChatGPT (OpenAI) was used for language refinement during the drafting process (version reviewed: January 2026). The author confirms that all content, arguments, and conclusions were generated independently and remain their sole responsibility. No AI tool was used for generating original research findings or analysis.

FUNDING AND APC STATEMENT

The APC was fully waived by the publisher under the AIP funding strategy, in accordance with the AJEE Charges Policy for early-career researchers.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЕФЕКТИВНІСТЬ СУДОВОЇ СИСТЕМИ В ЕРУ ЦИФРОВИХ АКТИВІВ: ПЕРСПЕКТИВИ SMART-ТЕХНОЛОГІЙ

Константінос Папахрісту-Дімітрас

АНОТАЦІЯ

Вступ. Розширення цифрових активів дедалі більше ставить під сумнів ефективність механізмів судового захисту, традиційно розроблених для матеріальних благ. Криптовалюти, smart-технології та цифрове контрольоване середовище порушують усталені уявлення про володіння, правозастосування та тимчасове правозастосування.

Методи. У дослідженні використовується доктринальна та порівняльно-правова методологія, що зосереджена на окремих юрисдикціях (Німеччина, Греція та Велика Британія) разом із відповідним законодавством ЄС. У ньому розглядається, як ці системи концептуалізують володіння, регулюють тимчасовий судовий захист та вирішують питання цифрового контролю в технологічно опосередкованих середовищах.

Результати та висновки. Аналіз демонструє, що традиційний захист володіння пропонує корисну, але лише частково адаптовану основу для цифрових активів. У той час як юрисдикції загального права демонструють більшу гнучкість у визнанні криптовалют та NFT майном, що підлягає тимчасовому захисту, системи цивільного права залишаються більш обмеженими вимогою матеріальності. Однак усі досліджені системи все більше покладаються на функціональні еквіваленти володіння, зокрема, через контроль на основі доступу. У статті стверджується, що ефективний судовий захист цифрових активів вимагає переосмислення володіння як контролю над доступом, а не фізичного утримання. Тимчасові судові заходи можуть забезпечити належний захист за умови, що суди готові втручатися, видаючи накази, спрямовані проти посередників та технологічних інфраструктур. У дослідженні зроблено висновок, що майбутній розвиток доктрини та законодавчі роз'яснення на рівні ЄС необхідні для забезпечення правової визначеності та транскордонної ефективності у спорах щодо цифрових активів.

Ключові слова. Тимчасові заходи, цивільне процесуальне право, володіння, цифрове володіння, посесорний захист, метавесвіт.

Research Article

BRIDGING THE GAP: ACCOUNTABILITY AND RISK-BASED REGULATION IN KAZAKHSTAN'S ARTIFICIAL INTELLIGENCE LEGISLATION

**Yenlik Nurgaliyeva, Aruzhan Baimakhanova*,
Svetlana Zharkenova and Guzal Galiakbarova**

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000187>

Date of submission: 06 Jan 2026

Date of acceptance: 18 Feb 2026

Online First Publication: 20 March 2026

Last Publication: 20 May 2026

Disclaimer:

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Yenlik Nurgaliyeva, Svetlana Zharkenova
and Guzal Galiakbarova

ABSTRACT

Background: This article addresses the critical challenges of establishing a robust legal regime for artificial intelligence (AI) in the wake of the European Union's Artificial Intelligence Act (Regulation (EU) 2024/1689, EU AI Act) and the Law of the Republic of Kazakhstan 'On Artificial Intelligence' (2025 or Kazakhstan AI Law). Despite these legislative efforts, scholarly debates persist regarding AI's legal status, personality, and protective functions. This study highlights a necessary shift from reactive regulation to a preventive, risk-based model in which legal norms adapt to algorithmic behavior before conflicts emerge. The research aims to identify regulatory gaps in the Kazakhstani framework relative to European standards, specifically in the areas of fundamental rights protection and judicial accountability.

Method: The study employs a descriptive-analytical, comparative research methodology. A legal doctrinal analysis of the EU AI Act and the Kazakhstan AI Law was conducted to

identify existing regulatory gaps. The formal-legal method was used to evaluate definitions of AI and its legal characteristics. Content analysis of contemporary legal scholarship (2015–2025) provided the basis for legal modeling of the ‘electronic personhood’ status. The research also utilizes a systems approach to categorize AI risks—minimal, medium, and high—within the public administration and law enforcement sectors.

Results and Conclusions: The analysis reveals that while the EU AI Act establishes a comprehensive ban on high-risk technologies such as mass biometric surveillance and predictive policing, the Kazakhstan AI Law lacks similar prohibitions, potentially leading to discriminatory law enforcement practices. The study concludes that recognizing AI as an ‘electronic personhood’ with a hybrid legal capacity is essential for ensuring accountability for autonomous decisions. Specific legislative amendments are proposed for the Kazakhstan AI Law, including: 1) mandating independent expert assessments for high-risk systems; 2) prohibiting the exchange of state secret databases via AI platforms; 3) establishing algorithmic accountability for providers and operators. The research emphasizes that balancing innovation with digital accountability is the key challenge for modernizing the national digital legal order.

1 INTRODUCTION

The impact of AI on fundamental human rights is of great interest to legal scholars, who are concerned about the potential adverse effects of AI on humans and the need to develop legal mechanisms to protect human rights when using AI.

This discussion of the place and role of artificial intelligence in the legal system is among the central areas of legal research. Over the past decade, there has been an active development of new legal doctrines concerning the status of AI as a subject and an object of law, the ethical foundations of algorithmic management, and institutional mechanisms for the legal regulation of digital technologies. The researchers emphasize that AI is not just a technical phenomenon, but one that transforms the fundamental categories of law and order—subjectivity, responsibility, the expression of will, and legal personality.¹

The EU AI Act adopted by the European Union in 2024 failed to solve all the problems related specifically to the legal regulation of AI, which is confirmed by ongoing

1 Joanna J Bryson, Mihailis E Diamantis, and Thomas D Grant, ‘Of, For, and By the People: The Legal Lacuna of Synthetic Persons’ (2017) 25 Artificial Intelligence and Law 273, doi:10.1007/s10506-017-9214-9.

discussions about its legal regime of use, regulatory methods, areas of its application, as well as its protective properties.²

In her capacity as the Rapporteur for the Committee on Legal Affairs, Mady Delvaux-Stehres argued that "robots can no longer be considered as simple tools in the hands of other actors. The more they are able to learn and take autonomous decisions, the less they are just a tool." This paradigm shift leads to the recommendation of "creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic personhoods responsible for making good any damage they may cause." This status would specifically apply to cases where robots make autonomous decisions or otherwise interact with third parties independently.³

At the same time, according to A. Hars, it has recently been impossible to implement legal regulation of AI, since, due to its complexity, opacity, and rapidly changing 'nature,' it will undoubtedly be challenging to establish regulatory rules with their transparency, certainty, and explicitness. In addition, possible failures in AI's work will not meet regulatory expectations, may harm, undermine confidence in the legal institutions they use, and, ultimately, affect its development and use.⁴

In this regard, the EU AI Act serves as a primary benchmark for our study, providing a comparative framework to evaluate the normative gaps in the recently adopted Kazakhstan AI Law.⁵ This article critically analyzes the emerging legal regime in Kazakhstan, focusing on the transition toward a risk-based regulatory model and the contentious proposal to grant AI the status of an 'electronic personhood' to ensure accountability and the protection of fundamental rights.

- 2 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L <<http://data.europa.eu/eli/reg/2024/1689/oj>> accessed 5 January 2026; *EU Artificial Intelligence Act: Up-to-date developments and analyses of the EU AI Act* <<https://artificialintelligenceact.eu/>> accessed 5 January 2026.
- 3 European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) [2018] OJ C 252/239; Nathalie Nevejans, *European Civil Law Rules in Robotics: Study* (EU 2016) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2016\)571379](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2016)571379)> accessed 21 February 2026.
- 4 András Hárs, 'AI and International Law: Legal Personality and Avenues for Regulation' (2021) 62(4) Hungarian Journal of Legal Studies 320, doi:10.1556/2052.2022.00352.
- 5 Law of the Republic of Kazakhstan No 230-VIII 'On Artificial Intelligence' (adopted 17 November 2025) [in Kazakh] <<https://adilet.zan.kz/kaz/docs/Z2500000230>> accessed 5 January 2026.

2 METHODOLOGY

This study employs a comprehensive descriptive-analytical and comparative research framework designed to evaluate the legal challenges posed by artificial intelligence (AI) within the digital legal order. To ensure a multidimensional examination, the research is organized into the following methodological stages:

The choice of EU Law as the main reference is due to its role as the world's first comprehensive regulatory standard, defining the global trajectory of AI regulation through risk assessment. The primary research tool is the comparative legal method, used to identify divergences and normative gaps between the European Union's Artificial Intelligence Act (Regulation (EU) 2024/1689, *EU AI Act*) (hereinafter – EU AI Law) and the Law of the Republic of Kazakhstan ‘On Artificial Intelligence’ (2025). This comparison extends beyond textual differences to a doctrinal inquiry into the underlying regulatory models—liberal, ethical-normative, and technocratic—to determine their suitability for the Kazakhstani legal tradition.

The method of legal modeling is applied to construct the conceptual framework for the ‘electronic personhood’ status. This involves a functional approach that prioritizes algorithmic accountability over purely technical definitions, shifting the focus from AI as a ‘pile of metal’ to AI as an autonomous legal category capable of bearing responsibility.

A systems approach was utilized to analyze AI as an integrated complex of software-hardware architecture and cognitive-functional elements. Content analysis of global scholarly literature (2015–2025) and international frameworks, such as UNESCO and OECD recommendations, provided the basis for evaluating emerging concepts, including predictive policing and risk-based regulation.

The study adopts a proactive legal design paradigm, to evaluate how transparency and the duty of explainability can be integrated into the legal framework to ensure effective judicial oversight. This methodological focus ensures that the proposed legislative amendments are designed to balance technological innovation with the protection of fundamental human rights.

3 EVALUATING THE KAZAKHSTAN AI LAW THROUGH THE PRISM OF THE EU AI ACT

3.1. Comparative Analysis of AI Definitions and Risk-Based Regulation

Economic growth and the modernization of national infrastructure are increasingly driven by the deep integration of digital technologies and AI across key industrial and financial sectors. Under these conditions, legal certainty in AI's interactions with humans is essential, ranging from access to ‘data’ to ensuring the security, confidentiality, and quality of that

'data.' The guarantee of security is directly related to the protection of human rights and freedoms, not only in the application of AI but also in its development, which, in turn, objectively requires ensuring the rule of law.

To develop effective legal regulation, special attention should be paid to the concept of 'artificial intelligence' and its features in the legal sense.

The definitions of AI in the scientific literature do not meet the requirements for legal definitions, as they are excessively vague and comprehensive, and therefore, their practical application is questionable.

The evolution of legal thought necessitates a shift from technical, hardware-oriented descriptions of artificial intelligence to a functional and risk-based framework.

Early definitions, such as those focusing on 'cybernetic computer-software-hardware systems', are increasingly viewed as outdated and overly localized, offering limited utility for determining modern civil liability.

In contrast, the European approach, epitomized by the EU AI Law, defines an AI system as a machine-based system designed to operate with varying levels of autonomy, focusing on its ability to generate outputs, such as predictions, recommendations, or decisions that influence physical or virtual environments.

This shift is mirrored in the OECD guidelines, which emphasize the system's capacity for 'inference' to achieve explicit or implicit objectives.⁶

Furthermore, the UNESCO Recommendation frames AI as an information ecosystem, prioritizing human rights and non-discrimination.⁷ Aligning national legislation with these international standards is crucial for bridging the 'digital divide' and ensuring that AI is treated not merely as a 'pile of metal,' but as a sophisticated legal construct requiring a robust framework for liability and insurance.

When revealing the essence of the term 'artificial intelligence', in our opinion, there is no need to describe AI's abilities and capabilities in detail; instead, focus on the signs of AI. Without identifying which, it is impossible to give an understandable definition of AI.

Also, the definition of AI given in the 'AI Act' cannot be called successful, where AI is understood as a 'machine system' designed to work with various levels of autonomy and which can be adaptive after deployment, and which, to achieve explicit and implicit goals, draws conclusions based on the input data received on how to generate output

6 OECD, *Recommendation of the Council on Artificial Intelligence* (OECD/LEGAL/0449, OECD 2025) <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>> accessed 21 February 2026.

7 UNESCO, *Recommendation on the Ethics of Artificial Intelligence 2021* (SHS/BIO/REC-AIETHICS/2021, UNESCO 2021) <<https://unesdoc.unesco.org/ark:/48223/pf0000380455>> accessed 21 February 2026.

data, such as forecasts, content, recommendations, or decisions that may affect physical or virtual environments.⁸

In this definition, we also do not find significant signs of AI, such as the ability of AI to simulate human cognitive functions: to simulate the most complex functions of the brain, through which the process of rational cognition of the world is carried out, including self-learning and the search for solutions without a predefined algorithm; comparability of the result of AI with the results of human intellectual activity, etc.

The Kazakhstan AI Law, Art. 1, paragraph 3, defines the following:

‘Artificial intelligence is a functional ability to simulate cognitive functions characteristic of humans, providing results comparable to or superior to the results of human intellectual activity.’⁹

This definition has not been finalized linguistically and does not reflect the essential features of AI.

The answer to the question of what the main policy directions are in the field of legal regulation and the use of AI was given in the Stanford University report ‘Artificial Intelligence and Life in 2030’:

- ‘1. Define a path toward accruing technical expertise in AI at all levels of government.
2. Remove the perceived and actual impediments to research on the fairness, security, privacy, and social impacts of AI systems.
3. Increase public and private funding for interdisciplinary studies of the societal impacts of AI.’¹⁰

Of course, these areas of AI development and use are not enough for the safe coexistence of AI and society, and therefore, they can be supplemented with the following:

- ensuring that people are informed about the benefits and risks associated with using AI;
- training of highly qualified specialists in the field of AI;
- ensuring the certification of AI systems and a ban on the production and use of non-certified systems;
- development of mechanisms of tort and joint liability for the use of non-certified systems.

8 Regulation (EU) 2024/1689 (n 2) para 12.

9 Law of the Republic of Kazakhstan No 230-VIII (n 5) art 1, para 3.

10 Peter Stone and others, ‘Artificial Intelligence and Life in 2030: The One Hundred Year Study on Artificial Intelligence’ (arXiv:2211.06318, 31 October 2022) 47, doi:10.48550/arXiv.2211.06318.

The purpose of the law adopted by the European Union is to protect fundamental rights, democracy, the rule of law, and environmental sustainability from the risks posed by high-risk artificial intelligence. That is, the primary focus is on protecting fundamental human rights from AI, which, in turn, is called high-risk. The Kazakh law does not have this goal. However, it proclaims, as one of the basic principles of state regulation of public relations in the field of artificial intelligence, the principle 'as the priority of human well-being, freedom of will in decision-making.'¹¹ As a well-known fact, the purpose of any law is a specific result that the legislator strives for, and the principle is the general idea underlying the law. Consequently, the basis of legal regulation is not only the ideas laid down in the law, but a specific result. Unfortunately, laws do not always clearly define the primary purpose of the law, but there is a 'substitution' of principles, objectives, etc., by categories.

Despite the difficulties associated with legal regulation, Kazakhstan has adopted the AI Law, the effectiveness of which will be demonstrated by its practical application. Thus, Chapter 4 'Artificial intelligence systems', in particular, Article 17 'Legal regime of artificial intelligence systems'

(voluminous in content) divides artificial intelligence systems, depending on the degree of impact on the security of society, users, and the state, into three categories: minimal, medium, and high risk. At the same time, the assignment of artificial intelligence systems to a specific category is determined by their owner in accordance with the principles of information object classification. Unlike Article 5 of the EU Law on AI, which establishes an exhaustive list of prohibited practices (in particular, real-time remote biometric identification), Article 17 of the Law of the Republic of Kazakhstan on AI focuses on risk classification, leaving issues such as crime prediction outside the scope of direct prohibition. For clarity, we will construct a table.

Table 1. Comparative table of prohibited practices

No	Type of prohibition	EU AI Law ¹²	Kazakhstan AI Law ¹³
1	Social screening Clause "c" of paragraph 1 of Article 5 of the EU AI Law	Placing on the market, commissioning, or using an AI system that exploits a person's vulnerability due to their age, disability, or other specific social or economic situation is prohibited.	Article 17 of the Law of the Republic of Kazakhstan on AI Paragraph 3 prohibits the creation and operation of AI systems possessing one of the creative functional capabilities within the territory of the Republic of Kazakhstan;

11 Law of the Republic of Kazakhstan No 230-VIII (n 5) art 4, para 5.

12 Regulation (EU) 2024/1689 (n 2).

13 Law of the Republic of Kazakhstan No 230-VIII (n 5).

No	Type of prohibition	EU AI Law ¹²	Kazakhstan AI Law ¹³
		It is completely prohibited for the state and private individuals.	The assessment and classification of individuals or groups of individuals for a specific period based on their social behavior or known, assumed, or predicted personal characteristics is prohibited, except in cases stipulated by the Law of the Republic of Kazakhstan (clause 2, paragraph 3 of Article 17). The exploitation of an individual's moral and or physical vulnerability due to age, disability, social status, or any other circumstances for the purpose of causing or threatening to cause harm to an individual is also prohibited (clause 2, paragraph 3 of Article 17).
2	Biometric categorization Clause "b" of paragraph 1 of Article 5 of the EU AI Law	The placing on the market, putting into operation for a specific purpose, or use of biometric categorization systems that classify individuals based on their biometric data to conclude their race, political views, trade union membership, religious or philosophical beliefs, convictions, sex life, or sexual orientation is prohibited. The use of remote biometric identification systems in "real-time" mode in public places for law enforcement purposes is prohibited.	Classifying individuals based on their biometric data to conclude their race, political views, religious affiliation, or other circumstances (criteria) for the purpose of discriminating against them in any way is prohibited. (clause 5, paragraph 3 of Article 17 of the Law of the Republic of Kazakhstan)

No	Type of prohibition	EU AI Law ¹²	Kazakhstan AI Law ¹³
3	Manipulative methods Clause "a" of Article 5 of the EU AI Law	It is prohibited to place on the market, commission, or use AI systems that use subconscious techniques beyond human creation or purposefully manipulative or misleading methods to significantly distort personal behavior that impairs a person's ability to make an informed decision.	It is prohibited to use subconscious, manipulative, or other methods that use the behavior of an individual and limit the ability to make informed decisions or force them to make decisions that may cause harm or create a threat of harm (clause 1, paragraph 3 of Article 17 of the Law of the Republic of Kazakhstan)
4	Predictive methods based on profiling (predictive policing) Clause "da" of paragraph 1 of Article 5 of the EU AI Law)	It is prohibited to place on the market, put into operation, or use AI to assess the risk of individuals in order to assess or predict the risk of an individual committing a criminal offense based solely on profiling an individual or evaluating their personal qualities and characteristics. This prohibition does not apply to AI systems used to support human assessment, which is already based on objective and verifiable facts related to criminal activity.	Not mentioned.
5	Methods for determining emotions Clause "dc" of paragraph 1 of Article 5 of the EU AI Law	Placing on the market, commissioning, and using AI systems to determine an individual's emotions in workplaces and educational institutions are prohibited. Exception: It is allowed to use AI for medical or safety reasons.	Clause 6, paragraph 3 of Article 17 of the Law of the Republic of Kazakhstan: It is prohibited to determine the emotions of an individual without his consent, except in cases provided for by the laws of the Republic of Kazakhstan.

As shown in Table 1, the EU AI Law contains categorical prohibitions on unacceptable uses of AI. Some of these prohibitions are reflected in paragraph 3 of Article 17 of the Law of the Republic of Kazakhstan, although not in a categorical form. Thus, the prohibition of social screening (clause 2, paragraph 3 of Article 17) and methods of determining emotions (clause 6, paragraph 3 of Article 17) are prohibited by law, but may be supplemented by departmental regulatory legal acts or contain exceptions to legislative rules, which, in our opinion, should not be allowed. The law should be of direct effect, especially in terms of prohibitions; i.e., it should contain legal provisions that are directly applicable, without the need to adopt additional clarifying regulatory legal acts. For some reason, the ban on predictive policing was not reflected. This is not accidental, as lawmakers considered it possible to use AI in law enforcement, although this contradicts international standards. After all, it is known that AI modules can inherit the bias of historical crime data, which can lead to discriminatory police work methods.

3.2. The Doctrine of 'Electronic personhood' and Algorithmic Accountability

The difficulties of legal regulation of AI are highlighted in Ruschemeier's article, which focuses on humanity overall attitude towards AI. In her opinion, on the one hand, AI is charged with solving humanity's most serious problems of without taking into account the human factor, i.e., its role is overestimated; on the other hand, the impact of 'big data' on man-made social, political, and other structures is underestimated. Given that AI systems pose different problems depending on the subject of use and the purpose of use, he considers it impossible to formulate a single comprehensive definition for 'algorithms' of 'AI'. She suggests developing various characteristics of various algorithms and applications of AI, and ways to use them in practice. Taking into account these problems, he justifies the need for legal regulation of AI, which would contain effective ways to manage them and, instead of a single comprehensive definition of the role of 'AI' algorithms, puts forward his position, which is to develop separate characteristics of various AI algorithms and applications and ways to use them in practice.¹⁴ This proposal should be supported since in reality, practice needs not so much general legal regulation as specialized regulation that identifies the specifics of AI, taking into account its application industries.

Further, Ruschemaer suggests three approaches to the possible legal regulation of AI by legal norms: the first approach is objective regulation, in which AI will be in the situation in which it currently finds itself; the second approach is the introduction of minor changes to legislation; and, finally, the third approach is the possibility of providing AI with personality status.¹⁵

14 Hannah Ruschemeier, 'AI as a Challenge for Legal Regulation – The Scope of the Artificial Intelligence Act' (2023) 23(3) ERA Forum 361, doi:10.1007/s12027-022-00725-6.

15 *ibid*

We should pay attention to the second and third approaches, since it is impossible to constantly 'keep' AI static; it is rapidly developing. We should take a closer look at the third approach while making minor changes to the legislation. In this regard, it is impossible not to turn to the opinion of Hars, who proposes to provide AI not with a full, but with a semi-status, the essence of which is that AI will receive the status 'in portions', i.e., rights and obligations will be granted to it as necessary, with mandatory justification for their provision. That is to assign legal personality to AI in accordance with human needs.¹⁶

A group of scientists advocating the endowment of AI with legal capacity, i.e., to be a subject of legal relations (to have rights and responsibilities), does not take into account that AI is currently in the process of formation and development, and recognition of legal personality for AI is unlikely to be implemented in practice.

One can consider awarding AI a hybrid legal capacity, i.e., one that combines elements of both an individual and a legal entity. Recently, there has been a shift away from treating AI solely as an object of law, in which it has only property rights. In the legal literature, the prevailing position is to recognize AI in the distant future as a legal entity or formally award it legal status.

The uncertainty in matters of legal personality stems from the fact that AI and its properties have not been sufficiently studied, not only from a legal perspective but also as a phenomenon, despite the benefits of AI for humanity and society being recognized. One thing is known that 'AI differs from conventional computer algorithms in that it can train itself and, based on its experience, can act differently in similar situations depending on previously performed actions.'¹⁷

The heterogeneity of AI makes it possible to divide them into two types: conventional AI, which ensures the creation of new scientific and technical products for all spheres of public life, and universal AI, which has significantly greater opportunities to influence public relations involving individuals and legal entities, which objectively requires their differentiated legal regulation.

Despite the uncertainty in establishing AI's legal personality, it should be recognized that AI is a legal category, if only because of the need to develop a concept that provides for AI's liability for damage caused by its actions against individuals and legal entities.

Thus, there are three leading positions of scientists regarding the status of AI: 1) AI is a subject of law and is close to an individual in content; there is a proposal to introduce a separate legal status of an 'electronic personhood'; 2) AI is an object of law and should be equated with animals in status, i.e. it is property; 3) AI is only a technical means.

16 Hárs (n 4).

17 Paulius Čerka, Jurgita Grigienė and Gintarė Sirbikytė, 'Liability for Damages Caused by Artificial Intelligence' (2015) 31(3) Computer Law & Security Review 376, doi:10.1016/j.clsr.2015.03.008.

The most appropriate way to characterize AI is to recognize it as a status of ‘electronic personhood’ with hybrid legal capacity, which is necessary not as a technical formality, but as a mechanism for distributing algorithmic responsibility. The proposed status will enable AI to make independent decisions, interact with other actors, and most importantly, be responsible for its autonomous decisions. Establishing legal responsibility is objectively necessary, as AI activities pose significant risks, including breaches of data security and confidentiality, targeted attacks, and serious consequences for users due to unauthorized access to personal data. It is the risks of using AI that require a responsible approach to the use of AI and the creation, on the one hand, of ‘adequate legal protection of fundamental human rights and, on the other hand, conditions for the development of innovation. The balance between security and innovation will be a key challenge to the implementation of the new EU law.’¹⁸

Undoubtedly, the EU AI Act has become the basis for regulating neural networks worldwide, including Kazakhstan. Kazakhstan's current ‘Concept for the Development of Artificial Intelligence for 2024-2029’¹⁹ has established benchmarks for reaping the benefits of AI technologies in the short- and medium-term, as well as for preparing for potential long-term challenges. It also stipulates that AI technologies should not discriminate against anyone or violate privacy, personal, or family secrets. Unfortunately, this Concept mentions the liability of AI system providers and operators for harm caused to third parties. The ‘Act on AI’ only provides for fines for failure to comply with established regulations governing the operation of AI systems, for non-compliance with established requirements, and for failure to provide information or for providing false or incomplete information about the system's operation to the authorized body. As can be seen, none of the aforementioned documents address who is responsible for decisions made by AI. Kazakhstan's law partially fills this gap by establishing civil and administrative liability for these actions, but it does not specify the mechanisms for their implementation.

In the Anglo-American legal tradition, by contrast, researchers' attention is focused on legal responsibility for AI's actions. Ryan Calo notes that algorithmic autonomy creates ‘legal blind spots’ where classical institutions of civil, administrative, and criminal responsibility lose their effectiveness.²⁰ The scientist introduces the Concept of ‘moral crumple zones’, a metaphor describing how responsibility for the actions of autonomous systems is actually shifted to the people involved in their operation, regardless of the actual degree of control. Continuing this thought, Joanna Bryson argues that recognizing AI as a legal entity is

18 Asel Imangalieva and Dauren Karashev, ‘Issues of Legal Personality of Artificial Intelligence: Responsibility of Artificial Intelligence in Kazakhstan’ (PRG, 28 March 2024) <https://prg.kz/document/?doc_id=34826280> accessed 5 January 2026.

19 Resolution of the Government of the Republic of Kazakhstan No 594 ‘Concept for the Development of Artificial Intelligence for 2024–2029’ (adopted 24 July 2024) [in Kazakh] <<https://adilet.zan.kz/kaz/docs/P2400000592>> accessed 5 January 2026.

20 Ryan Calo, ‘Robotics and the Lessons of Cyberlaw’ (2015) 103(3) California Law Review 513.

unacceptable, as it would lead to 'blurring accountability' and undermine the principle of individual responsibility.²¹

Particular attention is paid to algorithmic accountability, which entails transparency in decision-making by machine systems. European authors emphasize that the duty of explainability must be integrated into the legal framework of AI, as without it, effective judicial and administrative oversight is impossible.²²

It follows from this that, as a rule, the legal impact on public relations arises as the need to solve a problem, whereas preventive regulation is aimed at preventing offenses. Therefore, the strategic objective of legal regulation of AI is to ensure that existing norms are ready to prevent conflicts. At the same time, the transparency of decision-making by machine systems is of great importance.

As shown by the positions of the scientists described above, the optimal model of legal regulation has not yet been developed, indicating the complexity of the AI object we are studying.

In our opinion, especially in the context of the positions of scientists that have not been confirmed by practice, it is impossible to unequivocally answer the question of endowing AI with legal personality, since AI lacks several essential features of legal personality that a person possesses – this is assertive behavior (to feel, assert, defend, etc.). AI, imitating human behavior, at the same time cannot identify with a person.

3.3. Global Trends and Institutional Adaptation

Susskind draws attention to the institutional consequences of introducing AI into the legal sphere, noting that traditional professions are losing their monopoly on legal knowledge. He argues that the strategic goal of the legal system is to shift from reactive regulation to proactive legal design, where legal norms adapt to the behavior of algorithms even before a conflict arises.²³

Analyzing the 'EU AI Law,' Lucaj et al. note that regulation alone will not be sufficient if additional tools are not in place throughout the entire lifecycle: testing, documentation and reliability practices, auditing, and interdisciplinary training. Further AI research should concern mandatory audits throughout the entire lifecycle; conducting technical expertise in government institutions and developing infrastructure and tools for accredited certification and harmonized standards.²⁴

21 Bryson, Diamantis, and Grant (n 1).

22 Karen Yeung, 'Algorithmic Regulation: A Critical Interrogation' (2018) 12(4) Regulation & Governance 505, doi:10.1111/rego.12158.

23 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (3rd edn, OUP 2023) doi:10.1093/9780192864727.001.0001.

24 Laura Lucaj and others, 'TechOps: Technical Documentation Templates for the AI Act' (arXiv:2508.08804v1, 12 August 2025) doi:10.48550/arXiv.2508.08804.

We should note that several foreign studies address ethical principles and regulatory mechanisms of algorithmic management. Floridi and Cowls proposed the Concept of five universal principles of responsible AI—benevolence, harm avoidance, autonomy, justice, and explainability.²⁵ These principles have served as the basis for some international documents, including the UNESCO Recommendations on AI Ethics (2021) and the OECD Framework Policy.²⁶ Karen Yeung develops the idea of algorithmic governance, understanding it as a system of regulatory management of citizens' behavior through codes and algorithms, which transforms the classical model of public regulation.²⁷

In EU Law, all AI-based systems are classified by risk level: unacceptable, high, limited, and minimal. Unacceptable risk is prohibited; high risk has eight categories; limited risk has a fixed, predetermined maximum amount of possible damage; and minimal risk is practically unregulated. The Kazakhstan AI Law defines three levels of risk without detailing: high, medium, and minimal risk, categories that the Government of the Republic of Kazakhstan determines.

Thus, EU AI Law contains:

- misuse of images of people from the Internet or from surveillance cameras to create facial recognition databases;
- recognizing emotions in the workplace and in educational institutions, conducting social ratings, manipulating human behavior, or exploiting its vulnerability;
- predictive policing (predicting the future behavior of someone or something); predictive activities when crimes are predicted by artificial intelligence.

At the same time, law enforcement agencies can use a biometric identification system to search for a missing person or prevent a terrorist attack. However, in this case, they need to obtain judicial or administrative permission and strictly observe security measures. Mass biometric surveillance in real time is prohibited. In addition, the law strictly regulates generative AI and high-risk AI-based systems.

EU law grants citizens the right to file complaints about AI systems and receive clarifications about decisions that affect their rights. AI systems must also respect copyright, and artificial or processed images, audio, or video content must be clearly marked as such.²⁸ These issues are reflected in the Kazakh law in one interpretation or another.

25 Luciano Floridi and Josh Cowls, 'A Unified Framework of Five Principles for AI in Society' (2019) 1(1) *Harvard Data Science Review* 2, doi:10.1162/99608f92.8cd550d1.

26 OECD, *State of Implementation of the OECD AI Principles: Insights from National AI Policies* (OECD Digital Economy Papers no 311, OECD Publishing 2021) doi:10.1787/1cd40c44-en.

27 Yeung (n 22).

28 Regulation (EU) 2024/1689 (n 2) arts 50, 86.

One of the main issues is the legal personality of AI, which is not, by accident, included in the European Union's agenda, which is seriously considering two issues that have arisen: 1) whether AI should be considered as individuals or legal entities, animals, or other existing subjects of law; 2) whether a new category should be created with its own characteristics and applicable consequences in the context of the distribution of rights and obligations, including liability for damage.

In comparative legal terms, three main models for regulating artificial intelligence are generally distinguished:

1. The liberal model (USA, Canada) is characterized by a focus on the principles of self-regulation and soft law, where the state sets only general frameworks. At the same time, specific standards are developed in industry codes of ethics and professional associations.²⁹
2. The ethical-normative model (EU) is based on a combination of mandatory norms (GDPR, AI Act) and ethical regulators aimed at protecting human rights and preventing discrimination.³⁰
3. The technocratic model (China) assumes the integration of AI into the system of state control, where legal regulation serves as a tool for achieving strategic development goals, rather than protecting private interests.³¹

In the Asian region, the Concept of 'human-centric artificial intelligence' is coming to the forefront, reflected in the strategies of Japan and South Korea. Here, the key objective is the harmonization of technological progress and social values, while regulatory policy is built around the principles of trust, transparency, and social inclusiveness.³²

Thus, international studies demonstrate a shift from technological determinism to legal pragmatism: artificial intelligence is increasingly viewed not as a threat, but as a socially regulated entity with limited autonomy. International approaches emphasize the need for a balance between innovative development and the protection of human rights, shaping a new paradigm of digital legal order.

A comprehensive analysis of various sources suggests that the current trend is toward the development of hybrid regulatory models that combine mandatory legal norms with mechanisms of self-organization and ethical oversight. This evolution reflects a global shift

29 Ryan Calo, A Michael Froomkin, and Ian Kerr, *Robot Law* (Edward Elgar 2016).

30 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1; Regulation (EU) 2024/1689 (n 2).

31 Angela Huyue Zhang, 'The Promise and Perils of China's Regulation of Artificial Intelligence' (2025) 63 Columbia Journal of Transnational Law 1.

32 OECD (n 26).

in the understanding of law as a dynamic system capable of responding to the technological challenges of the 21st century and integrating elements of algorithmic governance and digital accountability.

Kazakhstan is strengthening its global position in digital governance. According to the UN E-Government Survey 2024, the country rose to 24th place in the global e-government development ranking, improving its position by four places compared to the previous report.³³ The advancement of digital services has been facilitated by the digitalization of the banking sector, and Kazakhstan's openness to integrating its services with banks. For example, the Halyk Bank app allows its clients to register their place of residence. The development of public services is facilitated not only by cooperation with the banking sector but also by nationwide high-speed Internet and cellular coverage.

Despite the widespread implementation of the above-mentioned areas outlined in the State Program, some of the main obstacles to the development of digitalization in Kazakhstan are:

- cumbersome, contradictory, and unstable legislation;
- excessive regulation of government functions and administrative procedures at the legislative level, which deprives authorized bodies of independence and the ability to make prompt decisions to optimize external and internal business processes, implement best practices, and digital solutions;
- legislative gaps in the regulation of digital human and civil rights;
- uncontrolled use of big data, data processing algorithms using artificial intelligence (AI), and the Internet of Things for the implementation of digital surveillance;
- the lack of a unified legislative framework governing the activities of digital service providers.

These problems have become even more acute with the adoption of the 'Concept for the Development of Artificial Intelligence for 2024–2029'³⁴ in Kazakhstan, as well as the Kazakhstan AI Law,³⁵ which defines only the guidelines for obtaining the benefits of AI technologies in the short and medium terms.

In addition to discussions of the legal personality of artificial intelligence and the problem of attributing responsibility, the international academic literature also shows a persistent interest in institutional formats for regulating digital technologies. A special place is occupied by the analysis of so-called regulatory sandboxes. These are experimental legal regimes created by the state for the controlled testing of innovative solutions. A study by

33 Department of Economic and Social Affairs, *United Nations E-Government Survey 2024: Accelerating Digital Transformation for Sustainable Development, With the addendum on Artificial Intelligence* (UN 2024).

34 Resolution of the Government of the Republic of Kazakhstan No 594 (n 19).

35 Law of the Republic of Kazakhstan No 230-VIII (n 5).

Truby et al. traces the dynamics of the development of the European approach to such mechanisms: the authors demonstrate that sandboxes serve as a form of managed legal flexibility, enabling the testing of artificial intelligence systems under reduced regulatory risk.³⁶ As a result, they become a tool for balancing the need to stimulate technological progress with the requirement to maintain a high level of legal certainty.³⁷ Similar initiatives are operating in Canada and Singapore, where government agencies act as mediators between AI developers and law enforcement agencies, forming a model of 'adaptive governance,' or adaptive regulation.³⁸

US scholarly literature focuses on the problem of antitrust and tort regulation of algorithmically controlled systems. Researchers emphasize that the concentration of large amounts of data in the hands of large corporations (e.g., Amazon, Google, and Meta) poses a threat of 'algorithmic dominance' and requires the modernization of antitrust legislation.³⁹ At the same time, the existing legal doctrines of 'product liability' and 'negligence' are not able to fully take into account the autonomous nature of AI solutions, which requires the development of a new category of 'algorithmic liability' based on the principles of predictability and verifiability of algorithms. In this context, a significant contribution is made by the literature on the principle of accountability-by-design, which involves the introduction of legal accountability mechanisms at the design stage of artificial intelligence systems.⁴⁰

The research area devoted to international legal aspects of AI regulation deserves special attention. The works of E. Sassoli and M. Ketts consider the problem of autonomous weapon systems (AWS) in the context of international humanitarian law. The authors emphasize that the legal categories of guilt and intent are difficult to apply to autonomous algorithms, which raises the question of the need for a new regulatory paradigm that enshrines the principle of 'meaningful human control' as a prerequisite for the legitimacy of the use of AI.⁴¹ In turn, the doctrine of public international law is developing towards the recognition of artificial intelligence as an object of international regulation, as evidenced by the initiatives of the Council of Europe and the OECD to develop a global Code of Ethics for autonomous technologies.⁴²

36 Jon Truby and others, 'A Sandbox Approach to Regulating High-Risk Artificial Intelligence Applications' (2022) 13(2) European Journal of Risk Regulation 270, doi:10.1017/err.2021.52.

37 *ibid*

38 Yeung (n 22).

39 Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard UP 2016).

40 Andrew D Selbst and Solon Barocas, 'The Intuitive Appeal of Explainable Machines' (2018) 87(3) Fordham Law Review 1085.

41 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*. (2nd edn, Edward Elgar 2022).

42 Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law [2024] CETS 225.

The integration of AI into legal practice, particularly in the justice system, is attracting increasing attention from researchers. Two areas of its application in the justice system are distinguished: 1) office work and general judicial matters; 2) the evaluation of evidence and the establishment of legally significant circumstances in a specific case.

Currently, Kazakhstan has implemented the 'Electronic Justice' system, which allows claims, complaints, and petitions to be filed online through the "Court Office" service, and judicial decisions are issued. This service also determines the jurisdiction for civil cases, minimizing errors in court selection and speeding up claim registration by automatically distributing them. The unified information and analytical system of judicial bodies, "Torelik", is used in the drafting of civil procedural documents. By the beginning of 2025, 665,000 out of two million court cases had been reviewed using AI. The "Digital Analytics of Judicial Practice" program is operational, trained to analyze court decisions, compare them, identify shortcomings, and predict the outcome of a civil case. When a specific claim is submitted, a judge can see judicial practice in similar cases, including cassation, and make the right decision. It should be especially noted that the AI analysis is used as additional reference material.⁴³

Effective access to justice requires not only the filing of a complaint, but also legislative recognition of the "duty of explainability." This would allow courts to conduct meaningful analysis of algorithmic decisions, transforming AI from a "black box" into a subject of judicial review.

To explore the second area of AI application in assessing evidence and establishing legally significant circumstances in a specific case, let's consider the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment, which enshrines the following principles:

- respect for fundamental human rights – the right to an adversarial trial;
- the right to a fair hearing;
- non-discrimination against individuals or groups;
- the principle of quality and security, designed to ensure the processing of court documents by officially functioning databases of regulatory legal acts, court decisions, etc.;
- transparency, impartiality, and reliability of data processing methods, as well as external auditing;
- control by the user as an informed subject over the court's decision made using AI.

43 Ainaş Seitmuratova, 'Kazakhstani Courts Embrace AI in their Daily Practices' (*Kursiv News*, 22 January 2025) <https://kz.kursiv.media/en/2025-01-22/engk-nknk-kazakhstani-courts-embrace-ai-in-their-daily-practices/?utm_campaign=endless_feed> accessed 5 January 2026.

It is particularly emphasized that AI does not make, but are instead made by a human judge.⁴⁴

In UK court practice, the concept of access to justice when using AI emerged in the case of *R (Bridges) v Chief Constable of South Wales Police* (2020), which concerned the use of automated facial recognition. The Court of Appeal held that the lack of clear, statutory criteria for the functioning of the algorithmic system and the scope of officials' discretion hindered individuals' ability to predict the legal consequences of its use and, therefore, hindered the exercise of the right to effective judicial review. The court emphasized that even with a formal complaints mechanism, the lack of transparent rules and explainability of the algorithmic decision deprives judicial review of any meaningful content. Thus, the algorithmic system was deemed incompatible with the requirements of legality and procedural fairness precisely because of the lack of legal guarantees of contestability.⁴⁵ The British experience confirms that access to justice presupposes not only the possibility of recourse to the courts, but also the legally supported verifiability of algorithmic interventions.

The judicial approaches of EU member states were consolidated with the adoption of the EU Artificial Intelligence Regulation 2024 (AI Act), which, for the first time, enshrined at the supranational level the right of a person affected by an individual decision made using a high-risk AI system to receive an explanation of that decision. The legislator explicitly links the obligation of explainability with the possibility of pursuing legal remedies, including judicial appeal. Thus, the explainability of algorithmic decisions is legally enshrined as a tool for transforming AI from a "black box" into an object of legal assessment and judicial review.⁴⁶

This approach reflects the transition from fragmented judicial protection to a systemic model for ensuring access to justice in the context of digitalization. International judicial experience demonstrates the emergence of a robust approach, according to which the right to appeal decisions made using artificial intelligence cannot be considered effective without legislative and procedural codification of the duty of explainability. Judicial practice confirms that the opacity of algorithmic decisions deprives courts of meaningful oversight and deprives citizens of the right to defense. In this context, explainability is not a technical but a legal condition for access to justice, ensuring that AI becomes an object subject to judicial review.

Thus, a general pattern can be observed: the higher a state's level of technological development, the more attention is paid not to legal prohibition but to institutional adaptation—the creation of flexible, integrated forms of regulation. Canada operates the

44 European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment (adopted 3 December 2018) <<https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment>> accessed 5 January 2026.

45 Case C1/2019/2670 R (*Bridges*) v *South Wales Police* [2020] EWCA Civ 1058.

46 Regulation (EU) 2024/1689 (n 2) arts 85, 86.

Algorithmic Impact Assessment (AIA), a mandatory risk assessment tool for all government agencies using machine learning systems.⁴⁷ These approaches demonstrate that modern legal thought is increasingly leaning toward 'soft governance,' in which mechanisms of monitoring, transparency, and public oversight replace norms.

In the Asia-Pacific region, jurisdictions such as Singapore and South Korea have pioneered operationalized AI governance. Singapore, through its AI Verify Foundation, provides a standardized technical framework for algorithmic testing and verification, facilitating both self-assessments and third-party audits⁴⁸. Similarly, South Korea's Ministry of Science and ICT has integrated ethical compliance into the oversight of high-risk AI applications, moving beyond theoretical guidelines toward institutionalized monitoring and evaluation⁴⁹.

The development of legal regulation of artificial intelligence is carried out within the framework of multilevel normativity, in which traditional imperative norms are combined with principles of self-regulation and ethical responsibility. The idea of 'responsible AI' is becoming a kind of legal meta-category that combines legal, ethical, and social mechanisms under a single concept of digital law and order. This trend indicates a shift in emphasis from issues of legal personality and AI to the practical implementation of the principles of transparency, non-discrimination, and the predictability of algorithmic decisions. Therefore, when developing legal mechanisms to regulate AI, it is necessary to draw on scientific and conceptual ideas developed by scientists as guidelines for building national AI regulatory models.

In the context of the evolving legal regulation of artificial intelligence, particular significance should be attached to the problem of normative uncertainty arising from the rapid technological development and the lag of legal institutions. AI systems develop at a pace that outstrips traditional legislative cycles, which leads to the formation of so-called 'regulatory gaps,' situations in which socially significant relations mediated by AI fall outside clear legal qualification. This circumstance objectively necessitates a revision of classical approaches to legal regulation based exclusively on static legal norms.

From the standpoint of legal theory, artificial intelligence should be viewed not only as a technological phenomenon but also as a factor transforming the architecture of legal regulation itself. The growing autonomy of algorithmic systems challenges the traditional model of legal causality, which assumes a direct link between the subject's will, action, and legal consequences. In the case of AI, decision-making is often probabilistic, opaque, and

47 'Algorithmic Impact Assessment Tool' (*Government of Canada*, 7 January 2026) <<https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html>> accessed 10 January 2026.

48 Infocomm Media Development Authority (IMDA), 'AI Verify: An International Open-Source Foundation for AI Testing' (2023) <<https://aiverifyfoundation.sg/>> accessed 21 February 2026.

49 Ministry of Science and ICT (Republic of Korea), 'National Strategy for Artificial Intelligence: National AI Ethics Guidelines' (2020).

distributed across complex socio-technical systems, which complicates the attribution of intent, fault, and foreseeability, core categories of legal responsibility.

In this regard, modern doctrine increasingly turns to functional and risk-oriented approaches to regulation. Instead of focusing exclusively on the legal status of artificial intelligence as a potential subject or object of law, emphasis is placed on controlling the risks generated by AI systems throughout their entire lifecycle: from design and training to deployment and decommissioning. Such an approach corresponds to the law's preventive function and enables the development of flexible regulatory instruments that adapt to technological change without undermining legal certainty.

For Kazakhstan, the adoption of this paradigm is particularly relevant. As a state actively pursuing digital transformation, Kazakhstan faces the challenge of integrating artificial intelligence into public administration, healthcare, finance, and law enforcement while safeguarding constitutional rights and freedoms. Under these conditions, the legal regulation of AI should not be limited to declarative principles but must include enforceable mechanisms of accountability, transparency, and oversight. The introduction of mandatory impact assessments, algorithmic audits, and requirements for human oversight in high-risk AI systems could serve as effective tools for minimizing legal and social risks.

Thus, the development of the Kazakhstan AI Law should be based on a combination of doctrinal clarity, institutional flexibility, and a human-centered approach. Such a model would not only protect fundamental rights but also create a stable legal environment conducive to innovation and responsible technological development.

4 CONCLUSIONS

The legal aspects of AI technology are still under discussion among scientists, who have not reached consensus on issues of legal capacity and liability for harm caused by AI. To develop an effective mechanism for legal regulation of AI, it is necessary to draw on the European Union's experience, in particular by adopting certain provisions of the EU AI Law. Potential threats to human rights and freedoms in the use of AI require scientific and applied research by scientists, taking into account international legal norms. When developing national laws, they should reflect the following provisions:

- Article 17 of the Law of the Republic of Kazakhstan on AI should include in the List of Prohibited Practices Using AI predictive methods based on profiling, i.e., "predictive policing" methods, to prevent AI from predicting crimes;
- establish the status of AI as an electronic personhood with hybrid legal capacity for the purpose of distributing algorithmic liability;
- excessive regulation of AI activities should be avoided to develop promising technologies;

- a balance must be struck between AI safety and the development of innovation;
- provide for the right of citizens to file complaints against AI systems and to receive clarification of decisions regarding violated rights.

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Competing interests: No competing interests were disclosed by authors.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free from any impact by any organization.

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EDITORS

Managing Editor – Prof. Iryna Izarova. **English Editor** – Robert Reddin.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Nurgaliyeva Y, Baimakhanova A, Zharkenova S and Galiakbarova G, 'Bridging the Gap: Accountability and Risk-Based Regulation in Kazakhstan's Artificial Intelligence Legislation' (2026) 9(2) Access to Justice in Eastern Europe 161-86 <<https://doi.org/10.33327/AJEE-18-9.2-a000187>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000187>

Summary: 1. Introduction. – 2. Methodology. – 3. Evaluating the Kazakhstan AI Law through the Prism of the EU AI Act. – 3.1. *Comparative Analysis of AI Definitions and Risk-Based Regulation*. – 3.2. *The Doctrine of 'Electronic personhood' and Algorithmic Accountability*. – 3.3. *Global Trends and Institutional Adaptation*. – 4. Conclusions.

Keywords: *Algorithmic accountability, electronic personhood, risk-based regulation, predictive policing, Kazakhstan AI Law, EU AI Act, access to justice.*

ADDITIONAL INFORMATION

The article was prepared within the framework of the project: IRN AP26198993 «Legal support for digital nomads and monitoring of current problems in the field of social and labor relations in the context of digitalization». Financing from the state budget.

DETAILS FOR PUBLICATION

Date of submission: 06 Jan 2026

Date of acceptance: 18 Feb 2026

Online First Publication: 20 March 2026

Last Publication: 20 May 2026

Was the manuscript fast tracked? - No

Number of reviewer report submitted in first round: 3 reports

Number of revision rounds: 3 rounds with major and minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПОДОЛАННЯ РОЗРИВУ: ПІДЗВІТНІСТЬ ТА РИЗИК-ОРІЄНТОВАНИЙ ПІДХІД У ЗАКОНОДАВСТВІ КАЗАХСТАНУ ПРО ШТУЧНИЙ ІНТЕЛЕКТ

Єнлік Нургалієва, Аружан Баймаханова*, Світлана Жаркенова та Гузаль Галіакбарова

АНОТАЦІЯ

Вступ. У статті розглядаються критичні проблеми створення надійного правового режиму для штучного інтелекту (ШІ) після ухвалення Акту Європейського Союзу про штучний інтелект (2024 р.) (Акт ЄС про ШІ) та Закону Республіки Казахстан «Про штучний інтелект» (2025 р.) (Закон Казахстану про ШІ). Незважаючи на ці законодавчі зусилля, наукові дебати щодо правового статусу, правосуб'єктності та захисних функцій ШІ тривають. У дослідженні підкреслюється необхідність переходу від реактивного регулювання до превентивної, ризик-орієнтованого підходу, де правові норми адаптуються до алгоритмічної поведінки щодо виникнення конфліктів. Метою дослідження є виявлення регуляторних прогалин у казахстанській системі порівняно з європейськими стандартами, зокрема щодо захисту основних прав та судової відповідальності.

Методи. У статті використовується описово-аналітична та порівняльна методологія дослідження. Було проведено юридичний доктринальний аналіз Акту ЄС про ШІ та Закону Казахстану про ШІ для виявлення наявних регуляторних прогалин. Формально-правовий метод було використано для оцінки визначень ШІ та його правових характеристик. Контент-аналіз сучасної юридичної науки (2015–2025 рр.) забезпечив основу для правового моделювання статусу «електронної особи». У дослідженні також використовується системний підхід для категоризації ризиків ШІ – мінімальних, середніх та високих – у секторах державного управління та правоохоронних органів.

Результати та висновки. Результати демонструють, що хоча Акт ЄС про ШІ встановлює повну заборону на технології високого ризику, такі як масове біометричне спостереження та прогнозне поліцейське забезпечення, Закон Казахстану про ШІ не містить аналогічних заборон, що потенційно може призвести до дискримінаційної практики правоохоронних органів. У дослідженні було зроблено висновок, що визнання ШІ «електронною особою» з гібридною правоздатністю є важливим для того, щоб забезпечити відповідальність за автономні рішення. Запропоновано конкретні законодавчі зміни до Закону Казахстану про ШІ, зокрема: 1) обов'язкове проведення незалежних експертних оцінок для систем високого ризику; 2) заборона обміну базами даних державної таємниці через платформи ШІ; 3) встановлення алгоритмічної відповідальності для постачальників та операторів. У дослідженні наголошується, що баланс між інноваціями та цифровою відповідальністю є ключовим викликом для модернізації національного цифрового правопорядку.

Ключові слова. Алгоритмічна підзвітність, електронна особа, регулювання на основі ризиків, прогнозна поліція, Закон Казахстану про ШІ, Акт ЄС про ШІ, доступ до правосуддя.

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000185>

Date of submission: 5 Jan 2026

Date of acceptance: 7 Feb 2026

Online First Publication: 10 March 2026

Last Publication: 20 May 2026

Disclaimer:

The authors declare that their opinions and views expressed in this manuscript are free from any impact of any organisations.

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Research Article

BIG DATA-DRIVEN PREDICTIVE POLICING: GLOBAL PRACTICES AND LESSONS FOR ASEAN COUNTRIES

Thu Huong Vu*, Thi Phuong Do and Viet Khanh Hoa Nguyen

ABSTRACT

Background: The use of big data and algorithmic tools has become increasingly common in law enforcement. One notable development is Big Data-Driven Predictive Policing (BDPP), which seeks to predict where crime may occur or who may be involved by analysing large datasets. Although prediction has long been part of policing, BDPP differs in scale and automation, relying on advanced analytics and machine learning. While many police agencies view BDPP as a way to improve efficiency and move towards preventive policing, its use has raised important legal and social concerns. Issues such as transparency, data bias, accountability, and the protection of fundamental rights remain unresolved, particularly in ASEAN countries, where legal frameworks for algorithmic policing are still developing.

Method: This article is based on a qualitative literature review of academic studies, criminological research, and policy documents on predictive policing. It examines how BDPP operates in practice, with attention to both place-based and person-based models. Selected experiences from the United States, the Netherlands, and the United Kingdom are reviewed

to assess the reported effectiveness of predictive policing, as well as its practical limitations and associated problems. Drawing on these findings, the article identifies lessons relevant to ASEAN countries considering adopting similar approaches.

Results and Conclusions: The article shows that while BDPP offers potential to enhance law enforcement efficiency and proactive resource allocation, global evidence from the US and Europe indicates mixed effectiveness and substantial risks related to algorithmic bias, transparency, and fundamental rights. For ASEAN countries, where institutional capacity and data protection regimes differ significantly, cautious and phased adoption is advisable. Priority should be given to controlled, place-based pilot projects, supported by clear legal mandates, data governance standards, independent review, and sustained human oversight.

1 INTRODUCTION

The rapid growth of big data technologies has transformed multiple fields, including the criminal justice system.¹ Across the world, law enforcement agencies are moving towards the use of data analysis to anticipate and prevent crime. Among these innovations, Big Data-Driven Predictive Policing (BDPP) has gained significant attention. Although predictive techniques such as crime mapping² and offender profiling³ have existed for decades, predictive policing represents a new generation of crime prevention, one shaped by the technological capabilities of the Big Data era. BDPP combines large-scale data analytics with algorithmic tools. These systems identify crime patterns and estimate the locations and time periods in which offences are more likely to occur and, in some cases, assess individuals who may be linked to future criminal activity.⁴ From the United States to the European Union, BDPP has become a central element in modern policing strategies, reflecting the global trend towards evidence-based, technology-supported public security management.

- 1 Elizabeth E Joh, 'Policing by Numbers: Big Data and the Fourth Amendment' (2014) 89(1) Washington Law Review 35; Samuel Fosso Wamba and others, 'How "Big Data" Can Make Big Impact: Findings from a Systematic Review and a Longitudinal Case Study' (2015) 165 International Journal of Production Economics 234, doi:10.1016/j.ijpe.2014.12.031; Greg Ridgeway, 'Policing in the Era of Big Data' (2018) 1 Annual Reviews of Criminology 401, doi:10.1146/annurev-criminol-062217-114209.
- 2 Jerry Ratcliffe, 'Crime Mapping: Spatial and Temporal Challenges' in Alex R Piquero and David Weisburd (eds), *Handbook of Quantitative Criminology* (Springer 2010) 5, doi:10.1007/978-0-387-77650-7_2; Spencer Chainey and Jerry Ratcliffe, *GIS and Crime Mapping* (John Wiley & Sons 2013); Rachel Boba Santos, *Crime Analysis with Crime Mapping* (SAGE Publications 2016).
- 3 Peter B Ainsworth, *Offender Profiling and Crime Analysis* (Willan 2001) doi:10.4324/9781843924630; Brent E Turvey, *Criminal Profiling: An Introduction to Behavioral Evidence Analysis* (Academic Press 2011).
- 4 Craig D Uchida, 'A National Discussion on Predictive Policing: Defining Our Terms and Mapping Successful Implementation Strategies' (*National Institute of Justice*, 1 November 2009) NCJ 230404 <<https://nij.ojp.gov/library/publications/national-discussion-predictive-policing-defining-our-terms-and-mapping>> accessed 2 October 2025; Walt L Perry and others, *Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations* (Rand Corporation 2013).

In the ASEAN region, interest in predictive analytics for policing and public safety is growing,⁵ although levels of technological readiness and regulatory development differ significantly among Member States. Some countries possess advanced digital infrastructure and established data protection regimes, while others are still consolidating basic data governance systems. At the same time, predictive policing remains a contested innovation. While it offers the potential to enhance efficiency, optimise resource allocation, and enable more proactive intervention, it also introduces complex challenges. Concerns about transparency, fairness, accountability, and the protection of fundamental rights underscore the need for cautious and context-sensitive adoption. This article addresses two specific research questions: (1) What are the practical effectiveness, limitations, and risks of BDPP systems as evidenced by global experience? (2) How can ASEAN countries adopt BDPP in ways that align with regional institutional capacities, legal traditions, and human rights standards, while avoiding the pitfalls observed elsewhere? This article seeks to inform policymakers and legislators by synthesising global evidence and proposing context-sensitive pathways for ASEAN adoption.

2 METHODOLOGY

This article adopts a qualitative legal-criminological approach, combining doctrinal legal analysis with a comparative and policy-oriented review. It examines relevant legislation, policy documents, judicial decisions, and academic literature on big-data-driven predictive policing to clarify key concepts, operational models, and their legal implications. The analysis covers both place-based and person-based predictive policing systems, drawing on illustrative examples from the United States, the Netherlands, and the United Kingdom,

- 5 Jonard Asor and others, 'Building Model for Crime Pattern Analysis Through Machine Learning Using Predictive Analytics' (2022) 2(1) International Journal of Science, Technology, Engineering and Mathematics 61; Hind Rashed Saleh Al Shamsi and Su'aidi Safei, 'Artificial Intelligence Adoption in Predictive Policing to Predict Crime Mitigation Performance' (2023) 14(3) International Journal of Sustainable Construction Engineering and Technology 289; Novia Sucita, Surya Nita and Chairul Muriman, 'Predictive Policing by Bhabinkamtibmas as a Solution to Address Criminality in Cilempung Village, Pasirjaya, Karawang' (2024) 4(10) International Journal of Social Service and Research 1, doi:10.46799/ijssr.v4i10.1048; Rere Cika Ihza Pamesti and Hsu Min Hsi, 'Applicability of Predictive Policing in Indonesia Police Agency' (2024) 27(1) Jurnal Litbang Polri 1, doi:10.46976/litbangpolri.v27i1.234; Ng Zhi Yong, Kua Choon Jin and Rozita Anwar, 'Renewing a Criminal Intelligence Analyst's Value Proposition in the Digital Age - the Singapore Experience' (2025) 2(1) International Journal of Contemporary 60, doi:10.3316/informit.T20250206 00018190413636180; Phirapat Mangkhalasiri and Krisanaphong Poothakool, 'Data Science in Policing in Thailand: Challenges and Future Directions – A Review From International Perspectives' (2025) 12(2) Rangsit Journal of Social Sciences and Humanities 18, doi:10.59796/jcsh.v12i2.18-34; Thanh Hà, 'Research on the Application of AI in Preventing and Responding to Non-Traditional Security Threats' *Báo điện tử Tiền Phong* (Hà Nội, 19 September 2025) [in Vietnamese] <<https://tienphong.vn/nguyen-cuu-ung-dung-ai-trong-phong-ngua-ung-pho-voi-cac-de-doa-an-ninh-phi-truyen-thong-post1779329.tpo>> accessed 16 October 2025.

chosen for their early adoption of predictive policing and the availability of documented legal and policy responses. Existing evaluations, research studies, and official reports are also reviewed to assess the claimed effectiveness of BDPP and identify recurring concerns regarding data quality, algorithmic bias, transparency, and fundamental rights. On this basis, the article develops normative and policy-oriented conclusions, with particular attention to the conditions under which BDPP may be cautiously considered in ASEAN countries, emphasising the need for legal safeguards, sound data governance, and meaningful human oversight.

3 AN OVERVIEW OF BIG DATA-DRIVEN PREDICTIVE POLICING

3.1. Definition and Conceptual Foundations

Police have traditionally identified high-risk places and individuals to disrupt recurring patterns of crime. Predictive policing thus represents a change in the means of prediction rather than the underlying policing logic.⁶

In technological terms, big data refers to “massive, complex datasets”, characterised by high volume, variety, and velocity.⁷ Simply put, they comprise extensive observations and multiple data variables, the overall scope differing across specific uses. From a legal perspective, however, the concept extends beyond those technical features to emphasise how this “vast, fast, disparate, and digital” information is collected, processed by algorithms, and used within the legal system.⁸

Although the size and complexity of big data make analysis challenging and time-consuming, it can offer further understanding of future trends and recurring patterns.⁹ The use of advanced statistical and computational methods to generate such understanding is commonly described as predictive analysis.¹⁰ When these analytical techniques are applied to historical crime data to forecast future offences, they give rise to what is now termed

6 Andrew G Ferguson, ‘Policing Predictive Policing’ (2017) 94(5) Washington University Law Review 1109.

7 Seref Sagiroglu and Duygu Sinanc, ‘Big Data: A Review’ (2013 International Conference on Collaboration Technologies and Systems (CTS), 20-24 May 2013) doi:10.1109/CTS.2013.6567202; Din J Wasem, *Mining of Massive Datasets* (CreateSpace Independent Publishing 2014); Andrea De Mauro, Marco Greco and Michele Grimaldi, ‘A Formal Definition of Big Data Based on Its Essential Features’ (2016) 65(3) Library Review 122, doi:10.1108/LR-06-2015-0061.

8 Sarah Brayne, ‘Big Data Surveillance: The Case of Policing’ (2017) 82(5) American Sociological Review 977, doi:10.1177/0003122417725865; Ridgeway (n 1).

9 Wim Hardyns and Anneleen Rummens, ‘Predictive Policing as a New Tool for Law Enforcement? Recent Developments and Challenges’ (2018) 24 European Journal on Criminal Policy and Research 201, doi:10.1007/s10610-017-9361-2.

10 Colleen McCue, *Data Mining and Predictive Analysis: Intelligence Gathering and Crime Analysis* (2nd edn, Elsevier 2015) doi:10.1016/C2013-0-00434-3; John D Kelleher, Brian Mac Namee and Aoife D’Arcy, *Fundamentals of Machine Learning for Predictive Data Analytics, Second Edition: Algorithms, Worked Examples, and Case Studies* (2nd edn, MIT Press 2020).

“predictive policing”. Craig Uchida provides one of the earliest and widely cited definitions of predictive policing, describing it as a policing approach that relies on information and advanced analytical techniques to support anticipatory crime prevention and proactive decision-making.¹¹ Walt Perry provides a broader, person-based definition of predictive policing, describing it as the use of analytical, especially quantitative, methods to generate statistical forecasts that guide police intervention aimed at preventing crime or supporting the investigation of offences.¹² Based on these different but complementary notions of BDPP, we propose the following definition: *Big data-driven predictive policing is the collection and algorithmic analysis of multiple, large datasets on crimes and related factors to identify and statistically predict individuals or geospatial areas with a higher probability of criminal activity, thereby informing policing strategies and prevention tactics.*

Three core features characterise BDPP in theory and practice. *Firstly*, it utilises data from multiple large datasets. As a “creature of the world of Big Data”¹³, BDPP depends on the collection and ingestion of information from multiple and continuously updated datasets to enhance predictive accuracy. These typically include crime history variables, time-dependent variables, opportunity and precursor crimes.¹⁴ Much of this information is derived from official repositories, including police databases and census records, but increasingly it is also supplemented by mass surveillance technologies such as automatic licence plate readers, facial recognition systems, and closed-circuit television.¹⁵ *Secondly*, it is based on, or initiated by, predictive algorithmic analysis. Central to BDPP is the use of intelligence models, geospatial analysis tools, data analysis tools, and advanced techniques such as machine learning and deep learning, which identify patterns and correlations across vast and massive datasets.¹⁶ *Lastly*, the results are used to guide responses to anticipated criminal behaviour. Predictive policing mainly aims to produce forecasts about crime trends and recurring patterns, which can then be used to inform planning, resource allocation, and preventive interventions.¹⁷ Over time, the broader aim is to support crime prevention by helping police identify risks earlier and to respond more effectively.¹⁸

11 Uchida (n 4).

12 Perry and others (n 4).

13 Andrew D Selbst, ‘Disparate Impact in Big Data Policing’ (2018) 52 Georgia Law Review 109, doi:10.2139/ssrn.2819182.

14 Hardyns and Rummens (n 9).

15 Jiang Su, ‘The Use of Big Data in Criminal Justice and Its Challenges’ (2023) 11(1) Peking University Law Journal 105, doi:10.1080/20517483.2023.2223851.

16 Amar Shukla et al., ‘Criminal Combat: Crime Analysis and Prediction Using Machine Learning’ (2021 International Conference on Intelligent Technologies (CONIT), 25-27 June 2021) doi:10.1109/CONIT51480.2021.9498397; Paria Sarzaeim and others, ‘A Systematic Review of Using Machine Learning and Natural Language Processing in Smart Policing’ (2023) 12 Computers 255, doi:10.3390/computers12120255; Hardyns and Rummens (n 9).

17 Jennifer Bachner, ‘Predictive Policing: Preventing Crime with Data and Analytics’ (Improving Performance Series, IBM Center for The Business of Government 2013); Lyria Bennett Moses and Janet Chan, ‘Algorithmic Prediction in Policing: Assumptions, Evaluation, and Accountability’ (2018) 28(7) Policing and Society 806, doi:10.1080/10439463.2016.1253695; McCue (n 10); Perry and others (n 4).

18 Hardyns and Rummens (n 9).

3.2. Classification of BDPP Models

Scholars have proposed several ways to classify BDPP. These include: (i) classifications based on *analytic techniques*, such as hot-spot mapping, data mining, and social network analysis;¹⁹ (ii) classifications by *methodology*, including spatial (place-focused), spatio-temporal (analysing patterns across space and time), and social network (to detect persons of interest);²⁰ (iii) from an *evolutionary* perspective, predictive policing can be divided into three stages: early models aimed at forecasting property crime hotspots, later models designed to address violent crime locations, and more recent models that shift attention toward individuals connected with criminal activity.²¹ The most widely discussed classification, however, distinguishes BDPP according to the *prediction target*: place-based models, which aim to forecast the future occurrence of crime in particular areas, and person-based models, which focus on predicting an individual's future behaviour.²²

Place-based BDPP aim to forecast high-risk locations and times for criminal activity. They typically analyse historical incident data to identify emerging hot spots or patterns.²³ Many early BDPP implementations were place-based; indeed, Predictive Policing 1.0 and 2.0 were designed to target locations (initially property crime areas, later violent crime areas).²⁴ Operationally, location-based predictions allow police to optimise patrol deployment and preventive presence in vulnerable areas.

Person-based BDPP, in contrast, attempts to identify individuals (or groups) at high risk of future criminal involvement using diverse datasets (e.g., prior arrests, social associations, social media activity, etc.). Person-based prediction has been extensively studied in related fields, such as recidivism research and terrorism studies. These models are often subdivided into (a) suspect-based and (b) threat-assessment-based systems,²⁵ or into (a) offender-focused, (b) perpetrator-identification, and (c) victim-prediction models.²⁶ In practice, the police may deter offending through direct

19 Uchida (n 4).

20 Bachner (n 17).

21 Ferguson (n 6).

22 Dylan J Fitzpatrick, Wilpen L Gorr, and Daniel B Neill, 'Keeping Score: Predictive Analytics in Policing' (2019) 2 Annual Review of Criminology 473, doi:10.1146/annurev-criminol-011518-024534; Ferguson (n 6); Youngsub Lee, Ben Bradford and Krisztian Posch, 'The Effectiveness of Big Data-Driven Predictive Policing: Systematic Review' (2024) 7(2) Justice Evaluation Journal 127, doi:10.1080/24751979.2024.2371781.

23 Mareile Kaufmann, Simon Egbert, and Matthias Leese, 'Predictive Policing and the Politics of Patterns' (2019) 59(3) The British Journal of Criminology 674, doi:10.1093/bjc/azy060; GO Mohler and others, 'Randomized Controlled Field Trials of Predictive Policing' (2015) 110(512) Journal of the American Statistical Association 1399, doi:10.1080/01621459.2015.1077710.

24 Ferguson (n 6).

25 Selbst (n 13).

26 Perry and others (n 4).

engagement, prioritise arrest to prevent further offences, and adopt public health approaches that address underlying needs through social services.²⁷

4 GLOBAL PRACTICES OF BIG DATA-DRIVEN PREDICTIVE POLICING

4.1. Implementation of Big Data-Driven Predictive Policing in Practice

The core idea behind BDPP is that law enforcement agencies can use large-scale data analytics to guide resource allocation and use in day-to-day operations. By transforming raw information into practical insights, BDPP helps improve both the accuracy and timing of police decision-making. The potential benefits of BDPP can be viewed from two main perspectives:

a) Place-Based Predictive Policing

Building on the near-repeat crime assumption, the theory that offences tend to recur within a short period and nearby area after a recent incident²⁸, many BDPP models, such as advanced hot-spot mapping and risk terrain analysis, allow police to plan and deploy resources with greater precision. By using predictive algorithms and data integration, officers can identify “hot spots” where crimes are statistically more likely to occur and forecast when such events are most probable.²⁹ This data-driven approach enables more efficient use of limited patrol forces by focusing attention on areas and times of higher risk. By shifting policing strategies from reactive responses to proactive prevention, targeted deployment not only strengthens deterrence but also improves response times, enabling the prevention or quick interruption of criminal activity. Ultimately, BDPP moves policing away from responding to crime after it occurs and towards earlier, preventive intervention.

One illustration of this model is the Crime Anticipation System (CAS), a predictive policing initiative developed in the Netherlands to identify likely crime locations. After its nationwide introduction in 2019, the Netherlands became the first country to implement predictive policing on a countrywide basis.³⁰ CAS draws on historical data covering around 200 variables related to demographics, socio-economic conditions, and crime opportunities, obtained from the Central Crime Database, the Municipal Administration,

27 Daniel Marciniak, 'Algorithmic Policing: An Exploratory Study of the Algorithmically Mediated Construction of Individual Risk in a UK Police Force' (2023) 33(4) *Policing and Society* 449, doi:10.1080/10439463.2022.2144305.

28 Perry and others (n 4).

29 Albert Meijer and Martijn Wessels, 'Predictive Policing: Review of Benefits and Drawbacks' (2019) 42(12) *International Journal of Public Administration* 1031, doi:10.1080/01900692.2019.1575664; Perry and others (n 4).

30 Litska Strikwerda, 'Predictive Policing: The Risks Associated with Risk Assessment' (2021) 94(3) *The Police Journal: Theory, Practice and Principles* 422, doi:10.1177/0032258X20947749.

and Statistics Netherlands.³¹ It generates forecasts through a “heat map” divided into 125-by-125-meter grid squares, assigning each a risk score for the upcoming two weeks. Between October 2013 and July 2014, CAS correctly predicted 15% of residential burglaries in Amsterdam and nearly predicted another 36% (where the predicted location was adjacent to the actual crime site). For muggings, CAS predicted 33% of incidents correctly and nearly 57% accurately.³² However, CAS’s actual impact on reducing crime rates remains unclear. Because CAS focuses on locations, it is best suited to predicting crimes that occur in specific physical spaces, such as burglary, pickpocketing, and mugging, etc. and not for offences such as fraud. Another limitation involves crimes that are rare (e.g., murder) or underreported (e.g., sexual assault or drug-related offences), which cannot be predicted accurately by a spatio-temporal model.³³

The United States was an early adopter of predictive policing technologies. Geolitica, known as PredPol until its 2021 rebrand, was developed in 2011 for the Los Angeles Police Department in collaboration with the University of California, Los Angeles. As a commercial product, the system is promoted as a ready-to-use solution that allows law enforcement agencies to deploy predictive tools with minimal additional technological or training requirements. PredPol’s mathematical model, adapted from earthquake aftershock prediction, relies on three variables: time, location, and crime type. Its predictions are displayed on a map divided into 500 ft. by 500 ft. grid cells.³⁴ Following earlier experiences with hotspot models, HunchLab was developed for the Philadelphia Police Department and the U.S. Attorney’s Office in cooperation with Temple University and Rutgers University.³⁵ Unlike PredPol, HunchLab analyses hundreds of variables through machine learning, training and testing, and the data to produce forecasts that help plan police patrols more effectively. Early testing in Chicago and Philadelphia showed promising results in reducing crime, although findings have not yet been published in peer-reviewed journals.³⁶ In recent years, SoundThinking (formerly ShotSpotter), a leader in gunshot detection technology, acquired parts of Geolitica (formerly PredPol) and HunchLab, merging them into a new product called ResourceRouter. ResourceRouter integrates location-based crime data with external risk-terrain data to

31 Serena Oosterloo and Gerwin van Schie, ‘The Politics and Biases of the “Crime Anticipation System” of the Dutch Police’ (BIAS 2018 Bias in Information, Algorithms, and Systems, Sheffield, UK, 25 March 2018) vol 2103, 30 <<https://ceur-ws.org/Vol-2103/>> accessed 9 October 2025.

32 Jitske Sanne De Grauw, ‘Tijdruimtelijk Voorspellen van Criminele Incidenten’ (Master thesis, Vrije Universiteit Amsterdam 2014).

33 Oosterloo and van Schie (n 31).

34 Bachner (n 17); GO Mohler and others, ‘Self-Exciting Point Process Modeling of Crime’ (2011) 106(493) *Journal of the American Statistical Association* 100, doi:10.1198/jasa.2011.ap09546; Perry and others (n 4).

35 Azavea, ‘HunchLab: Under the Hood’ (HunchLab, 2015) <<https://blog.pilpul.me/files/2015/09/HunchLab-Under-the-Hood.pdf>> accessed 23 October 2025.

36 Andrew Guthrie Ferguson, ‘Predictive Policing Theory’ in Tamara Rice Lave and Eric J Miller (eds), *The Cambridge Handbook of Policing in the United States* (CUP 2019) 491, doi:10.1017/9781108354721.025.

generate patrol plans targeting areas of highest risk and need.³⁷ Currently, no peer-reviewed, evidence-based studies confirm its effectiveness. In a 2024 report from the Worcester Police Department, Interim Police Chief Paul B. Saucier stated that “ResourceRouter is not expected to result in arrests or major changes to our emergency response. Instead, it enhances our community policing foot beat efforts by directing officers to areas of their route where their presence is most likely to reassure residents and deter crime”.³⁸

b) Person-Based Predictive Policing

Another important application of BDPP is identifying individuals assessed as at risk of future involvement in criminal activity, whether as potential offenders or victims. These person-based systems, which focus on individual-level data, have been developed in several countries, although they vary considerably in purpose, methodology, and legal acceptance.

In the Netherlands, the System Risk Indication (SyRI) was a notable example of person-based predictive policing designed to identify potential offenders. The Dutch authorities introduced the system as a tool to prevent and detect fraud in areas such as welfare benefits, income-based schemes, taxation, and compliance with labour law. The system integrated data from multiple sources, including employment records, debt information, civic integration data, health insurance status, and standard personal information such as name, residential address, and date of birth. However, in early 2020, the District Court of The Hague ruled that SyRI violated Article 8 of the European Convention on Human Rights (ECHR), which protects the right to privacy. Consequently, the system was suspended and is no longer in use.³⁹

One of the earliest person-focused predictive policing initiatives in the United States was the Party to Violence (PTV) program, launched in 2012 by the Chicago Police Department together with the Illinois Institute of Technology. The initiative consisted of a series of risk assessment models, beginning with five versions of the Strategic Subject List (SSL) and later extended by the Crime and Victimization Risk Model (CVRM). The SSL generated numerical risk scores for individuals, whereas the CVRM classified individuals into ordered risk tiers, indicating a higher probability of involvement in a shooting, either as a victim or as an offender, within eighteen months.⁴⁰ These models analysed demographic information, arrest histories, and social network data, including co-arrest patterns with previous victims,

37 ‘ResourceRouter’ (*SoundThinking*, 2025) <<https://www.soundthinking.com/law-enforcement/resource-deployment-resourcerouter/>> accessed 9 October 2025.

38 Paul B Saucier, *Report Concerning the ShotSpotter and ResourceRouter Programs* (City of Worcester Police Department 2024).

39 Case C-09-550982-HA ZA 18-388 (Rechtbank Den Haag, 5 February 2020) ECLI:NL:RBDHA:2020:865.

40 Joseph M Ferguson, *Advisory Concerning the Chicago Police Department’s Predictive Risk Models: Report of the Public Safety Section of the Office of Inspector General* (City of Chicago, Office of Inspector General 2020); Stella Cheng, ‘Predictive Policing in Practice: A Case Study of Chicago’s Strategic Subject List’ (Senior Thesis, Claremont McKenna College 2025) 2.

to predict potential offenders and victims. Each individual identified on the SSL received a personalised “custom notification” letter delivered by police officers, explaining the factors contributing to their inclusion on the list. The letter also served as a formal warning that continued involvement in gun violence would attract heightened law enforcement attention and potential legal consequences.⁴¹

Across Europe, person-based predictive policing most commonly takes the form of risk modelling, in which individuals are assessed and prioritised based on their estimated probability of future criminal or violent behaviour.⁴² In the United Kingdom, several police forces have implemented predictive policing initiatives, including those in Durham, London, Avon and Somerset, and the West Midlands.⁴³ One of the most notable examples is the Harm Assessment Risk Tool (HART), developed jointly by the Durham Constabulary and researchers from the University of Cambridge. Using machine-learning techniques, HART estimates an individual’s likelihood of reoffending over two years. The system categorises individuals as high-, medium-, or low-risk.⁴⁴ Those identified as moderate risk may be directed to the Checkpoint Programme,⁴⁵ a diversion initiative aimed at rehabilitation and the reduction of reoffending rates. Another program is the National Data Analytics Solution (NDAS), led by the West Midlands Police in collaboration with eight other police forces.⁴⁶ NDAS combines artificial intelligence and statistical modelling to evaluate the probability that an individual may either commit or experience gun- or knife-related crime, as well as the potential for victimisation related to modern slavery.⁴⁷

Existing evaluation and assessment studies provide only limited and mixed evidence regarding the effectiveness of BDPP. Among the available studies, only a few have tested predictive algorithms in real-world policing settings; most have been retrospective analyses

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- 41 Kelly Koss, ‘Leveraging Predictive Policing Algorithms to Restore Fourth Amendment Protections in High-Crime Areas in a Post-Wardlaw World’ (2015) 90(1) *Chic-Kent Law Review* 301.
 - 42 Fieke Jansen, *Data Driven Policing in the Context of Europe* (ERC-funded project Data Justice Working Paper, Data Justice Lab 2018).
 - 43 Hannah Couchman, ‘Policing by Machine: Predictive Policing and the Threats to Our Rights Liberty’ (*Liberty*, 1 February 2019) <<https://www.libertyhumanrights.org.uk/issue/policing-by-machine/>> accessed 10 October 2025; ‘Trapped in the Matrix: Secrecy, Stigma, and Bias in the Met’s Gangs Database’ (*Amnesty International*, 23 May 2018) <<https://www.amnesty.org.uk/knowledge-hub/all-resources/london-trident-gangs-matrix-metropolitan-police/>> accessed 10 October 2025.
 - 44 Marion Oswald and others, ‘Algorithmic Risk Assessment Policing Models: Lessons from the Durham HART Model and “Experimental” Proportionality’ (2018) 27(2) *Information & Communications Technology Law* 223, doi:10.1080/13600834.2018.1458455.
 - 45 *ibid*; Couchman (n 43).
 - 46 ‘National Data Analytics Solution – Violent Crime’ (*West Midlands Police & Crime Commissioner*, 3 November 2021) <<https://www.westmidlands-pcc.gov.uk/wp-content/uploads/2022/01/2021-11-03-EC-Agenda-Item-2.1-NDAS-VC-National-Data-Analytics-Solution.pdf>> accessed 10 October 2025.
 - 47 Chris Baraniuk, ‘Exclusive: UK Police Wants AI to Stop Violent Crime before It Happens’ (*New Scientist*, 26 November 2018) <<https://www.newscientist.com/article/2186512-exclusive-uk-police-wants-ai-to-stop-violent-crime-before-it-happens/>> accessed 11 October 2025; Jansen (n 42).

conducted after the fact.⁴⁸ While several studies show a significant positive effect for place-based predictive models,⁴⁹ others show no significant results.⁵⁰ Moreover, in most cases, the effectiveness of BDPP appears to depend on specific conditions, such as particular combinations of crime types, police strategies, and contextual factors. Only one study has examined profiling (person-based predictive policing) with ambiguous outcomes.⁵¹ These mixed findings may be explained by variations in evaluation design, differences in the type of predictive policing model, and the analytical methods used to generate predictions.⁵² Overall, the current body of research suggests that while BDPP shows potential under certain conditions, its broader reliability and general effectiveness remain uncertain.

4.2. Problems and Limitations

a) Transparency and Accountability

One of the most common criticisms of BDPP is the lack of transparency surrounding the algorithms that power predictive models, particularly those based on machine learning. This issue is often described as the “black box” problem, where the decision-making process of an algorithm is either proprietary or too complex to comprehend.⁵³

Compared with traditional statistical methods, machine-learning models tend to show stronger predictive performance when applied to complex and high-dimensional datasets.⁵⁴ The best-known example is the neural network, which learns patterns from data and adjusts itself through repeated training cycles.⁵⁵ However, its internal workings are often opaque, making it difficult to understand how input variables lead to specific predictions or

48 Lee, Bradford and Posch (n 22).

49 Anthony A Braga and Brenda J Bond, 'Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial' (2008) 46(3) *Criminology* 577, doi:10.1111/j.1745-9125.2008.00124.x; Curtis Florence and others, 'Effectiveness of Anonymised Information Sharing and Use in Health Service, Police, and Local Government Partnership for Preventing Violence Related Injury: Experimental Study and Time Series Analysis' (2011) 342 *BMJ* d3313, doi:10.1136/bmj.d3313; Jeremy G Carter and others, 'The Indianapolis Harmspot Policing Experiment' (2021) 74 *Journal of Criminal Justice* 101814, doi:10.1016/j.jcrimjus.2021.101814; Jerry H Ratcliffe and others, 'The Philadelphia Predictive Policing Experiment' (2021) 17 *Journal of Experimental Criminology* 15, doi:10.1007/s11292-019-09400-2; Ferguson JM (n 40); Mohler and others, 'Randomized' (n 23).

50 Priscillia Hunt, Jessica Saunders and John S Hollywood, *Evaluation of the Shreveport Predictive Policing Experiment* (Safety and Justice Program, RAND Corporation, 2014).

51 Jessica Saunders, Priscillia Hunt, and John S Hollywood, 'Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago's Predictive Policing Pilot' (2016) 12 *Journal of Experimental Criminology* 347, doi:10.1007/s11292-016-9272-0.

52 Lee, Bradford and Posch (n 22).

53 Cynthia Rudin, 'Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead' (2019) 1(5) *Nature Machine Intelligence* 206, doi:10.1038/s42256-019-0048-x.

54 Simon Haykin, *Neural Networks and Learning Machines* (3rd edn, Prentice-Hall 2009).

55 Kevin Gurney, *An Introduction to Neural Networks* (CRC Press 2018) doi:10.1201/9781315273570.

outcomes.⁵⁶ As a result, unlike more conventional statistical approaches such as logistic regression, these models provide limited explanatory insight.⁵⁷ The problem is further complicated by the fact that many predictive policing models, particularly those developed by private technology companies, are proprietary.⁵⁸ Their algorithms and training data are protected as commercial secrets, preventing external examination or independent validation. Consequently, the public, and sometimes even police agencies themselves, cannot fully access or understand how predictions are generated.

When a predictive model labels a person or area as “high risk”, it may be unclear which specific factors led to that conclusion. This opacity makes it difficult to evaluate whether the predictions are fair, accurate, or lawful. It also raises problems of accountability, as neither developers, law enforcement officers, nor policymakers can clearly explain or defend how a given decision was reached.⁵⁹

b) Data Quality and Bias

Another major limitation of BDPP concerns the quality of data used to train and operate predictive systems. Because predictive technologies depend on large volumes of data, their performance is closely tied to how usable, accurate, and well-structured that data is. In practice, however, obtaining data that meets these standards is difficult, which exposes a key weakness in BDPP.⁶⁰ These models typically rely on existing sources such as crime records, personal data, and pattern-matching outputs.⁶¹ In policing contexts, the problem is further compounded by the fact that such datasets are often incomplete, outdated, or inaccurate - an issue commonly described as “dirty data”.⁶²

Within data science, dirty data is typically understood as data that is incomplete, inaccurate, or inconsistently formatted.⁶³ In policing, however, the concept has a broader

56 Vikas Hassija and others, ‘Interpreting Black-Box Models: A Review on Explainable Artificial Intelligence’ (2024) 16 *Cognitive Computation* 45, doi:10.1007/s12559-023-10179-8.

57 Hardyns and Rummens (n 9).

58 Louise Amoore and V Piotukh, ‘Life beyond Big Data : Governing with Little Analytics’ (2015) 44(3) *Economy and Society* 341, doi:10.1080/03085147.2015.1043793; Julia Angwin and others, ‘Machine Bias’ (*ProPublica*, 23, May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> accessed 13 October 2025; Rudin (n 53).

59 Moses and Chan (n 17).

60 Ferguson (n 6).

61 *ibid*; Harry Surden, ‘Machine Learning and Law’ (2014) 89(1) *Washington Law Review* 88.

62 Ferguson (n 6); Rashida Richardson, Jason M Schultz and Kate Crawford, ‘Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice’ (2019) 94 *New York University Law Review Online* 15 <<https://nyulawreview.org/online-features/dirty-data-bad-predictions-how-civil-rights-violations-impact-police-data-predictive-policing-systems-and-justice/>> accessed 12 October 2025.

63 Won Kim and others, ‘A Taxonomy of Dirty Data’ (2003) 7 *Data Mining and Knowledge Discovery* 81, doi:10.1023/A:1021564703268.

meaning, as it may also reflect data produced through biased, corrupt, or unlawful practices. This may include records that have been intentionally manipulated, influenced by systemic or individual bias, or generated through false arrests, fabricated evidence, or misleading reports of criminal activity.⁶⁴ Because BDPP systems are built upon historical data, they inevitably reflect the patterns and biases of prior policing practices, often reinforcing pre-existing inequities.⁶⁵ When such biased or unreliable data are used as inputs, predictive algorithms tend to reproduce and amplify these distortions, leading to inaccurate or unfair outcomes. In practice, this can lead to increased surveillance and police contact with those scored as “high-risk”, potentially creating feedback loops of over-policing in marginalised communities.⁶⁶

Person-based models, such as Operation LASER used by the Los Angeles Police Department, create similar feedback loops in which police contact increases an individual's threat score, which, in turn, predicts future police contact. The program was discontinued in 2019, following findings that officers frequently failed to follow established procedures and disproportionately affected certain community members, including individuals with no prior arrest history.⁶⁷ Similarly, a related program in Pittsburgh was suspended in 2020 following concerns that it may have generated racially biased outcomes.⁶⁸

c) Societal Impacts

Although predictive policing is often presented as a tool to support crime prevention, its use can also raise serious societal concerns, particularly regarding civil liberties and privacy. Academic discussion frequently points to its implications for fundamental rights such as human dignity, the presumption of innocence, and the right to privacy.⁶⁹

64 Kristian Lum and William Isaac, “To Predict and Serve?” (2016) 13(5) *Significance* 14, doi:10.1111/j.1740-9713.2016.00960.x; Ferguson (n 6); Richardson, Schultz and Crawford (n 62).

65 Ferguson (n 6); Joh (n 1); Richardson, Schultz and Crawford (n 62).

66 Lum and Isaac (n 64); Selbst (n 13).

67 Mark P Smith, ‘Review of Selected Los Angeles Police Department Data-Driven Policing Strategies’ (Los Angeles Police Commission, Office of the Inspector General 2019) <https://a27e0481-a3d0-44b8-8142-1376cfbb6e32.filesusr.com/ugd/b2dd23_21f6fe20f1b84c179abf440d4c049219.pdf> accessed 12 October 2025; Seumas Miller, ‘Predictive Policing’ in David Edmonds (ed), *Future Morality* (OUP 2021) 73, doi:10.1093/oso/9780198862086.003.0007.

68 Sabelli Martin and others, *Garbage In, Gospel Out: How Data-Driven Policing Technologies Entrench Historic Racism and “Tech-Wash” Bias in the Criminal Legal System* (National Association of Criminal Defense Lawyers 2021).

69 Linnet Taylor, ‘On The Presumption Of Innocence in Data-Driven Government: Are We Asking the Right Question?’ in Emre Bayamlioglu and others (eds), *BEING PROFILED: COGITAS ERGO SUM: 10 Years of Profiling the European Citizen* (Amsterdam UP 2019) doi:10.1515/9789048550180-014; Athina Sachoulidou, ‘Going beyond the “Common Suspects”: To Be Presumed Innocent in the Era of Algorithms, Big Data and Artificial Intelligence’ [2023] *Artificial Intelligence and Law*, doi:10.1007/s10506-023-09347-w; Sofia Söderholm, ‘Fundamental Rights Control When Implementing Predictive Policing – a European Perspective’ (2023) 11(1) *Peking University Law Journal* 91, doi:10.1080/20517483.2023.2223850.

In person-based systems, individuals may be identified as “high risk” based on statistical correlations rather than concrete evidence. This can result in increased police attention simply because someone fits certain profiles, for example, being unemployed or living in an area classified as “high risk”, even when the criteria used are not clearly defined.⁷⁰ Labelling individuals in this way risks undermining the presumption of innocence, which is a central principle of criminal justice.

These concerns are closely linked to the way predictive policing systems use data. Such systems often combine large amounts of personal information, surveillance footage, and social media activity. When combined, these data sources can create detailed profiles of individuals and communities. This raises concerns about whether individuals’ privacy is adequately protected and whether such extensive data use is permissible for law enforcement purposes. More broadly, the growing use of big data in policing has fuelled debates about the development of a “surveillance society” and about how data are collected, stored, and monitored by police and other state authorities.⁷¹

5 RECOMMENDATIONS FOR ASEAN COUNTRIES

5.1. ASEAN’S Institutional and Regulatory Landscape

The ten ASEAN Member States operate under different economic systems, legal frameworks, and institutional arrangements. The region includes highly digitalised jurisdictions with advanced technological infrastructure, such as Singapore, alongside lower- and middle-income countries where the digitisation of law enforcement remains uneven. Since the accession of Cambodia, Laos, Myanmar, and Vietnam in the late 1990s, ASEAN has recognised what is commonly described as the “developmental divide” between the more economically advanced members and the newer entrants.⁷² The Member States also follow different legal traditions, although in practice many systems are shaped by multiple historical influences. Cambodia, Indonesia, Laos, Thailand, and Vietnam are predominantly civil law jurisdictions; the common law tradition largely influences Brunei

70 Eva Schlehahn and others, ‘Benefits and Pitfalls of Predictive Policing’ 2015 European Intelligence and Security Informatics Conference (2015 European Intelligence and Security Informatics Conference, 7-9 September 2015) <<https://ieeexplore.ieee.org/document/7379738>> accessed 13 October 2025.

71 Brayne (n 8); MR McGuire, ‘The Laughing Policebot: Automation and the End of Policing’ (2021) 31(1) *Policing and Society* 20, doi:10.1080/10439463.2020.1810249; Shoshana Zuboff, ‘The Age of Surveillance Capitalism’ in Wesley Longhofer and Daniel Winchester (eds), *Social Theory Re-Wired* (3rd edn, Routledge 2023) 11.

72 Rodolfo C Severino, ‘The ASEAN Developmental Divide and the Initiative for ASEAN Integration’ (2007) 24(1) *ASEAN Economic Bulletin* 35.

Darussalam, Malaysia, Myanmar, and Singapore; The Philippines maintains a mixed system drawing from both civil and common law sources.⁷³

Regulation of artificial intelligence, data protection, and cybersecurity is uneven across ASEAN. Vietnam, Indonesia, Singapore, Malaysia, and Thailand have enacted data protection legislation and adopted national AI policies⁷⁴, while other Member States are still developing comprehensive data governance frameworks. Supervisory capacity also differs. Singapore, Malaysia, and Thailand have established data protection authorities with technical expertise. The Indonesian government has announced plans to finalise the establishment of a dedicated state agency for personal data protection this year⁷⁵. In Vietnam, data protection oversight is primarily exercised by the Cybersecurity and High-Tech Crime Prevention Department under the Ministry of Public Security, rather than by an independent data protection authority. Cambodia, Laos, and Myanmar do not currently maintain dedicated data protection institutions.

For these reasons, any approach to predictive policing in ASEAN must take account of national institutional capacity. Uniform regulatory standards across the region would not correspond to existing legal and administrative conditions.

5.2. Policy Framework for ASEAN BDPP Adoption

Drawing on global experience, ASEAN countries can benefit from adopting BDPP as part of their broader efforts to modernise law enforcement. However, its introduction must be guided by sound governance, legal safeguards, and contextual awareness to ensure that technological innovation supports justice, fairness, and public trust.

First, ASEAN countries should adopt a comprehensive and well-regulated approach to predictive policing. Predictive analytics should not be treated as a standalone solution but as one component of a broader, integrated crime prevention strategy⁷⁶ that complements

73 Joshua Kow, 'On Legal Harmonisation Within ASEAN' [2012] *The Singapore Law Review* <<http://www.singaporelawreview.com/juris-illuminae-entries/2015/on-legal-harmonisation-within-asean>> accessed 5 February 2026; Jason Odering, 'Southeast Asian Region Countries Law: Regional and Comparative Resources' (*University of Melbourne, Library*, 2020) <<https://unimelb.libguides.com/c.php?g=930183&p=6721948>> accessed 5 February 2026.

74 Vietnam Law No 91/2025/QH15 on Personal Data Protection 2025; Vietnam Law No 134/2025/QH15 on Artificial Intelligence 2025; Indonesia Law No 27 on Personal Data Protection 2022; Indonesia National Strategy for Artificial Intelligence 2020-2045; Malaysia Personal Data Protection Act 2010; Malaysia National Artificial Intelligence Roadmap 2021-2025; Thailand Personal Data Protection Act BE 2562 2019; Thailand's draft AI law 2025; Singapore Personal Data Protection Act 2012; Singapore National AI Strategy 2019.

75 'Indonesia to Establish Independent Personal Data Protection Agency' (*Antara News*, 4 February 2026) <<https://en.antaranews.com/news/402914/indonesia-to-establish-independent-personal-data-protection-agency>> accessed 5 February 2026.

76 Perry and others (n 4).

traditional approaches such as hotspot policing, problem-oriented policing and community-oriented policing⁷⁷. Before implementation, each country should establish a clear legal and ethical framework that defines the permissible scope of data collection, processing, and use. International experience, such as the suspension of the Dutch SyRI system,⁷⁸ shows that the absence of a defined legal foundation can lead to breaches of human rights. If SyRI violated human rights in a well-regulated European context, the risk in ASEAN jurisdictions with weaker safeguards is substantially greater. Therefore, ASEAN jurisdictions must establish detailed regulations governing data collection, processing, and sharing, particularly concerning personal information. These rules should comply with principles on privacy, human dignity, and the presumption of innocence, ensuring that predictive policing operates within clear ethical and legal boundaries. Given varying institutional capacity, ASEAN Member States may initially prioritise place-based predictive models, which generally pose lower risks to individual rights. Person-based models should only be considered where strong procedural safeguards and review mechanisms are in place.

Second, improving data governance and data quality while balancing technology with human oversight. The accuracy of predictive models depends on the quality and authenticity of their data inputs. Although artificial intelligence can process vast datasets and detect hidden patterns, it cannot understand social, economic, and cultural contexts that shape criminal behaviour. Across ASEAN, law enforcement data systems, such as national population registries, police databases, and immigration records, are still being standardised and interconnected and may contain inconsistencies or outdated records. As seen in the United States, “dirty data” and biased datasets can create feedback loops of over-policing, particularly in disadvantaged communities.⁷⁹ To mitigate such risks, human supervision is essential to review and question algorithmic outputs. Establishing clear standards for data validation and independent oversight mechanisms would help ensure that predictive models are built on fair, accurate data.

Third, the introduction of predictive policing should follow a gradual, pilot-based approach rather than a large-scale deployment. These pilot programs should include independent evaluations by academic institutions and civil society organisations to assess not only predictive accuracy but also the social and ethical implications. Promising examples are already evident across the region. In Singapore, the GRAND-VISION project, a research collaboration between the Singapore Police Force, Fujitsu, and Singapore Management University, applies deep learning to historical crime data (such as location, time of day, season, and weather conditions) to generate heat maps indicating where and when crimes are more likely to be committed. The system is designed to

77 Ferguson JM (n 40).

78 Case C-09-550982-HA ZA 18-388 (n 39).

79 Lum and Isaac (n 64); Martín and others (n 68).

support the targeted deployment of patrols and crime prevention resources.⁸⁰ In Vietnam, the project “AI-powered solution targeting social security risks among young citizens aged 13 to 25”, which won second prize at the 2024 Data for Life competition, is being supported by the National Population Data Center’s incubation program to refine its predictive model. Similarly, in Indonesia, the “Predictive Policing by Bhabinkamtibmas” initiative in Cilempung Village uses a predictive policing model adapted to local community conditions to enhance public safety.⁸¹ Such pilot initiatives could serve as controlled environments to improve algorithmic precision, verify data quality, and identify potential unintended consequences before wider implementation.

Finally, training and capacity building are essential. Police officers and policymakers must understand how predictive policing systems function, including advanced techniques such as machine learning and data analytics, and how to interpret algorithmic results critically. Training programs should include modules on data ethics, algorithmic literacy, and human rights, ensuring that technology is applied in a way that respects due process and public accountability. Regional cooperation through ASEAN mechanisms, such as the ASEANAPOL framework, can support the exchange of expertise, the development of shared ethical standards, and mutual learning among participating states.

6 CONCLUSIONS

Big data-driven predictive policing represents both a technological opportunity and a governance challenge for modern law enforcement. International experiences from the United States, the United Kingdom, and the Netherlands demonstrate that while BDPP can enhance efficiency and support proactive crime prevention, it also raises serious ethical, legal, and social concerns. For ASEAN countries, the responsible adoption of predictive policing requires a balanced approach, grounded in strong legal safeguards, reliable data governance, and human oversight. By learning from global practices and adapting them to national conditions, ASEAN countries can harness the benefits of BDPP while safeguarding human rights and public trust in its digital transformation of policing.

80 Jonathan Chase and others, ‘GRAND-VISION: An Intelligent System for Optimized Deployment Scheduling of Law Enforcement Agents’ (Proceedings of the 31st International Conference on Automated Planning and Scheduling ICAPS 2021, June 7-12) 459 <https://ink.library.smu.edu.sg/sis_research/5980> accessed 5 February 2026.

81 Sucita, Nita and Muriman (n 5).

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3. Amore L and Piotukh V, 'Life beyond Big Data: Governing with Little Analytics' (2015) 44(3) *Economy and Society* 341, doi:10.1080/03085147.2015.1043793
4. Angwin J and others, 'Machine Bias' (*ProPublica*, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> accessed 13 October 2025
5. Asor J and others, 'Building Model for Crime Pattern Analysis Through Machine Learning Using Predictive Analytics' (2022) 2(1) *International Journal of Science, Technology, Engineering and Mathematics* 61
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Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free from any impact of any organisations.

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EDITORS

Managing Editor – Prof. Iryna Izarova. **English Editor** – Robert Reddin.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Vu TH, Do TP and Nguyen VKH, ‘Big Data-Driven Predictive Policing: Global Practices and Lessons for ASEAN Countries’ (2026) 9(2) Access to Justice in Eastern Europe 187-213
<<https://doi.org/10.33327/AJEE-18-9.2-a000185>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000185>

Summary: 1. Introduction. – 2. Methodology. – 3. An Overview of Big Data-Driven Predictive Policing. – 3.1. *Definition and Conceptual Foundations*. – 3.2. *Classification of BDPP Models*. – 4. Global Practice of Big Data-Driven Predictive Policing. – 4.1. *Implementation of Big Data-Driven Predictive Policing in Practice*. – 4.2. *Problems and Limitations*. – 5. Recommendations for ASEAN countries. – 5.1. *ASEAN's Institutional and Regulatory Landscape*. – 5.2. *Policy Framework for ASEAN BDPP Adoption*. – 6. Conclusions.

Keywords: *big data, predictive policing, algorithmic, data analytics.*

DETAILS FOR PUBLICATION

Date of submission: 5 Jan 2026

Date of acceptance: 7 Feb 2026

Online First Publication: 10 March 2026

Last Publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in the first round: 2 reports

Number of revision rounds: 2 rounds with major and minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

This article was prepared with the assistance of AI tools. Specifically, Grammarly was employed for proofreading during the drafting process (version reviewed: December 2025). The authors confirm that all content, arguments, and conclusions were generated independently and remain their sole responsibility. No AI tool was used for generating original research findings or analysis.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРОГНОЗНА ПОЛІЦЕЙСЬКА ДІЯЛЬНІСТЬ НА ОСНОВІ ВЕЛИКИХ ДАНИХ: ГЛОБАЛЬНА ПРАКТИКА ТА УРОКИ ДЛЯ КРАЇН АСЕАН

Т. Хьонг Ву*, Т. Фуонг До та В. К. Хоа Нгуєн

АНОТАЦІЯ

Вступ. Використання великих даних та алгоритмічних інструментів стає все більш поширеним у правоохоронних органах. Одним із помітних нововведень є прогнозна поліцейська діяльність на основі великих даних (BDPP), яка прагне передбачити, де може статися злочин або хто може бути причетний, за допомогою аналізу великих наборів даних. Хоча прогнозування вже давно є частиною поліцейської діяльності, BDPP відрізняється масштабом та автоматизацією, спираючись на передову аналітику та машинне навчання. Хоча багато поліцейських органів розглядають BDPP як спосіб підвищення ефективності та переходу до превентивної поліцейської діяльності, його використання спричинило важливі правові та соціальні проблеми. Такі питання, як прозорість, упередженість даних, підзвітність та захист основних прав, залишаються невирішеними, особливо в країнах АСЕАН, де правові межі для алгоритмічної поліцейської діяльності все ще розробляються.

Методи. Ця стаття базується на якісному огляді літератури академічних та кримінологічних досліджень, політичних документів щодо прогносної поліцейської діяльності. У ній розглядається, як BDPP працює на практиці, з наголосом як на місцевих, так і на особистих моделях. У статті розглянуто вибраний досвід Сполучених Штатів, Нідерландів та Великої Британії для оцінки ефективності прогносної поліцейської діяльності, а також її практичних обмежень та пов'язаних з цим проблем. З огляду на ці висновки, у статті визначено уроки, які можуть бути актуальними для країн АСЕАН, що розглядають можливість впровадження подібних підходів.

Результати та висновки. У статті показано, що хоча BDPP пропонує потенціал для підвищення ефективності правоохоронних органів та проактивного розподілу ресурсів, глобальні дані зі США та Європи вказують на неоднозначну ефективність та суттєві ризики щодо алгоритмічної упередженості, прозорості та основних прав. Для країн АСЕАН, де інституційний потенціал та режими захисту даних суттєво відрізняються, доцільним є обережне та поетапне впровадження. Пріоритет слід надавати контрольованим пілотним проектам, які базуються на місцях, що підтримуються чіткими правовими мандатами, стандартами управління даними, незалежним оглядом та постійним людським наглядом.

Ключові слова. Великі дані, прогнозна поліцейська управління, алгоритмічний аналіз, аналітика даних.

TÓM TẮT BẰNG TIẾNG VIỆT*

Bài báo nghiên cứu

DỰ BÁO CẢNH SÁT VỚI DỮ LIỆU LỚN: THỰC TIỄN THẾ GIỚI VÀ BÀI HỌC CHO CÁC QUỐC GIA ASEAN

Vũ Thu Hương*, Đỗ Thị Phương, Nguyễn Việt Khánh Hoà

TÓM TẮT

Bối cảnh: Trong những năm gần đây, dữ liệu lớn và các công cụ phân tích thuật toán ngày càng được ứng dụng rộng rãi trong hoạt động điều tra, truy tố và xét xử. Trong đó, dự báo cảnh sát bằng dữ liệu lớn được coi là một trong những hướng đi triển vọng nhất, giúp dự đoán những khu vực có nguy cơ cao hoặc những người có khả năng liên quan đến tội phạm thông qua hoạt động xử lý và phân tích các tập dữ liệu quy mô lớn. Mặc dù dự báo tội phạm từ lâu đã là một phần quan trọng của hoạt động cảnh sát nhưng dự báo cảnh sát sử dụng các phương pháp phân tích nâng cao và học máy để nâng cao quy mô và mức độ tự động hóa. Nhiều lực lượng cảnh sát trên thế giới nhìn nhận đây là bước chuyển mình tích cực, hướng tới một mô hình dự báo mang tính chủ động, phòng ngừa hơn. Tuy nhiên, cũng có không ít những lo ngại về tính minh bạch của thuật toán, nguy cơ sai lệch dữ liệu, trách nhiệm giải trình và việc bảo đảm các quyền và tự do cơ bản của công dân. Những vấn đề này cũng đặc biệt nan giải ở khu vực ASEAN, nơi hành lang pháp lý điều chỉnh hoạt động dự báo cảnh sát nói riêng và thuật toán, trí tuệ nhân tạo nói chung vẫn đang trong giai đoạn hình thành và chưa thực sự hoàn thiện.

Phương pháp: Bài viết được thực hiện theo phương pháp tổng quan tài liệu định tính, trên cơ sở nghiên cứu và đối chiếu các công trình học thuật, tài liệu tội phạm học và văn bản chính sách liên quan đến lĩnh vực dự báo cảnh sát. Từ đó, nghiên cứu làm rõ cơ chế vận hành trên thực tế của hai mô hình chính: mô hình dựa trên địa điểm và mô hình dựa trên cá nhân, thông qua các trường hợp điển hình tại Hoa Kỳ, Hà Lan và Vương quốc Anh. Trên cơ sở đó, bài viết phân tích, đánh giá hiệu quả, hạn chế của dự báo cảnh sát, đồng thời rút ra những bài học thực tiễn mà các quốc gia ASEAN có thể tham khảo khi cân nhắc áp dụng trong tương lai.

Kết quả và kết luận: Kết quả nghiên cứu chỉ ra rằng dự báo cảnh sát mang lại triển vọng nhất định trong việc nâng cao hiệu quả và tối ưu hóa việc phân bổ nguồn lực, tuy nhiên các bằng chứng thực nghiệm từ Hoa Kỳ và châu Âu lại cho thấy kết quả chưa đồng đều và tiềm ẩn không ít rủi ro, đặc biệt về sai lệch thuật toán, mức độ minh bạch và nguy cơ xâm phạm quyền cơ bản của công dân. Đối với các nước ASEAN - nơi năng lực thể chế cũng như mức độ hoàn thiện của cơ chế bảo vệ dữ liệu còn có sự chênh lệch lớn giữa các quốc gia, một lộ trình tiếp cận thận trọng, có kiểm soát và triển khai theo từng bước là hết sức cần thiết. Ưu tiên trước mắt nên tập trung vào các dự án thí điểm khoanh vùng địa bàn cụ thể, được đặt trong một khung pháp lý minh bạch và rõ ràng, đi kèm với các tiêu chuẩn quản trị dữ liệu chặt chẽ, cơ chế đánh giá độc lập, và quan trọng hơn hết là sự giám sát thường xuyên, liên tục của con người trong toàn bộ quá trình vận hành.

Từ khóa: dữ liệu lớn, dự báo cảnh sát, thuật toán, phân tích dữ liệu.

* The publication metadata in Vietnamese is presented as submitted by the authors.

Research Article

BEYOND THE STATE-CENTRIC BINARY: EVALUATING THREE PARADIGMS OF MULTINATIONAL CORPORATIONS' INTERNATIONAL LEGAL SUBJECTIVITY

Mohammed Alsudais

ABSTRACT

Background: *The traditional state-centric framework of international law is increasingly inadequate in a globalized landscape where multinational corporations (MNCs) wield economic and regulatory power that rivals sovereign states. This doctrinal lag creates a persistent "governance gap," particularly regarding corporate accountability for human rights and environmental impacts. Employing a doctrinal legal research design, this article analyzes treaties, judicial opinions, and soft law to evaluate how the international legal order can better integrate these non-state actors.*

Method: *The study categorizes the evolving status of MNCs through three paradigms: objects (passive entities fully subordinate to state mediation), partial subjects (context-specific holders of state-granted rights, such as in investment arbitration), and participants (functional actors contributing to a dynamic legal continuum).*

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000189>

Date of submission: 27 Nov 2025

Date of acceptance: 16 Feb 2025

Online First publication: 05 May 2026

Last Publication: 20 May 2026

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Results and conclusions: *While existing scholarship acknowledges corporate influence, this paper contributes a three-tiered taxonomy that moves beyond the rigid subject-object binary. It ultimately advocates for recognizing MNCs as secondary limited subjects and proposes a novel framework of rebuttable presumptions for normative responsibilities. By aligning legal obligations with functional global impact, this approach seeks to restore international law's relevance in a pluralistic global order.*

1 INTRODUCTION

In the traditional framework of public international law, states were regarded as the exclusive subjects, holding sole responsibility for their creation, enforcement, and the attendant rights and obligations.¹ This state-centric, realist paradigm portrayed the international system as fundamentally intergovernmental, confining legal subjectivity to sovereign entities alone. However, the evolving global landscape prompts a critical inquiry: Does this conventional approach demand revision in the modern era? The modern landscape, characterized by deep interconnections via tangible and intangible networks, has introduced greater complexity. While states continue to serve as the primary actors, they coexist with a diverse array of entities, including international organizations that emerged in the Nineteenth Century and proliferated throughout the Twentieth Century,² as well as those possessing partial or full international legal personality, such as quasi-states, quasi-international organizations, sui generis bodies, individuals, and groups.³ In recent decades, non-state actors have gained increasing prominence across domains encompassing military and political security, economic relations, sustainable development, human rights, and environmental protection.⁴ These actors frequently operate beyond robust international legal oversight, leveraging their ambiguous status to pursue private or corporate interests that can undermine foundational principles of international law, particularly those related to security, as articulated in Chapter VIII of the United Nations Charter.⁵

- 1 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Batoche Books, 2000); Jack L Goldsmith and Daryl J Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122(7) Harvard Law Review 1791.
- 2 Akira Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World* (University of California Press, 2002).
- 3 William Thomas Worster, 'Functional Statehood in Contemporary International Law' (2020) 46 Brooklyn Journal of International Law 39.
- 4 Bas Arts, *Non-State Actors in Global Governance: Three Faces of Power* (Preprint No 2003/4, Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter 2003); Claude Bruderlein, *The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars* (Centre for Humanitarian Dialogue 2000); Elke Krahmann, 'From State to Non-State Actors: The Emergence of Security Governance' in Elke Krahmann (ed), *New Threats and New Actors in International Security* (Palgrave Macmillan 2005) 3.
- 5 Charter of the United Nations (signed 26 June 1945) <<https://www.un.org/en/about-us/un-charter>> accessed 20 November 2025; Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007).

For this paper, non-state actors primarily include multinational corporations (MNCs). Given that certain multinational corporations now command greater economic power than some states,⁶ it is almost axiomatic that they are widely regarded as “a major, perhaps the major, phenomenon of the international economy today.”⁷ Furthermore, this category of non-state actors is generally regarded as one of the “driving forces” of globalization.⁸ Their operations are governed by provisions such as Article 2(a) of the 2011 Draft Articles on the Responsibility of International Organizations, which allows states and other entities to form such bodies without restricting their composition.⁹ Although these actors are not typically direct participants in implementing Chapter VIII, their involvement could be apt given the evolving nature of security threats. In this context, it is also critical to address the classification and prosecution of criminal liability for MNCs, as this is essential for maintaining ethical standards in international trade.¹⁰ However, such efforts encounter substantial obstacles, including legal inconsistencies across jurisdictions, cross-border enforcement challenges, and the absence of robust international mechanisms.

This study contributes to understanding the role of MNCs in contemporary international law, including in post-communist and transition economies that have become attractive destinations for foreign direct investment. This dynamic aligns with the broader conceptualization of MNCs as crucial agents of globalization, exerting influence over domestic policies, forging alliances to amplify their political leverage, and occasionally creating strong dependency dynamics that can reduce host nations to highly vulnerable, economically dependent host states. Such influences are especially evident in key sectors such as energy, manufacturing, and technology, mirroring the historical trajectory from colonial-era entities, such as the East India Company, founded in England in 1600, and the Vereenigde Nederlandsche Geoctroyeerde Oostindische Compagnie (known in English as the Dutch East India Company), which was established in 1602, to contemporary MNCs exhibiting traits of international legal personality.

Building on this regional lens, the study critically examines the evolving legal status of MNCs in international law by framing their positions through three core paradigms: objects, partial subjects, and participants. This categorization illustrates the shift from rigid state-centrism toward more inclusive frameworks that better accommodate non-state

6 Menno T Kamminga, ‘Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC’ in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 553, doi:10.1093/oso/9780198298069.003.0017.

7 Peter Dicken, *Global Shift: Reshaping the Global Economic Map in the 21st Century* (4th edn, Sage Publications 2003) 198.

8 Jörn Kleinert, *The Role of Multinational Enterprises in Globalization* (Kieler Studien - Kiel Studies, Springer 2004) 28.

9 ILC, *Draft Articles on the Responsibility of International Organizations, with Commentaries* (UN 2011) <<https://www.legal-tools.org/doc/3105dc/>> accessed 20 November 2025.

10 Khoat Van Nguyen, ‘Confronting Transnational Corporate Crime: Urgent Global Measures’ (2024) 7(4) *Access to Justice in Eastern Europe* 421, doi:10.33327/AJEE-18-7.4-a000106.

actors' roles in promoting global public goods, including human rights, labor standards, and environmental protection. Specifically, the objectives are: (1) to analyze the limitations of the object paradigm, which denies MNCs independent agency and perpetuates state control; (2) to evaluate the functional and consent-based attributes of the partial subject paradigm as a mechanism for bridging accountability gaps; (3) to assess the participant paradigm's process-oriented approach in overcoming traditional doctrinal binaries; and (4) to advocate for enhanced normative recognition of MNCs as secondary limited subjects, thereby addressing regulatory challenges in transnational operations and proposing adaptive reforms to impose rebuttable presumptions of obligations.

To achieve these objectives, the study employs a doctrinal legal research design. This involves a comprehensive literature review of scholarly works, international treaties, judicial opinions (e.g., the International Court of Justice's (ICJ) Reparation for Injuries advisory opinion), and soft law instruments (e.g., the UN Guiding Principles on Business and Human Rights). The approach is supplemented by critical analysis of historical evolutions, conceptual debates, and pragmatic developments, drawing on sources such as UN reports and academic critiques to evaluate paradigms and propose reforms in the international legal order.

2 THE HISTORICAL EVOLUTION

Long before global bodies, big companies across borders began shaping world ties when organizations such as the Dutch East India Company began sailing in the 1600s. Back then, firms such as England's equivalent gained official powers through a royal charter, turning them into fictional entities able to take risks far away.¹¹ One key shift stood out: investors locked money into ventures that could not leave certain trades, binding capital tightly. With backing now limitless, because money no longer vanishes without reason like it once did in old-style partnerships, businesses could stretch forever, especially when reaching far beyond their starting lands. Such a shift transformed MNCs from rarefied British franchises into genuine global players, beginning roughly two hundred years ago.¹² Now operating machines, powering nations, trading oceans, these modern giants still grow stronger each year, sometimes matching statecraft in reach and impact.

As both products and drivers of globalization, MNCs often surpass states in economic power. Pursuing optimal profits, they form alliances and conglomerates that enhance their economic strength and political power and influence, enabling them to shape national and international affairs. Interactions with states frequently yield collaborations or concessions,

11 Christiane Ahlborn, 'Towards a Theory on the International Legal Personality of Corporations' (2025) 16 Transnational Legal Theory 43.

12 Abdul Ghafar Ismail and Noraziah Che Arshad, 'Tracking the Pre-and Post-Colonial Banking: The Quest for Islamic Banking' (2010) 1 Prosiding Perkem V, Jilid 173.

at times reducing nations to "banana republics."¹³ On a global scale, MNCs influence not only individual governments but also collective state behavior, while shaping the agenda of international organizations, such as the UN's Global Compact and Sustainable Development Goals, which address human rights and environmental concerns.¹⁴

In a globalized world with porous borders facilitating flows of people, goods, services, technology, and capital, multinational companies increasingly dictate domestic policies in host states and broader regional and global relations. Alongside states and select international organizations, they act as key players in international economic relations, driving trade, foreign direct investment, global supply chains, job creation, technology transfer, and policy development. This crucial role inevitably affects their standing within the international community and its legal framework, with leading corporations displaying clear elements of international legal personality.

While international organizations have long been recognized as international legal persons, corporations occupy a legal gray zone regarding their international rights and obligations, often to their advantage.¹⁵ Parallels exist between the two: until the ICJ's 1949 Advisory Opinion on Reparation for Injuries,¹⁶ the legal personality of international organizations remained controversial. Even today, uncertainties linger about their specific rights and obligations, as illustrated by debates in the United Nations International Law Commission's work on the Articles on the Responsibility of International Organizations, including whether such entities possess a right to self-defense.¹⁷ Comparable issues arise for technology corporations contemplating "hack back" responses to cyber-attacks.¹⁸

Attributing international legal status to international organizations and corporations challenges the primacy of states as the principal subjects of international law, which traditionally exercise inherently sovereign functions and uphold the public character of public international law. Although states themselves are corporate entities, international law has historically struggled to conceptualize the corporate form. As the original subjects of

13 Khalid Zaman, 'Navigating the Perils of a Banana Republic: Lessons from Pakistan's Economic Crisis' (2023) 1(1) *Politica* 33, doi:10.5281/zenodo.7715198.

14 *United Nations Global Compact* (formation 26 July 2000) <<https://unglobalcompact.org/what-is-gc>> accessed 20 November 2025; *Transforming Our World: The 2030 Agenda for Sustainable Development* (adopted 25 September 2015 UNGA Res 70/1) <<https://sdgs.un.org/2030agenda>> accessed 20 November 2025; *Sustainable Development Goals* (established 2015) <<https://www.un.org/sustainabledevelopment/>> accessed 20 November 2025.

15 Ahlborn (n 11).

16 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion (ICJ, 11 April 1949) Rep 174.

17 ILC, *Draft Articles* (n 9).

18 Nicholas Winstead, 'Hack-Back: Toward a Legal Framework for Cyber Self-Defense' (*American University*, 26 June 2020) <<https://www.american.edu/sis/centers/security-technology/hack-back-toward-a-legal-framework-for-cyber-self-defense.cfm>> accessed 20 November 2025.

international law, states are presumed to possess international legal personality, with sovereignty linked to territoriality, though this connection has not always been absolute.

The modern concept of legal personality emerged alongside the rise of corporations, as illustrated by the East India Company and the Dutch East India Company. This development did not occur in isolation but emerged alongside early modern corporations amid expanding global trade in the Seventeenth Century. These pioneering joint-stock companies received government charters that conferred artificial personhood, enabling them to undertake large-scale, high-risk overseas ventures, particularly in Asia.¹⁹

Historically, traditional business structures, derived from Roman partnership law, proved inadequate for long-distance sea trade, as partners could withdraw capital at will, often dissolving the venture and hindering long-term resource commitments. The corporate form was innovated by introducing capital "lock-in" mechanisms that secured investors' funds indefinitely until liquidation.²⁰ This represented a legal advancement beyond mere contracts, relying on state-backed charters to ensure permanence and safeguard against arbitrary dissolution or expropriation by rulers.

The ICJ's ruling in *Reparation for Injuries*, affirming the United Nations' international legal personality, was pragmatically driven to secure its status against a non-member state. International law scholarship has only recently begun to theorize international organizations, focusing on their legal status.²¹ This article continues earlier attempts to contribute to theories of personhood in international law by examining MNCs' roles in transnational and international relations.²²

Despite this profound influence, MNCs lack formal status in international law. Private corporations and other non-state actors do not conform to traditional criteria for international legal personality. Nevertheless, legal personality endures as a powerful trope signifying the capacity to bear rights and obligations. Reluctance to extend it to non-state actors stems from equating it with full statehood, ignoring that personality is a binary status rather than a matter of degree. Once recognized, attention turns to the specific

19 Giuseppe Dari-Mattiacci and others, 'The Emergence of the Corporate Form' (2017) 33(2) *Journal of Law, Economics, & Organization* 193.

20 *ibid*

21 Christopher Balding and Daniel Wehrenfennig, 'Theorizing International Organizations: An Organizational Theory of International Institutions' (2011) 2(1) *Journal of International Organization Studies* 7; Ian Hurd, 'Theorizing International Organizations: Choices and Methods in the Study of International Organizations' (2011) 2(2) *Journal of International Organization Studies* 7; Ian Johnstone, 'Law-Making by International Organizations: Perspectives from IL/IR Theory' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 266.

22 Fleur Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory' (1994) 19(4) *Melbourne University Law Review* 893; Peter Muchlinski, *Multinational Enterprises and the Law* (3rd edn, OUP 2021).

capacities, rights, and obligations within the legal order. Thus, personality indicates that a collective entity exceeds the sum of its parts, applying equally to groups and individuals at domestic and international levels.

Given MNCs' active involvement in international relations, this article advocates greater legal status for them. Scholarship, particularly in business and human rights, has debated corporate personhood primarily in terms of potential obligations, with mainstream positions rejecting it, partly due to corporate resistance to international regulation. In contrast, systematic analysis of corporate rights, which, like obligations, evince legal capacity on the international plane, remains limited. Companies hold substantial rights across diverse international regimes, notably under the European Convention on Human Rights (ECHR), where they may invoke protections such as fair-trial and property guarantees. The Bosphorus judgment illustrates that such rights are exercised within an integrated system in which corporate complaints about sanctions or regulatory measures are assessed against a background of UN, EU, and domestic norms, reinforcing the idea that MNCs operate within a dense web of multi-level public authority rather than in a purely bilateral state–corporation relationship. Although this does not automatically bestow general international legal personality, such rights provide strong evidence of their international legal status. The following chapter will discuss in depth the status of MNCs through the prism of three main paradigms.

3 THE INTERNATIONAL LEGAL SUBJECTIVITY OF MULTINATIONAL CORPORATIONS: EVOLVING PERSPECTIVES AND CONTEMPORARY DEVELOPMENTS

3.1. Terminological Diversity

What counts as a multinational corporation isn't always clear: different fields and global groups use varied terms. Even the UN wavers, sometimes calling them multinationals, other times transnationals. Organizations such as the OECD and the ILO tend to say that multinational corporations. In scholarly work, the short form MNC covers a range of forms: massive companies, alliances, or setups shaped by ownership, location, and reach. These organizations start in one country but stretch into two or more, managing operations elsewhere.

Though structured differently, multinational companies stand out because they're run from a single center, answer to investors worldwide, and can move money across borders quickly through seamless transactions. Because of this reach, such firms sometimes act without strong ties to any particular country's economy, revealing gaps in how local laws handle their worldwide effects. Seeing these corporations not just as standard business

organizations but as creations shaped by global politics and economies makes it obvious why they must fit within established international legal structures. Simply put, it just works better that way.

In international legal literature, terms like "transnational" and "multinational" often imply subtle differences, with "corporation" suggesting a specific entity featuring legal personality, transferable shares, limited liability, centralized management, and investor ownership.²³ Nonetheless, these terms are commonly interchanged due to conceptual vagueness and MNCs' heterogeneous legal forms and structures, which lack a singular identity and operate as politico-economic constructs shaped by varied juridical tools.

Scholarly discourse shows strong resistance to viewing corporate entities as subjects of international law, and until recently, assertions of their international legal personality were rare, with many scholars preferring to leave the issue unresolved.²⁴ Consequently, emphasis is placed on differentiating MNCs from domestic firms, even those involved in international trade, by underscoring MNCs' distinctive traits, such as effortless cross-border relocation of production and assets, management structures that span borders, and tenuous substantive links to any single nation beyond formal incorporation. This flexibility and detachment from national regulations highlight the limitations of domestic legal systems in managing MNC impacts, underscoring the need to integrate them into international law frameworks.

3.2. The Question of Status

The concept of international legal subjectivity, often used interchangeably with international legal personality, refers to an entity's capacity to hold rights and obligations under international law, and to participate in its creation and enforcement. Traditionally, states have served as the primary subjects, while international organizations receive limited personality grounded in functional necessities. For MNCs, economic entities operating across borders, the issue of subjectivity is highly contentious. Scholarly literature spans a range of perspectives: from outright rejection due to international law's state-centric foundations, to advocacy for a limited or functional personality that acknowledges MNCs' substantial global influence, and proposals for a rebuttable presumption of responsibilities in fields like human rights and environmental protection.²⁵ This paper attempts to synthesize core arguments from key scholarly

23 Jan Wouters and Anna-Luise Chané, *Multinational Corporations in International Law* (Working Paper No 129, KU Leuven 2013) doi:10.2139/ssrn.2371216.

24 Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 76-7.

25 José E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9(1) Santa Clara Journal of International Law 1; Jonathan I Charney, 'Transnational Corporations and Developing Public International Law' (1983) 4 Duke Law Journal 748, doi:10.2307/1372465; David Adedayo Ijalaye, *The Extension of Corporate Personality in International Law* (Oceana 1978); Muchlinski (n 22); Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities' [1993] Journal of Global Legal Studies <<https://esil-sedi.eu/wp-content/uploads/2018/04/Nowrot.pdf>> accessed 20 November 2025.

contributions, underscoring ongoing debates in an era of globalization where MNCs frequently exercise power rivaling or surpassing that of some states.

Conferring international legal subjectivity on any entity, including MNCs, demands evidence that its status and actions fall under international legal regulation, that it possesses rights and duties stemming from such law, and that it actively contributes to global relations and institutions rather than merely benefiting passively. For MNCs, international law increasingly regulates their roles in critical transnational domains, granting specific rights and imposing duties; prominent MNCs also sometimes influence emerging norms and partner with international institutions. These interconnected factors collectively bolster MNCs' evolving standing within the international legal order.

The legal status of corporations, particularly MNCs, sparks greater scholarly debate than that of individuals, largely because individual subjectivity has gained relatively stable acceptance in modern international law, while corporate subjectivity remains fragmented and in flux.²⁶ Individuals are now clearly recognized as direct holders of rights and obligations under international human rights law²⁷ and international criminal law,²⁸ reflecting a post-World War II shift toward protecting human dignity beyond state mediation.²⁹ In contrast, MNCs, economic entities with vast global influence, elicit contention due to their hybrid nature as creations of domestic law yet actors in transnational spheres, raising questions about whether they possess independent legal personality, direct duties, or merely derivative rights. This asymmetry arises from international law's traditional state-centric framework, in which non-state entities, such as corporations, are not automatically endowed with subjectivity, leading to ongoing disputes over their accountability for harms such as labor exploitation or environmental degradation, weighed against their economic contributions. Alvarez, for example, questions whether corporations qualify as subjects of international law, arguing that such labeling is often distracting and risky, potentially equating profit-driven entities with natural persons and distorting accountability mechanisms; he contrasts this with individuals' clearer subjectivity under human rights regimes, cautioning against over-analogizing in areas like investor-state arbitration.³⁰

26 Alvarez (n 25).

27 Frédéric Mégret, 'The Nature of International Human Rights Obligations' in Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2010) 124, doi:10.2139/SSRN.1472196.

28 Via the Rome Statute of the International Criminal Court, which holds individuals accountable for crimes such as genocide and war crimes, etc. Rome Statute of the International Criminal Court (adopted 17 July 1998) [2004] UNTS 2187/3.

29 Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2018).

30 Alvarez (n 25).

3.3. Conceptual Clarification: Subjectivity, Personality, and Participation

Looking away from complex scholarly arguments, four concepts matter when placing multinational firms in the wider legal picture: sovereignty, international legal personality, subjectivity, and involvement.³¹ The power to determine global rule? That stays locked within national hands. Only states earn true sovereignty.³² A related concept appears through the lens labeled "international legal personality," also known as "subjectivity." This phrase points to those who can claim rights. Or have obligations under international agreements. That part matters, too. When it comes to MNCs, their legal position is not nearly as wide-reaching as that of states.³³ Power over them comes from states choosing to grant rights, not from something automatically given.³⁴ Those rights also apply mainly in narrow spaces, such as corporate accountability or dispute resolution through tribunals. In everyday terms, what "participation" really means is how much real influence these bodies wield.³⁵ This method tracks a company's actual impact on worldwide rules and choices, separate from its formal legal status.

31 For different approaches to these concepts, see, for example, Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1: Peace (9th edn, 2008) (classic state-centric account of sovereignty and personality); Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1995) doi:10.1093/law/9780198764106.001.0001 (reframing subjects/objects in process terms); and Nowrot (n 25) (arguing for reconceptualizing corporate personality). For personality as the capacity to bear international rights and obligations, see ICJ's advisory opinion: *Reparation for Injuries Suffered in the Service of the United Nations* (n 16) 179-80 (holding that the UN has rights and obligations and therefore international personality, though it is "certainly not a super-State").

32 On the classic view of sovereignty and the state as the primary subject of international law, see Jennings and Watts (n 31), and the traditional formulation quoted in Lassa Oppenheim, 'International Legal Sovereign' (summarizing the position that "states solely and exclusively are the subjects of international law").

33 On subjectivity/personality as an entity's standing as a direct addressee of international norms, see Section 3.2 above; and Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) doi:10.1017/CBO9780511921858 (discussing individuals as direct holders of rights and obligations).

34 *ibid*

35 Participation is defined as the functional capacity of an MNC to influence international norms and participate in a "dynamic continuum" of law-making, which in turn justifies the formal recognition of its limited subjectivity. For participation understood as functional influence over law-making and implementation, see Higgins (n 31) (describing international law as a "dynamic" process shaped by authoritative decisions of various actors); and Nowrot (n 25) (linking the *de facto* power of certain MNCs to a rebuttable presumption of normative responsibilities).

On participation and international law as an ongoing decision-making process involving multiple actors, see also Higgins (n 31) (criticizing the rigid subject/object dichotomy and emphasizing practical involvement); and Clapham (n 24) (analyzing the roles of corporations and other non-state actors in norm creation and implementation).

35 Patricia Rinwigati, 'The Legal Position of Multinational Corporation in International Law' (2019) 49(2) *Jurnal Hukum & Pembangunan* 376, doi:10.21143/jhp.vol49.no2.2009.

4 THREE MAIN PARADIGMS

Available academic viewpoints categorize MNCs under three main paradigms, as objects, partial subjects, or participants, each illustrating the incremental inclusion of non-state entities in a system long centered on states.³⁶ Moreover, the three principal paradigms illustrate an evolutionary shift, a radical departure, from strict state-centrism toward more adaptable and inclusive views of non-state actors in the global legal landscape.

4.1. The Object Paradigm

Under the object approach, big companies act like silent tools, entirely at the government's behest.³⁷ They seem unable to make moves on their own or bring global rules into play without direction. In 1940, the International Court of Justice endorsed this idea in the *Barcelona Traction* case.³⁸ It argued corporate rights come not from where they're used but where they were born. Over time, attempts to shift this framework have emerged, such as the 2003 UN Norms, which aim to compel firms to respect basic human rights.³⁹ Yet those plans never made it, blocked by nations and corporate powers alike. Even after the UN Guiding Principles introduced "responsibility to respect" human rights, those rights stay unenforceable as standards, not real legal duties under international law.⁴⁰

4.2. The Partial Subject Paradigm

In practice, courts often view multinational companies as holding only a fragment of the rights typically seen in global law. For instance, these firms frequently bring claims against the countries where they operate, but this power isn't inherent. It's derived from specific agreements between nations, such as bilateral investment treaties.⁴¹ These

36 *ibid*

37 Michelle Worthington and Peta Spender, 'Constructing Legal Personhood: Corporate Law's Legacy' (2021) 30(3) *Griffith Law Review* 348, doi:10.1080/10383441.2021.2003742.

38 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, 2nd phase (ICJ, 5 February 1970) <<https://www.icj-cij.org/case/50>> accessed 20 November 2025.

39 ECOSOC, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003) <<https://docs.un.org/E/CN.4/Sub.2/2003/12/Rev.2>> accessed 20 November 2025; David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97(4) *American Journal of International Law* 901, doi:10.2307/3133689.

40 Andreas Rasche and Sandra Waddock, 'The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research' (2021) 6(2) *Business and Human Rights Journal* 227, doi:10.1017/bhj.2021.2.

41 For a detailed application of this procedural standing in human rights counterclaims, see Case No ARB/07/26 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (ICSID, 8 December 2016) <<https://www.italaw.com/cases/1144>> accessed 20 November 2025.

arrangements essentially grant businesses a seat at the table during legal disputes.⁴² This functional approach mirrors the International Court of Justice's famous stance on reparations: that the law must evolve alongside the needs of the community.⁴³ While this allows the system to grant certain powers to non-state groups, it's a far cry from turning them into sovereign, state-like entities.⁴⁴ Through what is often called "principled pragmatism," corporations can step up their responsibilities via non-binding frameworks such as the UN Guiding Principles, all while acknowledging that governments still hold the ultimate authority to set the rules.⁴⁵

4.3. The Participant Paradigm

The participant paradigm represents a transformative shift in international legal theory, redirecting focus from the rigid concept of subjectivity, traditionally reserved for states as full bearers of rights and duties, to a more inclusive notion of participation, emphasizing actors' practical capacity to engage in legal relations, hold rights, and assume obligations.⁴⁶ This approach addresses longstanding limitations in classical doctrines by prioritizing functional involvement over categorical labels, enabling nuanced recognition of non-state entities such as MNCs without equating them with sovereigns. Rather than discarding subjectivity entirely, scholars suggest refining it as an evolving umbrella term that encompasses diverse roles, rights, obligations, and accountabilities, thereby resolving key questions: who qualifies as a participant (e.g., entities with demonstrable impact), what specific entitlements and duties do they hold (e.g., context-specific human rights responsibilities), and how to operationalize accountability (e.g., through adaptive frameworks like voluntary guidelines or dispute mechanisms).⁴⁷ Such refinement fosters pragmatic evolution, enabling international law to better accommodate the complexities of globalization while maintaining conceptual coherence.

42 Clapham (n 24).

43 *ibid.* Also see, Yuen-Li Liang, 'Reparation for Injuries Suffered in the Service of the United Nations' (1949) 43(3) *The American Journal of International Law* 460, doi:10.2307/2193639; William Thomas Worster, 'Relative International Legal Personality of Non-State Actors' (2016) 42(1) *Brooklyn Journal of International Law* 207.

The functional adaptation of personality was foundational in the ICJ's advisory opinion: *Reparation for Injuries Suffered in the Service of the United Nations* (n 16).

44 *ibid.* Scholarship highlighting the state-dependent nature of this status includes Worster (n 43) and Nicola Jägers, 'The Legal Status of the Multinational Corporation Under International Law' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law Int'l 1999) 259, doi:10.1163/9789004637566_025.

45 This reflects the 'principled pragmatism' of the UNGPs, which addresses the asymmetry in access to justice between MNCs and individuals. See, OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN 2011).

46 Alvarez (n 25); Higgins (n 31).

47 Ijalaye (n 25) 244.

This paradigm fundamentally departs from the orthodox subject-object dichotomy, which has historically confined actors to either plenary subjects, such as states with inherent and unrestricted capacities, or passive objects lacking independent agency.⁴⁸ This binary framework has fueled protracted, often fruitless debates over definitional thresholds, stifling progress in addressing the roles of non-state actors.⁴⁹ To overcome these constraints, scholars have denounced the dichotomy as an "intellectual prison" of limited utility, advocating instead viewing international law as a dynamic decision-making process involving a broad array of participants, including MNCs, NGOs, and individuals, without rigid classifications.⁵⁰ The term "participant" provides a flexible and baggage-free alternative to "subject" or "person," avoiding misleading parallels between corporations, created under domestic law for commercial purposes, and natural persons, who retain certain international rights irrespective of state recognition (e.g., as stateless individuals).⁵¹ By framing MNCs as participants, the paradigm highlights their active contributions to legal processes, such as influencing norms through economic leverage, while sidestepping doctrinal pitfalls that obscure practical realities. Ultimately, labeling a corporate entity as a "subject" or "object" of international law confuses more than it enlightens.⁵²

At its core, the participant paradigm reconceptualizes international law not as a static set of immutable rules imposed hierarchically, but as a fluid "dynamic continuum" shaped by ongoing, authoritative decisions from diverse actors responding to emerging global needs. In this process-oriented view, law emerges through interactive validation by recognized authorities, states, international organizations, and, increasingly, non-state entities like MNCs, allowing norms to adapt over time. Globalization accelerates this dispersion of law-making across sectors, positioning states, intergovernmental bodies, MNCs, NGOs, and individuals as coequal participants based on their tangible influence in decision-making arenas.⁵³ For instance, Higgins argues that entities gain direct rights, obligations, and capacities proportional to their "clout," such as MNCs shaping investment treaties or customary practices through market dominance.⁵⁴ This functional approach echoes the ICJ's reasoning in the *Reparation*, where the Court, addressing the UN's claim for reparations following the death of its agent in Palestine, held that the organization possesses objective international personality to the extent necessary for fulfilling its functions, independent of member states' recognition.⁵⁵ This seminal decision illustrates how

48 Peter Muchlinski, 'Corporations in International Law', *Max Planck Encyclopedia of Public International Law* (2014) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1513>> accessed 20 November 2025.

49 Simon Chesterman, 'Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones' (2010) 11(2) *Chicago Journal of International Law* 327.

50 Higgins (n 31) 49.

51 Alvarez (n 25) 8.

52 *ibid*

53 Carmen E Pavel, *Law Beyond the State: Dynamic Coordination, State Consent, and Binding International Law* (OUP 2021).

54 Higgins (n 31) 2.

55 See CJ's advisory opinion: *Reparation for Injuries Suffered in the Service of the United Nations* (n 16).

international law pragmatically recognizes entities' capacities based on operational needs rather than formal status, directly supporting the participant paradigm's emphasis on inclusive, role-based involvement. Clapham builds on this by asserting that acknowledging non-state participation is crucial to effective human rights enforcement, as traditional state privileges, such as treaty-making or immunity, are often irrelevant in operational contexts such as corporate supply chains.⁵⁶ Other scholars push for even broader MNC inclusion in norm creation, advocating their direct involvement in regulatory frameworks to reflect their transnational power.⁵⁷ This sociological emphasis over doctrinal rigidity challenges state-centric biases, though it sparks debates on measuring participation, e.g., quantifying influence via economic impact or advocacy, and ensuring equitable appraisal across actors.

A practical embodiment of this paradigm is the UN Secretary-General's Special Representative on Business and Human Rights (SRSG) adoption of "principled pragmatism," which bypasses abstract subjectivity disputes to advance the "Protect, Respect and Remedy" Framework.⁵⁸ This initiative enhances corporate accountability for human rights abuses by clarifying states' duty to protect, businesses' responsibility to respect, and access to remedies, thereby filling gaps where international law lags behind reality, such as when host states fail to uphold protections. Emerging recognition further extends direct human rights obligations to non-state actors in de facto control scenarios, such as MNCs involved in enforced disappearances or in territorial governance in conflict zones, where they exercise authority akin to that of states.⁵⁹ Persistent vulnerabilities arise in conflict zones and state-business nexuses, intensified by privatization of public functions such as healthcare and security; in privatized conflicts, where states outsource military roles to private firms, accountability blurs, amplifying calls for direct corporate duties, particularly for state-owned entities engaged in hostilities. These dynamics highlight systemic shortfalls when state interests override protections, underscoring the need for reformed norms that bolster governmental oversight, integrate participant roles more effectively, and mainstream human rights in global governance through multijurisdictional regulation, corporate due diligence requirements, transparency mandates, and measures to combat greenwashing.⁶⁰

56 Clapham (n 24).

57 Patricia Rinwigati Waagstein, 'Corporate Human Rights Responsibility: A Continuous Quest for an Effective Regulatory Framework' (PhD thesis, Stockholm University 2009).

58 John Gerard Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (A/HRC/8/5, 7 April 2008) <<https://digitallibrary.un.org/record/625292?ln=en>> accessed 20 November 2025.

59 Clapham (n 24).

60 John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises' (A/HRC/17/31, 21 March 2011) <<https://docs.un.org/a/hrc/17/31>> accessed 20 November 2025; Junaid Sattar Butt and Farzana Kousar, 'Driving Sustainable Growth: The Corporate Sustainability Due Diligence Directive as a Catalyst (CSDDD) for Public Administration Reform and Corporate Accountability in the European Green Deal' (2024) 14(3) The Journal of Accounting and Management 7.

This evolving framework is exemplified in the Inter-American Court of Human Rights' Advisory Opinion OC-32/25, requested by Chile and Colombia to clarify state obligations in responding to the climate emergency under human rights law.⁶¹ The Court held that states must adopt measures to prevent, mitigate, and adapt to climate impacts with due diligence, while recognizing that corporations bear direct obligations and responsibilities in addressing the crisis, including through regulated actions to respect human rights. This opinion reinforces the participant paradigm by illustrating how international jurisprudence increasingly imposes functional obligations on non-state actors, such as MNCs, to address interconnected global challenges, thereby promoting accountability without formal subjectivity.

Finally, the paradigm underscores the imperative of prioritizing actors' functions in safeguarding human rights, with states retaining primacy due to their democratic legitimacy and capacity to balance societal interests. As the SRSG notes, states' primary obligations enable them to regulate for collective welfare, while corporations' profit-oriented nature necessitates adaptations of human rights duties to avoid overburdening entities with limited governance capabilities.⁶² Preserving states as chief norm-setters upholds the system's integrity, ensuring that participant inclusion advances rather than undermines equitable global order.

Participation thus encompasses not only norm generation but also preferential access to dispute-resolution forums, where corporations act as repeat players, reinforcing their practical standing as actors whose decisions shape the content and enforcement of international norms.

5 TOWARDS GREATER RECOGNITION OF MNCS

According to the predominant view among international legal scholars, not all entities participating in contemporary international relations qualify as international legal persons, despite their potential influence on the international community.⁶³ Mere de facto participation does not equate to legally relevant action on the international stage and thus does not confer the status of a subject of international law.⁶⁴ Instead, international legal personality requires some form of acceptance by the international community, typically through states granting the entity in question rights and or obligations under international

61 Lucas Carlos Lima, 'Symposium on Advisory Opinion AO-32/25 on the Climate Emergency and Human Rights: The Principle of Common but Differentiated Responsibilities' (*Opinio Juris*, 1 October 2025) <<https://opiniojuris.org/2025/10/01/symposium-on-advisory-opinion-ao-32-25-on-the-climate-emergency-and-human-rights-the-principle-of-common-but-differentiated-responsibilities/>> accessed 20 November 2025.

62 Ruggie (n 58; 60).

63 Nowrot (n 25) 4.

64 Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 176.

law.⁶⁵ In principle, there are no systematic barriers preventing non-state entities from participating in the international legal system as recognized actors, and no exhaustive list of subjects of international law exists.⁶⁶ Nonetheless, based on these generally acknowledged prerequisites for attaining international legal personality, the prevailing scholarly consensus holds that MNCs cannot be considered subjects of international law in the sense of being direct addressees of international legal obligations to promote global public goods.⁶⁷

From an access-to-justice perspective, the evolving procedural avenues open to MNCs provide particularly salient evidence of their integration into the international legal order. Corporations routinely appear as claimants before investor–state arbitral tribunals and, in regional human rights systems such as the ECHR, may directly bring applications or rely on Convention rights to challenge state measures; yet victims of corporate abuse often lack symmetrical access to comparable international forums. This asymmetry, reflected in cases like *Urbaser* and *Bosphorus*, strengthens the case for conceptualizing MNCs as secondary limited subjects whose enhanced access to international adjudicatory bodies must be balanced by clearer, directly enforceable obligations and remedial avenues for affected individuals and communities.

Although it has long been argued in the legal literature that international human rights treaties might be interpreted as directly applicable to private actors such as MNCs,⁶⁸ the majority of international legal scholars, drawing on the drafting history of the relevant conventions and teleological methods of treaty interpretation, have persuasively shown that human rights treaties, along with, for example, the growing array of international conventions aimed at combating bribery, impose direct obligations only on the states that are parties to them, and not on other entities.⁶⁹ Moreover, despite noteworthy developments, such as efforts to enforce purported human rights obligations against corporations in domestic courts in the United States⁷⁰ and, in the domain of "soft law," one must concur with the aforementioned dominant view that MNCs have not, under either treaty law or customary international law, save for a limited number of highly specific regulations,

65 Phillip K Menon, 'The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine' (1992) 1(1) Florida State University Journal of Transnational Law & Policy 151; Jägers (n 44).

66 JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (4th edn, Clarendon Press 1949); Philip C Jessup, *A Modern Law of Nations: An Introduction* (Macmillan 1948).

67 Hans W Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises' (1979) 22 German Yearbook of International Law 11; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 2002) doi:10.4324/9780203427712.

68 Nicola MCP Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002); Jordan J Paust, 'The Reality of Private Rights, Duties, and Participation in the International Legal Process' (2004) 25(4) Michigan Journal of International Law 1242.

69 J Delbruck, 'Third-Party Effects of Fundamental Rights Through Obligations Under International-Law' (1975) 12 Law and State 61; Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46(2) Neth. Int'l L. Rev. 171, doi:10.1017/S0165070X00002394.

70 Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004).

attained sufficient normative recognition from states and international organizations to be subjected to direct obligations under international law.⁷¹

The regulation of MNCs is primarily anchored in the domestic laws of the states where they are headquartered and in those where they establish subsidiaries or conduct operations.⁷² As entities formed and registered within sovereign territories rather than through international mechanisms, MNCs are governed by national rules concerning their establishment, operational conditions, legal supervision, and taxation.⁷³ Nevertheless, international law increasingly contributes to their partial regulation, often indirectly via the harmonization of national legislations across states. International law governs MNC activities through treaties that delineate rights and obligations, particularly in their interactions with states and international organizations.⁷⁴ For instance, within the European Union, EU law, despite its supranational traits, is classified as international law and regulates MNC relations.⁷⁵ Beyond regional frameworks, treaties address an expanding range of issues, and MNCs are incorporated into the structures of organizations such as the United Nations. While MNCs may conclude international agreements, enforce claims, and incur liability, their legal personality remains secondary and constrained. Derived from the status conferred by states under domestic law, they operate as extensions of municipal law and lack full state-like attributes, such as sovereign immunity. Their capacity to engage in treaty-making is limited to advancing human rights without impinging on non-derogable obligations.⁷⁶

Furthermore, collusion may emerge between states and MNCs, with governments deriving benefits from lenient human rights enforcement. To attract investment, states may prioritize economic advantages over accountability, thereby diluting norms. Resource and institutional deficiencies, particularly in developing countries, further hamper oversight, enabling MNCs to exploit regulatory gaps or perpetrate violations.⁷⁷ The transnational nature of operations often results in dismissals of lawsuits on grounds of forum non conveniens, depriving victims of justice. Extraterritorial application of laws can provoke tensions in interstate relations and infringe on sovereignty, as exemplified by

71 See e.g., International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969) [1982] UNTS 973/3, art 3 (replaced by 1992 Protocol, as amended 2000); United Nations Convention on the Law of the Sea (adopted 10 December 1982) [1998] UNTS 1833/397, art. 137.

72 Larry Catá Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2007) 14(2) ILSA Journal of International & Comparative Law 499.

73 Larry Catá Backer, 'Regulating Multinational Corporations: Trends, Challenges, and Opportunities' (2015) 22(1) The Brown Journal of World Affairs 153.

74 Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19(1) Connecticut Journal of International Law 1.

75 Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations Under EU Law and International Law* (Edward Elgar 2011).

76 Charney (n 25) 748.

77 Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443.

the Bhopal disaster.⁷⁸ Finally, inconsistent compliance by states with their human rights obligations generates variability, rendering indirect regulation unreliable. A quintessential example of this regulatory interplay is the Bosphorus case, in which the ECHR examined a company's challenge to the impoundment of its aircraft, an act rooted in UN sanctions, implemented via EU Regulations, and carried out by national authorities. This case highlights how MNCs navigate a multi-layered legal landscape, where the 'equivalent protection' of their rights is contested across international and regional regimes, further complicating their status as mere domestic entities.

Traditionally, international law has recognized only states as subjects, but this perspective is evolving, with non-state entities increasingly acknowledged as legal persons. Although MNCs have not yet been fully accepted in this regard, their status remains a contentious candidate for international personality. This paper advocates for treating MNCs as secondary limited subjects in the context of human rights, distinct from the primary full personality accorded to states. Such recognition would permit them to enter into agreements, enforce claims, and bear direct liability, while remaining derived from domestic law and excluding sovereign privileges. Treaty rights would be confined to the promotion of human rights. Emerging recognition of MNCs' more prominent role in global governance, as reflected in the UN Guiding Principles on Business and Human Rights, underscores this shift by emphasizing corporate responsibility to respect human rights independently of state action. To further this evolution, proposals for treaty revisions could include amending core human rights instruments, such as the International Covenant on Economic, Social, and Cultural Rights, to explicitly bind MNCs directly, or drafting a new multilateral treaty establishing enforceable obligations on corporations for human rights due diligence and remediation.⁷⁹

This recognition is imperative for adapting international law to contemporary societal transformations, wherein power has shifted to non-state actors and states increasingly operate through corporations. A rigidly state-centric focus risks rendering international law obsolete in its promotion of human rights.⁸⁰ The distinction between subjects and objects is blurring in human rights governance, as evidenced by individual accountability for war crimes and claims against states. It has already been noted that this dichotomy serves no functional purpose; if law binds individuals, it should bind influential MNCs as well.⁸¹ For victims, the identity of the perpetrator is immaterial; international law must therefore confront MNC abuses beyond the reach of deficient municipal systems to safeguard human dignity.⁸² This approach finds support in the seminal arbitral decision

78 Hanson Hosein, 'UNSETTLING: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster' (1993) 16(2) 6 Boston College International & Comparative Law Review 285.

79 Rasche and Waddock (n 40).

80 Charney (n 25).

81 Higgins (n 31).

82 Ratner (n 77).

in *Urbaser S.A. v. Argentine Republic*, where Spanish water companies challenged Argentina's measures during an economic crisis, and Argentina counterclaimed that the investors violated the human right to water under international law.⁸³ The ICSID tribunal held that corporations can be directly bound by human rights obligations derived from international treaties, rejecting the claimants' argument that such duties apply solely to states. This ruling is directly relevant as it affirms MNCs' capacity to bear independent international legal responsibilities, reinforcing the thesis that normative recognition of their subjectivity is both feasible and necessary for effective human rights protection. Ultimately, outdated assumptions that only states violate rights and that governments reliably ensure compliance no longer apply, necessitating the elevation of MNCs to the status of subjects.

Accordingly, the question raised earlier in this text regarding the normative integration of multinational corporations into the international legal order can, by invoking this evolving doctrine on subjects of international law, be answered in the affirmative. In both economic and political terms, these non-state actors rank among the most influential participants in the contemporary international system, endowed with substantial potential to contribute positively to, or conversely frustrate, the promotion and protection of global public goods. Therefore, in view of the core objectives of the international legal order and the imperative for international law to align closely with evolving realities in the international system, a presumption, thus far unrebutted by states and international organizations, emerges in favor of multinational corporations being subject to international legal obligations to contribute to, inter alia, the promotion and protection of human rights, core labor and social standards, as well as the environment.

6 CONCLUSIONS

In synthesizing the evolving discourse on the international legal subjectivity of multinational corporations (MNCs), this article reaffirms the imperative to recognize their normative integration within the international legal order, particularly as secondary limited subjects in the realm of human rights. Rooted in the historical terminological diversity that distinguishes MNCs as profit-driven entities with cross-border operations, from early conflations with foreign direct investment to modern distinctions in UN and OECD instruments, this perspective underscores their detachment from national regulations and the consequent need for international frameworks to address their transnational impacts.

Key findings illuminate MNCs' contested status through three principal paradigms. The object paradigm, emblematic of classical state-centrism, relegates MNCs to passive entities under sovereign control, denying them independent rights or duties and channeling regulation through domestic implementation. In contrast, the partial subject paradigm

83 Case No ARB/07/26 (n 41).

attributes functional, state-dependent personality, enabling limited capacities such as invoking treaty protections in investment disputes while preserving state primacy. The participant paradigm further advances this evolution by emphasizing practical engagement over rigid classifications, viewing MNCs as active contributors to legal processes in a dynamic continuum shaped by globalization. Collectively, these paradigms reveal a shift from absolute state exclusivity toward inclusive recognition, evidenced by developments like the UN Guiding Principles on Business and Human Rights, which impose responsibilities to respect rights amid accountability gaps in conflict zones and state-business nexuses.

The implications of this recognition extend profoundly to international relations and globalization, where MNCs' economic power rivals states, necessitating direct obligations to mitigate harms in human rights, labor standards, and environmental protection. Yet, limitations persist, including scholarly resistance rooted in fears of equating corporations with states and the non-binding nature of soft law instruments like the 2003 Draft Norms. Future directions should explore deeper operationalization of participant roles in specific regimes, such as investor-state arbitration or emerging treaties, to resolve these debates.

Ultimately, as power disperses beyond states, embracing MNCs' rebuttable presumption of normative responsibilities ensures international law's relevance, fostering a balanced order that promotes global public goods while adapting to societal transformations.

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Corresponding author, solely responsible for preparing the manuscript.

Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that their opinion and views expressed in this manuscript are free of any impact of any organizations.

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EDITORS

Managing editor – Mag. Yuliia Hartman. **English Editor** – Robert Reddin.

Ukrainian language Editor – Mag. Liliia Hartman.

Arabic language Editor – Mag. Alaa Abdel.

ABOUT THIS ARTICLE

Cite this article

Alsudaïs M, 'Beyond the State Centric Binary: Evaluating Three Paradigms of Multinational Corporations' International Legal Subjectivity' (2026) 9(2) Access to Justice in Eastern Europe 214-41 <<https://doi.org/10.33327/AJEE-18-9.2-a000189>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000189>

Summary: 1. Introduction. – 2. The Historical Evolution. – 3. The International Legal Subjectivity of Multinational Corporations: Evolving Perspectives and Contemporary Developments. – 3.1. *Terminological Diversity*. – 3.2. *The Question of Status*. – 3.3. *Conceptual Clarification: Subjectivity, Personality, and Participation*. – 4. Three Main Paradigms. – 4.1. *The Object Paradigm*. – 4.2. *The Partial Subject Paradigm*. – 4.3. *The Participant Paradigm*. – 5. Towards Greater Recognition of MNCS. – 6. Conclusions.

Keywords: multinational corporations, international law, legal personality, object paradigm, partial subjects, participant paradigm.

DETAILS FOR PUBLICATION

Date of submission: 27 Nov 2025

Date of acceptance: 16 Feb 2025

Online First publication: 05 May 2026

Last publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in the first round: 2 reports

Number of revision rounds: 3 rounds

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

<https://ajee-journal.com/responsible-use-of-ai-tools-in-publishing-with-ajee>

AI DISCLOSURE STATEMENT

The manuscript was written by the author. AI tools were used exclusively for spelling, grammar, and stylistic refinement, including addressing editorial feedback regarding scholarly tone and conciseness. No generative AI was used to create original content, research ideas, or legal analyses.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗА МЕЖАМИ ДЕРЖАВОЦЕНТРИЧНОЇ БІНАРНОСТІ: ОЦІНКА ТРЬОХ ПАРАДИГМ МІЖНАРОДНОЇ ПРАВОСУБ'ЄКТНОСТІ БАГАТОНАЦІОНАЛЬНИХ КОРПОРАЦІЙ

Мохаммед Алсудайс

АНОТАЦІЯ

Вступ. Традиційна державоцентрична система міжнародного права дедалі менше відповідає вимогам глобалізованого середовища, де багатонаціональні корпорації (БНК) мають економічну та регуляторну владу, що конкурує з суверенними державами. Це доктринальне відставання створює постійний «прогалину в управлінні», особливо щодо корпоративної відповідальності за права людини та вплив на навколишнє середовище. Використовуючи доктринальний дизайн правового дослідження, ця стаття аналізує договори, судові висновки та «м'яке» право, щоб оцінити, як міжнародний правопорядок може краще інтегрувати ці недержавні суб'єкти.

Методи. У дослідженні еволюція статусу БНК класифікується за трьома парадигмами: об'єкти (пасивні суб'єкти, повністю підпорядковані державному посередництву), часткові суб'єкти (контекстно-специфічні носії прав, наданих державою, наприклад, в інвестиційному арбітражі) та учасники (функціональні суб'єкти, що сприяють динамічному правовому континууму).

Результати та висновки. Хоча наявні наукові дослідження визнають корпоративний вплив, ця стаття пропонує трирівневу таксономію, яка виходить за межі жорсткої бінарності суб'єкт-об'єкт. Зрештою, вона виступає за визнання БНК як вторинних обмежених суб'єктів та пропонує нову систему спростованих презумпцій для нормативної відповідальності. Узгоджуючи правові зобов'язання з функціональним глобальним впливом, цей підхід прагне відновити актуальність міжнародного права в плюралістичному світовому порядку.

Ключові слова. Багатонаціональні корпорації, міжнародне право, правосуб'єктність, об'єкти парадигма, часткові суб'єкти, парадигма учасника.

ABSTRACT IN ARABIC*

مقال بحثي

ما وراء الثنائية المتمحورة حول الدولة: تقييم ثلاثة نماذج للذاتية القانونية الدولية للشركات متعددة الجنسيات

السديس محمد

المخلص:

أولاً: تمهيد: يواجه الإطار التقليدي للقانون الدولي العام، المرتكز على سيادة الدولة كشخص قانوني وحيد، تحديات متصاعدة في ظل تنامي نفوذ الشركات متعددة الجنسيات التي أضحت كيانات اقتصادية تضاهي الدول في قدراتها. وقد أدى هذا التحول إلى بروز "فجوة حوكمة" هيكلية تظهر بوضوح في عجز الآليات الدولية الحالية عن مساءلة هذه الشركات عن انتهاكات المعايير الدولية، لاسيما في مجالات الأضرار البيئية العابرة للحدود وحقوق الإنسان. لذا، تبرز هذه الدراسة لمعالجة ضرورة فقهية ملحة تقضي بمراجعة المركز القانوني لهذه الشركات بما يتواءم مع معطيات النظام الدولي المعاصر.

ثانياً: المنهجية: تعتمد الدراسة منهجاً قانونياً تحليلياً نقدياً لفحص المعاهدات الدولية والاجتهادات القضائية، مع التركيز على أدوات "القانون الرخو" (Soft Law) كالمبادئ التوجيهية للأمم المتحدة. وتقوم الدراسة ببناء نموذج تصنيفي ثلاثي الأبعاد لرصد التطور القانوني لهذه الشركات:

1. نموذج "محل القانون": الذي يعتبر الشركات كيانات سلبية تخضع للوساطة السيادية للدولة.
2. نموذج "الشخص القانوني الجزئي": الذي يمنحها أهلية مشتقة ومحدودة (كما في التحكيم الاستثماري).
3. نموذج "المشارك": الذي يركز على الدور الوظيفي الفعلي للشركات كفاعل ديناميكي في صياغة الحوكمة العالمية.

ثالثاً: النتائج والخاتمة: تخلص الدراسة إلى حتمية إدماج الشركات متعددة الجنسيات ككيانات فاعلة ذات "ولاية قانونية مقيدة" لموازنة حقوقها مع التزاماتها المعيارية. وتقدم الدراسة إسهاماً نوعياً من خلال طرح إطار معياري مبتكر يقوم على مبدأ القرائن القابلة للدحض Rebuttable Presumptions؛ حيث يفترض هذا الإطار التزام الشركات بالمعايير الدولية الكونية (كحماية البيئة ومعايير العمل) بناءً على

*. The publication metadata in Arabic is presented as submitted by the authors.

حجم أثرها العالمي، ما لم يتم إثبات خلاف ذلك، مما ينقل عبء الإثبات القانوني ويضمن المساواة دون المساس بمركزية الدولة كصاحبة شرعية تنظيمية عليا. تهدف هذه المقاربة إلى تعزيز فاعلية القانون الدولي وربطه بالواقع المعاصر لنظام متعدد الأطراف لا تقتصر فيه صياغة المسارات القانونية على الدول وحدها.

الكلمات الرئيسية: الشركات متعددة الجنسيات، القانون الدولي العام، الشخصية القانونية الدولية، حوكمة الشركات، القرائن.

Research Article

JOINT PROPERTY DISPUTES IN DUTCH AND ISLAMIC LEGAL TRADITIONS: A SOCIAL JUSTICE PERSPECTIVE

Ahmed Mansour

ABSTRACT

Background: Establishing joint ownership, often referred to as community assets in the Netherlands, offers a valuable opportunity for family members and friends to pool their financial resources and acquire property together, significantly reducing both initial payments and ongoing costs. Yet the potential for strain in these relationships can give rise to myriad challenges. Conflicts may arise over simultaneous use of the property, or over selling or renting it out. Navigating these complexities can transform what was once a shared dream into a source of tension and dissatisfaction, potentially escalating into costly legal battles that may even disregard the terms of a will. An essential question lingers: who should take the reins to manage this joint property, and how can co-proprietors navigate conflicts over its use and disposal with grace and effectiveness?

Method: This study employs a qualitative, doctrinal, and comparative legal analysis to critically examine regulations concerning joint property through the functional outcomes and the normative foundations of both Islamic and Dutch legal traditions on property rights. It identifies key issues that can

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a0001969>

Date of submission: 2 Mar 2026

Date of acceptance: 07 Mar 2026

Online First Publication: 01 May 2026

Last Publication: 20 May 2026

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lead to injustices or protracted legal battles. A significant aspect of this research is the comparison of the philosophical approaches of Lawrence Becker, Thomas Merrill, Henry Smith, and others with the perspectives of historical Islamic jurists (fuqaha) on social justice. Three legal precedents demonstrate how courts balance the rules surrounding joint property with principles of social justice. This research aims to explore the similarities and differences in the management of joint property between Islamic and Dutch legal traditions, focusing on the underlying legal principles that shape the practical rules governing joint property.

Results and Conclusions: Although joint property ownership is a common practice, there remains a surprising dearth of academic research addressing the essential property rights issues governed by classical Islamic jurisprudence. Moreover, no studies have ventured to compare the Dutch Civil Code (DCC) with the tenets of Islamic legal jurisprudence regarding the regulation of community assets. Such a comparison is vital for grasping how these two legal systems intersect, especially given their distinct historical and cultural contexts, and for understanding their practical implications in diverse societies. The findings reveal a striking similarity between these legal frameworks in how they manage major disputes concerning community assets. This research posits that while the Dutch Civil Code and Islamic legal jurisprudence tackle different pivotal issues related to joint property, there is a compelling need for several reforms. These adjustments could foster greater alignment with fundamental principles of social justice, particularly in matters relating to the partitioning of joint property through forced sales.

1 INTRODUCTION

Investing in real estate ownership can foster investment motivation, wealth appreciation, and increased trust, which can be influenced by housing demand driven by population growth and government housing targets, leading to higher property values and rents. The way a person holds title to a property is a crucial consideration with legal and financial implications. Ownership can be sole, where one individual has an exclusive title to a property, or co-owned, referred to as "joint ownership" or "community assets," which entails shared responsibilities with trusted co-owners. Several economic and social factors contribute to the rise of co-buying, often because of inheritance upon an individual's death to their offsprings, but also as a result of partnerships aimed at investment.¹ Joint ownership can lead to disputes and negatively affect both partners, especially if one partner faces financial issues. This situation may weaken their existing relationship and result in conflict, detachment, or changes in financial obligations. Each perceives justice through their own distinct lens and interprets fairness individually. Lastly, if one owner wishes to sell their shareholding in the joint property and the other does not agree, this may constitute a clear

1 Daniel R Tilly and Patrick K Hetrick, 'North Carolina's Reincarnated Joint Tenancy: Oh Intent, Where Art Thou?' (2015) 93(6) North Carolina Law Review 1649-5.

cause of dispute. The wise course of action for resolving this uncomfortable joint ownership of the property is to divide it. Now, without clear rulings in complex family disputes, the social friction caused by prolonged litigation is reduced, which often disproportionately affects family cohesion and mental well-being. While modern law maintains that property rights in ownership deserve protection, this principle is inherently far from absolute. Partition law, for instance, permits the removal of dissenting co-proprietors from their property, paving the way for a forced sale of the entire estate in the event of disputes. This dynamic often sparks tension between ideals of social justice and the realities of joint property partition laws, particularly in the poignant context of "heirs' property." Such issues are notably prevalent in vulnerable communities, where inherited land may be lost to market pressures through court-ordered forced sales. Currently, how do the Dutch Civil Code (DCC) under Title 3.7² and Islamic legal traditions navigate the complex challenges associated with joint property, such as the use, administration, and to what extent do they resonate with fundamental principles of social justice, such as human rights, autonomy, and equality? Investigating these questions from both the DCC and Islamic legal traditions is significant, for while the functional outcomes may be similar in relation to the practical, social outcomes of both legal philosophies as well as legal rules on joint property, the normative foundations of both legal systems remain distinct because they derive authority from fundamentally different sources: divine revelation versus human-centric, secular reasoning.

2 METHODOLOGY SECTION AND SELECTION CRITERIA

This research examines the Dutch and Islamic legal traditions in relation to several complex issues surrounding joint ownership of property, through a functional approach to law. It investigates the practical and social outcomes of both legal philosophies and legal rules. It treats property not merely as a set of static, exclusionary rights, but as a social institution that arranges the use, administration, and disposal of joint assets. This research investigates essential questions about joint ownership, emphasizing the overall philosophical legal approaches governing the organization of joint ownership under Dutch Title 3.7 and Islamic law (fiqh), the definition of rights, management of contributions, and exit options for co-proprietors. Overall, these questions are practically oriented and are designed to uncover concrete legal issues arising in the context of joint property from the Dutch and the Islamic law (fiqh) perspectives.

This research adopts a problem-centered structure. It begins by identifying a specific legal issue, explains how it is addressed under Dutch law, and then discusses how it is handled under Islamic law. Finally, the paper concludes with a comparative observation. This

2 Dutch Civil Code (Civil Code of the Netherlands) <<http://www.dutchcivillaw.com/civilcodegeneral.htm>> accessed 20 February 2026.

approach provides readers with clear guidance at each stage and effectively highlights the paper's comparative contributions.

The reasons for selecting the Netherlands as the secular benchmark and the most suitable point of comparison for Islamic jurisprudence in this context are crucial for this research. Both legal systems exhibit a remarkably similar structure of **systematization**, with well-defined legal principles intricately arranged into a coherent body of law governing joint property matters. First, although the functional outcomes of treating joint ownership of property may appear similar between the Dutch and Islamic Legal Traditions, their normative foundations regarding property rights are profoundly distinct. They draw their authorities from fundamentally different sources: divine revelation in Islamic law and human-centered, secular reasoning in Dutch law. Second, the Islamic law (*fiqh*) and the DCC, Book 3 Title 3.7 defines a community of property as a situation where one or more assets belong to two or more co-proprietors jointly, with designed rules as an abstract, overarching framework with a permanent management structure that applies to all forms of joint property, whether from marriage, inheritance, or a business partnership, unless specific rules dictate otherwise. Third, and perhaps most importantly, both legal systems treat joint ownership primarily as a permanent state rather than a transitional one (often following death or divorce), with improvements expanding its flexibility. Thus, Islamic law and Title 3.7 of Book 3 provide a flexible general framework for joint ownership, including rules on administration, use, disposition, and the division (apportionment) of shared assets. Co-proprietors have significant freedom to create their own management regulations. If they cannot agree, a subdistrict court can impose a regulation that balances their interests. Fourth, while Dutch law does not directly apply Islamic law, it frequently interacts with it through private international law when dealing with citizens from countries where Islamic law is prevalent. For example, Dutch courts often face the challenge of recognizing foreign awards arising from joint property disputes stemming from inheritance, divorce, or co-investment. These cases may align or conflict with Dutch public policy. Overall, this research aims to highlight 'functional equivalents' of different legal mechanisms that achieve the same practical result, emphasize general principles that transcend national boundaries, and consider the possibility of a universal law grounded in reason.

The reasons for selecting the Netherlands as the benchmark and the most suitable point of comparison are it's the regulatory history of community assets in the Dutch Civil Code (DCC), which transitioned from a rigid Napoleonic model to a highly flexible, modern system that prioritizes "reasonableness and fairness". After WWII, jurist E.M. Meijers began drafting a "New Civil Code" to integrate commercial and civil law into a single system.³ When the new Code entered into force on January 1, 1992, it introduced Title 3.7 of Book 3. This created a standardized, abstract framework for *all* joint property (inheritances, business partnerships, etc.), not just marital assets. It codified "open

3 Remy D Chavannes, 'EM Meijers and the Recodification of the Dutch Civil Code after World War II: Renewal's Only Victory?' (Optional Thesis, Oxford University 1997).

norms" such as reasonableness and fairness, allowing courts greater leeway to intervene in joint property disputes than the previous formalistic regime. Islamic legal jurisprudence continues to wield considerable influence over the legislation in numerous countries, including Saudi Arabia, while also profoundly shaping the spiritual lives of Muslim communities during their sacred worship rituals.

In comparison to the French Civil Code,⁴ which relies on a more traditional and sometimes rigid concept of indivision, often seen as a temporary state where co-proprietors can trigger a partition (sale) at any time, Title 3.7 of the DCC offers a more integrated and flexible framework for joint ownership between co-proprietors, is governed by principles of reasonableness and fairness. In effect, Title 3.7 grants a court broad discretion to resolve disputes based on the specific context of the co-proprietors' relationship. As a result, judges are empowered to choose among different options, provided that their solutions are appropriate and proportional responses to any infringements.

Lastly, it is quite essential to highlight that Islamic legal jurisprudence (fiqh) is formed by deriving legal rulings from the Islamic primary sources, the Quran and Sunnah, through a systematic methodology.⁵ As Tom Houston noted, qualified scholars (mujtahidun) use interpretation and reasoning to apply divine principles to new situations, such as joint ownership of different issues, ensuring legal adaptability while maintaining adherence to Islamic principles.⁶ For example, the jurist (mujtahid) first searches for a direct, clear ruling from the two foundational sources, namely the Gracious Quran and the Sunnah.⁷ More specifically, the jurist (mujtahid) looks for an explicit verse (Ayat) addressing the issue. If the text is "definitive" (Qatai), meaning it has only one possible meaning (e.g., the prohibition of murder), the search ends here. In the context of joint ownership, in the Qur'an, Allah says: (and if a man or a woman is to be inherited by a non-lineal heir while having a uterine brother or sister, then to each one of them goes one sixth, but if they 'number' more than two, then they all share equally in one-third). This represents an explicit text support for the permissibility of forming joint ownership in Islamic law. However, qualified scholars (mujtahidun) still need to search for other explicit verses that govern the rights and obligations of co-proprietors. Then, if the Quran does not provide further verses showing further procedures, scholars turn to the Sunnah, the practices, traditions, sayings, and silent approvals of the Prophet Muhammad, for specific details and practical

4 French Civil Code (Code civil) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/> accessed 20 February 2026.

5 Ahmad Zaki Hammad, *The Gracious Qur'an: A Modern Phrased Interpretation in English* (Arabic-English Parallel Edition, Lucent Interpretations 2008); Shaykh Muhammad Aman Al-Jami, *The Position of the Sunnah in the Islamic Legislation* (Authentic Statements 2017).

6 Tom Houston, 'Islamic Law - the Beginnings' (2010) 55(4) *The Journal Law Society of Scotland* <<https://www.lawscot.org.uk/members/journal/issues/vol-55-issue-04/islamic-law-the-beginnings/>> accessed 20 February 2026.

7 'The Craft of Issuing Fatwa' (*General Secretariat for Fatwa Offices Worldwide*, 2016) <<https://www.fatwaacademy.org/enArticles/ViewArticle?id=1152&catid=24>> accessed 20 February 2026.

application. In reference to joint ownership, *the Messenger of Allah decreed pre-emption in every joint ownership, whether it be a dwelling or a garden. It is not lawful for him to sell it until his partner gives his consent. He (the partner) is entitled to buy it when he wishes, and he can abandon it if he so chooses. And if he (the one partner) sells it without getting the consent of the (other partner), he has the greatest right to it.*⁸ Furthermore, Qualified scholars (mujtahidun) heavily center their interpretation and reasoning about rights and obligations of joint ownership within the Prophetic tradition (Hadith) of the Prophet Muhammad: (There should be neither harming nor reciprocating harm) (La darara wa la dirara). Still, if no direct text is found, or the text is open to interpretation, the jurist checks for this, which is the unanimous agreement of qualified scholars from a previous generation on that specific issue (Ijma). Once a consensus is confirmed, it becomes a binding legal authority.

3 PERCEPTION OF 'OWNERSHIP' OF AN ASSET UNDER THE DUTCH & ISLAMIC (SHARIA) PROPERTY LAWS

Early Islamic legal jurists (fuqaha) interpreted the concept of ownership in diverse ways, with insights grounded in the Qur'ān. Central to this discussion is the idea that God grants humanity the gift of treasures, allowing them to be authorized owners, as illustrated by the story of Korah.⁹ Furthermore, it emphasizes the significance of avoiding unauthorized use of another person's property with the aim of fostering a culture of respect and accountability within society.¹⁰ Currently, Islamic legal jurists (fuqaha) such as *al-Kasani* (d. 1191 AD/ 587 AH) define 'ownership' as the authoritative power to have complete control over a specific item through making binding decisions with regard to management and control over an object that a particular owner distinctly owns.¹¹ Furthermore, *sadr al-Shari'a* (d. 1346 AD /747 AH) viewed ownership as a legitimate bond between a person and an object, wherein the nature of that object allows for both possession and disposal. The owner has the right to prevent others from interfering with their rights.¹² *Al-Kasani's* perspective seems to align

8 Abu al Hussain Muslim ibn al-Hajjaj al-Nishapuri, *Sahih Muslim*, Book 22: *The Book of Musaqah*, (28) Ch: Pre-emption, Hadith 167 <<https://sunnah.com/muslim:1608b>> accessed 20 February 2026.

9 Hammad, *The Gracious Qur'an* (n 5) Surah 28: Al Qasas (the Stories), Verse 76. "Now, Korah, was indeed from Moses people. But he committed injustices against them with insolence and arrogance, though we had given him such treasure-troves that their keys alone would weigh down a band of men endowed with might."

10 ibid, 'O you who believe, you shall not consume one another's wealth unjustly by false means. But rather let there be free trade with consent among yourselves, and do not kill yourselves [or one another]. Indeed, God is ever Merciful to you.'

11 'Ala' al-Din Abu Bakr ibn Mas'ud ibn Ahmad al-Kasani al-Hanafi, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* (2nd edn, Dar Al-Kotob Al-Ilmiyah 1986) vol 5, 107 [in Arabic].

12 Sadr al-Shari'a Ubaydullah ibn Mas'ud al-Mahbubi, *Explanation of Prevention in Matters of Guidance, which is an explanation of guidance for beginners in the jurisprudence of Abu Hanifa* (Public Domain Mark 2006) pt 2, 197 [in Arabic].

closely with Honoré's observation that possessing a property right in an object means holding a bundle of rights that defines ownership. Honoré articulates eleven essential elements that enrich the concept of ownership, each adding depth and significance to our understanding of what it truly means to possess something. Each element can vary in its definition and the types of things it applies to, for example, the right (liberty) to use, the right (power) to manage. Full ownership is achieved when all eleven elements are combined, regardless of how they are defined.¹³ Moreover, *sadr al-Shari'a* masterfully captured a vital dimension of ownership, as highlighted by Honoré. To be genuinely acknowledged as an owner, one must not only hold the right to security, ensuring robust protection against expropriation, but also possess the power to transfer ownership. This property right seems to award entitlements, including the ability to take specific actions regarding the asset, known as the "rights of access," as well as the authority to prevent others from taking particular actions, termed as the "rights of exclusion."¹⁴

In a different context, based on *al-buhūti* (d. 1641 AD / 1051 AH), joint property is recognized as a form of partnership under Islamic law (*al-sharika*), involving two main types: co-proprietorship of assets (*sharikat al-amlak*) and contractual partnerships (*musharakah*). Co-proprietorship of assets (*sharikat al-amlak*) is often without a formal partnership contract, often automatically via inheritance or joint purchase, indicating that each co-proprietor holds an undivided interest, an intangible yet significant fractional stake in a shared property held collectively by two or more individuals, presumably, with an equal claim on the entire asset, unless there is compelling evidence to suggest otherwise.¹⁵ The legitimacy of the property partnership has been established in the Qur'an and the Prophetic traditions, which show in practice the formation methods of joint ownership. In the Gracious Qur'an, Allah says: (and if a man or a woman is to be inherited by an non-lineal heir while having a uterine brother or sister, then to each one of them goes one sixth, *but if they 'number' more than two, then they all share equally in one-third*).¹⁶ *Al-'Aynī* (d. 1451 AD / 855 AH) insightfully

13 Lawrence Becker, 'The Moral Basis of Property Rights' in J Roland Pennock and John W Chapman (eds), *Nomos XXII: Property* (New York UP 1980) 190-1.

14 Ilya Segal and Michael D Whinston, 'Property Rights' in Robert Gibbons and John Roberts (eds), *Handbook of Organizational Economics* (Princeton UP 2013) 100, doi:10.2307/j.ctt1r2ggg.7. See also, Bruce G Carruthers and Laura Ariovich, 'The Sociology of Property Rights' (2004) 30(1) *Annual Review of Sociology* 24, doi:10.1146/annurev.soc.30.012703.110538.

15 Mansūr Ibn Yūnus bin Yunis bin Salah al-Din bin Hassan bin Idris Al-Buhūti, *Al-Rawd al-Murabba' Sharh Zad al-Mustaqni* (Modern Riyadh Library 1970) vol 2, 260 [in Arabic]. See also, Bradley T Borden, 'TICnerships' (2023) 18(2) *Brooklyn Journal of Corporate, Financial & Commercial Law* 587.

16 Hammad, *The Gracious Qur'an* (n 5) Surah 4: Al Nisa (Women), Verse 12. See also, the Messenger of Allah decreed pre-emption in every joint ownership and not divided, whether it may be a dwelling or a garden. It is not lawful for him (for the partner) to sell that until his partner gives his consent. He (the partner) is entitled to buy it when he desires and he can abandon it if he so likes. And if he (the one partner) sells it without getting the consent of the (other partner), he has the greatest right to it). Muslim ibn al-Hajjaj. *Sahih Muslim*, Book 22 (n 8) Hadith 167.

noted that co-proprietorship of assets occurs in various ways, including through mixing of assets or legal joint ownership, such as through inheritance.¹⁷

From a comparative perspective, the views of early Islamic legal jurists (fuqaha) on joint ownership closely resemble the concept of 'community of property' found in the DCC, specifically in Title 3.7 of Book 3. This concept embodies a significant idea: when two or more individuals legally share an asset, such as a home, land, or other property, they also share rights, responsibilities, and costs associated with that asset. The Dutch Title 3.7 outlines general provisions in Articles 1 and 2, which presume that each partner in a community of property holds equal shares, unless a different arrangement is established through their mutual legal relationship. Similarly, Articles 3:7.2 and 4:11 address situations in which co-proprietors in a joint property arrangement may have their assets inadvertently blended, for example, due to the marital community of property. This legal framework recognizes all assets and debts acquired during a marriage as joint property, shared equally by both spouses (50/50).¹⁸ Additionally, inheritance plays a crucial role in forming community assets. According to Article 4:11 of the DCC, individuals designated as intestate heirs to a deceased person's estate are entitled to inherit equal shares, ensuring a fair distribution among heirs.¹⁹

4 KEY LEGAL PITFALLS OF JOINT OWNERSHIP

From a legal practice perspective, based on Kristen Jackson, the proper formation of a joint ownership can be beneficial. Still, several factors should be considered before choosing this co-purchase option.²⁰ First, in case a co-proprietor faces financial difficulties that affect their stability, this situation potentially impacts the other owner as well because it potentially exposes the whole asset to the sale by creditors, for example, if one owner falls behind on mortgage payments, the bank may initiate foreclosure on the shared assets, which would affect all owners. Second, disagreements can frequently occur, such as when one owner wants to make significant changes to the shared property, while the other does not. Third, if one owner wants to sell the property, all owners may need to agree and participate in the

17 Rosalina Limbong, 'A Legal Perspective on Inheritance of Joint Property: A Comparative Analysis of Various Legal Systems' (2025) 1(1) Legal Frontier 11-2. See also, Abu Muhammad Mahmoud bin Ahmad bin Musa bin Ahmad bin Hussein Al-Ghitabi Al-Hanafi al-Din al-Ayni, *Mayor of Al-Qari Explanation of Sahih Al-Bukhari* (Dar Ihya Al-Turath Al-Arabi) vol 13, 40 [in Arabic].

18 Hannelore Thijs, 'The New Dutch Default Community of Acquests Regime: Key Innovations from a Comparative Perspective' (2025) 39(1) International Journal of Law, Policy and The Family ebae026, doi:10.1093/lawfam/ebae026.

19 Dutch Civil Code (n 2) art 4:11. See also, Tilly and Hetrick (n 1) 1694-5.

20 Kristen M Jackson, 'Jointly Owned Property' (*Jackson Law PA*, 2025) <<https://www.jacksonlawpa.com/documents/Jointly-Owned-Property.pdf>> accessed 20 February 2026. See also, 'Joint Property Ownership Disputes: The Basics' (*Jacksons*, 30 September 2025) <<https://jacksons.law/news/joint-property-ownership-disputes-the-basics/>> accessed 20 February 2026.

sale. These frequent situations can make co-proprietors susceptible to "post hoc" attempts to justify unequal contributions to the shared property. They can truly conflict with several principles of social justice by introducing financial instability, imbalanced power dynamics, and housing insecurity for co-proprietors. In this respect, the Gracious Qur'an observed this troublesome situation that takes place between co-proprietors in partnership of assets, as God says: *{And indeed, many of the partners are unjust to one another, except those who believe and do righteous deeds, and they are few}*²¹

4.1. Joint Ownership and the Principles of Social Justice

Joint ownership (often termed common property) is significantly intertwined with the principles of social justice, acting as a structural mechanism for achieving equity, fairness, and inclusion. While private property focuses on individual exclusion, joint ownership enables **redistributive potential** often allowing for the fair distribution of benefits, such as profit-sharing from community-owned land, and protection for vulnerable members of society. Currently, the central inquiry is: How do conflicts over joint ownership relate to fundamental principles of social justice, human rights, autonomy, and equity? According to Mona Khechen at UNESCWA, the term "social justice" does not have a universally accepted definition, but it is often linked to the establishment of a just society.²² This concept is based on the belief that justice entails promoting human welfare through equal rights and access to benefits. It also emphasizes the importance of fair treatment, recognition of cultural differences, and equitable access to resources, opportunities, **participation, and inclusion**. She further clarifies that there are generally three key concepts inherent in Rawls' two principles of justice and rights: equality and equity. Rights, as a fundamental principle of social justice, can be divided into two sub-groups: (a) legal rights, which include inherited rights, and (b) moral rights, which encompass basic human rights, liberties, and entitlements such as the right to have a say in matters that affect individuals, as well as the rights of certain groups to specific geographic territories. In addressing the concerns surrounding the interplay between human rights and ownership, Conway and Stannard, in their arguments, highlight that the sensation of ownership of land or other property is a deeply profound psychological experience, intricately embedded in our overall opinions and values and reflecting who we are.²³ In this regard, ownership is viewed as a fundamental human right, comparable to the rights to bodily security and integrity, and it is often considered to exist independently of state authority. Lawrence Becker proposed that if human beings are inherently territorial, acquisitive, and egoistic, motivated by a complex interplay of genetics, psychology, and sociology, then important implications follow for the theory of property rights. The instinctual freedom to pursue self-serving ambitions, along

21 Hammad, *The Gracious Qur'an* (n 5) Surah Sad, Ayat 24.

22 Mona Khechen, *Social Justice: Concepts, Principles, Tools and Challenges* (UN ESCWA 2013).

23 Heather Conway and John Stannard, 'Property and Emotions' (2016) 8(1) *Emotion Review* 38, doi:10.1177/1754073915601225.

with the right to acquire and safeguard both land and cherished possessions, are essential human needs. These compelling desires foster a robust presumption in favor of the legitimacy of social institutions, such as private property rights systems, that cater to and fulfill these intrinsic requirements.²⁴ As a result, both Thomas Merrill and Henry Smith contended that property rights and human rights seem to share more profound connections than is commonly acknowledged, because both create powerful obligations of non-interference placed on an undefined array of duty holders.²⁵ Additionally, both argue that because of the inherent communication challenges in establishing and upholding extensive responsibilities, it is essential that the corresponding rights remain straightforward and clear. In this context, "No punching" compellingly mirrors the principle of "No taking." Nevertheless, disputes surrounding joint ownership of property can clash with ownership as a fundamental human right when the legal framework governing shared assets restricts individual autonomy, disproportionately impacts vulnerable parties, or conflicts with the right to respect for family life and home. While international law generally protects the right to own property alone or in association with others, disputes arising from shared ownership often violate the "peaceful enjoyment" of possessions and the right to a home recognized in Article 8 of ECHR²⁶ as well as the peaceful enjoyment of possessions found in Protocol 1, Article 1,²⁷ especially if co-proprietors face disputes, unfair eviction (especially in social housing) leading to homelessness or forced sale of the entire shared joint property, highlighting potential conflict with essential human right for vulnerable cohabitants or those in shared housing schemes. The case of *Allard v. Sweden* (2001/2003), brought before the European Court of Human Rights (ECtHR), serves as a crucial example of the conflict between joint ownership and human rights centered on the state's failure to strike a "fair balance" between the property rights of different joint owners over a house built on jointly owned land. This case involved a compulsory demolition of a disputed house built by Inga Allard, a Swedish national, who, in 1988, built a house on land she jointly owned with family members. Although she had a building permit, she did not have the formal consent of all other joint owners as required by Swedish law. In 1989, other joint owners sued the applicant, leading to a 1990 District Court judgment ordering her to remove the house at her own expense because it was built without unanimous consent. While the removal order was being appealed, the applicant initiated division proceedings in 1990 to dissolve the joint ownership and assign individual plots to family members. Despite the ongoing division case, which might have legally assigned the specific plot to the applicant, the Swedish Supreme Court refused to stay the removal proceedings in March 1996. In June 1996, the house was

24 Becker (n 13) 200.

25 Thomas W Merrill and Henry E Smith, 'The Morality of Property' (2006) 48(5) William & Mary Law Review 1851.

26 Council of Europe, *European Convention on Human Rights: as amended by Protocols nos 11, 14 and 15; supplemented by Protocols nos 1, 4, 6, 7, 12, 13 and 16* (ECHR 2013) **art 8** <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 20 February 2026.

27 *ibid*, art 1 of Protocol no 1.

demolished by a construction firm under the direction of the Enforcement Office. The demolition began while the applicant's appeal against the enforcement process was still pending before the appellate court. Just months after the demolition, the Real Estate Court ruled in the division proceedings that the property should be split, assigning the applicant the exact plot where the house had once stood.

The ECtHR found a human rights violation and ruled that the demolition imposed an "individual and excessive burden" on the applicant. The court noted the lack of coordination among the judicial bodies and that the house was not even visible to the other joint owners, meaning their interest in its removal was minimal compared to the loss suffered by the applicant. As a result, the ECtHR concluded that the demolition decision was a violation of the applicant's right to peaceful enjoyment of her possessions as protected under Article 1 of Protocol No. 1 of the European Convention on Human Rights. Given these circumstances, the Court awarded the applicant EUR 100,000 for pecuniary damage and EUR 25,000 for costs. The property was later divided, and the applicant received the plot where her house had been, subsequently gaining permission to rebuild.²⁸

In fact, *Allard v. Sweden* serves as a cautionary tale about the "tyranny of the minority" in joint property ownership and the failure of state bureaucracy to see the bigger picture. The core of this case is the proportionality principle. While the Swedish courts were technically following the letter of the law (which required unanimous consent for construction), the ECtHR looked at the *effect*. Demolishing a home while a legal process (the division of land) was already underway to settle the dispute was seen as "manifestly unreasonable." Furthermore, the case exposes how joint ownership laws can be weaponized. The court noted that the other owners couldn't even see the house from their plots. Their insistence on demolition provided them no tangible benefit but caused the applicant massive "pecuniary and non-pecuniary" damage. By ruling in favor of Allard, the ECtHR signaled that Article 1 of Protocol No. 1 protects individuals from state-sanctioned actions that serve no real public or private interest other than rigid legalism.

Second, joint ownership, while fostering collaboration, often conflicts with the principles of autonomy, the right to self-determination, and independent decision-making by introducing interdependency that restricts individual control over assets, decisions, and actions. While not always listed as a primary, top-level principle of social justice, autonomy (or self-determination) is often included within the principles of human rights of participation, and inclusion.²⁹ Joint ownership requires that members make collective decisions about the use of the property. This participatory structure ensures that marginalized voices are included in decisions that directly affect their lives. From Damjan

28 *Allard v Sweden* App no 35179/97 (ECtHR, 24 June 2003) <<https://hudoc.echr.coe.int/eng?i=001-61164>> accessed 20 February 2026.

29 Taofeek K Owonikoko, 'Upholding the Principles of Autonomy, Beneficence, and Justice in Phase I Clinical Trials' (2013) 18(3) *Oncologist* 242, doi:10.1634/theoncologist.2013-0014.

Kukovec's perspective, autonomy is generally understood as the capacity for self-governance and the ability to choose one's own path. It also encompasses the relationship between an autonomous entity and others, as well as the ability to shape that relationship.³⁰ Additionally, autonomy is defined as independence and freedom from external control or influence. In this sense, Damjan Kukovec's perspective seems to depend on Joseph Raz's argument on autonomy. Raz defines personal autonomy as the capacity of an individual to be a "part-author" of their own life, shaping it through freely chosen, meaningful, and valuable options. This substantive conception requires three conditions: appropriate mental capacities, freedom from coercion or manipulation, and a range of valuable options provided by an autonomy-supporting society.³¹ The degree to which the principle of autonomy is compromised largely hinges on the circumstances surrounding the establishment of joint ownership. On one hand, when co-proprietors inherit their stakes, they may be unwittingly thrust into partnerships with individuals they would not have chosen voluntarily. This erosion of autonomy in the formation of joint ownership is strikingly apparent in such situations, highlighting the complexities and challenges of shared ownership. On the other hand, if a person chooses to partner with others and co-purchase properties, they exercise their autonomy by utilizing various faculties with minimal rationality. This includes the ability to understand the means necessary to achieve their goals through joint ownership, as well as the mental faculties required for planning actions such as investment or other purposes. In other words, as Aruna Nair argues, an autonomous individual, namely a co-proprietor, has opted to make free commitments to others, thereby limiting their future choices in service of shared or overlapping projects.³² This commitment can significantly conflict with their autonomy.

Most significantly, Cécile Fabre observed that recent scholarship on distributive justice seeks to illuminate the complexities of ownership rights over property, such as land and natural resources, collectively known as "the world."³³ These precious resources are fundamental for individuals to attain a quality of life that is not just decent but comparable to that of others. Such discussions delve into various perspectives on who, among the privileged and the disadvantaged, possesses the authority to determine how a particular property will be utilized (control rights). Furthermore, they explore the rights to the income generated from that property (income rights) and the ability to transfer these rights to others (transfer rights). In doing so, this discourse not only reframes our understanding of justice but also challenges us to consider the profound implications of ownership in shaping

30 Damjan Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) 8(3) *European Papers* 1407, doi:10.15166/2499-8249/723

31 Nicole Hassoun, 'Raz on the Right to Autonomy' (2014) 22(1) *European Journal of Philosophy* 96-7, doi:10.1111/j.1468-0378.2011.00473.x.

32 Aruna Nair, 'Property and Autonomy in the Marketplace: Freedom to Sell as Freedom of Exit' (2022) 33(1) *King's Law Journal* 34-5, doi:10.1080/09615768.2022.2034591.

33 Cécile Fabre, 'Justice, Fairness, and World Ownership' (2002) 21(3) *Law and Philosophy* 250, doi:10.1023/A:1015552412506.

our collective future. Following Cécile Fabre's argument, joint ownership may satisfy the sufficiency principle as a key principle of social justice, in which a group of individuals shares ownership rights, meaning that no individual can exercise those rights without obtaining permission from the other members of the group. Decisions about how the property should be used and by whom are made unanimously by the group. For example, if we co-own a piece of land, we each have equal rights over it. The production and distribution of resources are the result of a bargaining process where both parties have equal leverage over each other. This setup satisfies the sufficiency principle, as either of us can threaten to withhold access to the land unless the other provides the necessary resources, and vice versa. Despite this, because a co-proprietor cannot exercise their control over the land without the other's consent, to the point that a co-proprietor cannot even use the land unless both parties agree, we cannot be considered autonomous. Consequently, the autonomy principle is not upheld, and justice is therefore not achieved. Additionally, fairness is compromised because neither of the co-proprietors has meaningful control over the decisions that most impact our lives.³⁴

Third, joint property disputes can conflict with the social justice principle of equity, i.e., the fair distribution of resources, opportunities, and responsibilities within society, by revealing hidden inequalities, reinforcing existing power imbalances, and limiting marginalized groups' access to resources. For example, in personal relationships, joint accounts can obscure inequalities in financial access if one partner contributes more or controls the funds, disproportionately affecting the financial autonomy of the lower-earning partner. Moreover, joint property does not ensure equal control. Research shows that partners may feel entitled to control assets in proportion to their financial contributions rather than equally, allowing the financially stronger party to dominate decision-making. This contradicts social justice principles of equal agency. In economic contexts, joint ownership structures can create barriers to asset access for marginalized groups, such as women and youths, who may struggle to obtain credit, contribute equally to capital, or navigate complex and restrictive legal frameworks. This is particularly relevant in cases of joint ownership where a majority owner may pursue a court order for a forced sale of the entire property, potentially leading to losses for vulnerable co-proprietors. Overall, it seems that joint property often prioritizes formal equality (equal shares on paper) over substantive equity (fairness based on individual circumstances and needs), which can exacerbate, rather than alleviate, social and economic disparities.

4.2. The Use and Administration of a Joint Property

Building on the last discussion, owning a property with others is a strategic way to share costs and build wealth, but its success depends entirely on a clear framework for the use and administration of joint property. These two pillars transform a complex legal arrangement into a functional, shared asset. Without a solid framework for these pillars, owners often

34 *ibid* 256.

face "the tragedy of the commons," where individuals, acting in their own self-interest, overexploit a shared, finite resource, leading to its ultimate depletion, the property is neglected, or one person dominates the space. Defining these terms upfront is the only way to protect each owner's legal rights, prevent costly disputes, and ensure the property remains a valuable investment rather than a source of personal or financial stress. What are the philosophical and legal approaches governing the organization of joint ownership under Dutch Title 3.7 and Islamic traditions?³⁵

In general, both legal systems regard joint ownership as a permanent arrangement rather than a temporary stage. They offer considerable flexibility regarding the administration and use of shared assets. Co-proprietors have significant freedom to establish their own management rules. If they are unable to reach an agreement, a subdistrict court can impose a regulation that balances the interests of both parties. More precisely, both the Dutch Title 3.7 and Islamic legal jurisprudence distinguished between the use of an owned indivisible portion and the use of the entire joint property by each owner, perhaps with a view to distributive justice, focusing on the fair allocation of assets, rights, and responsibilities among co-owners. More systematically, two distinct legal philosophies guide the nature of joint ownership of a property under Dutch Title 3. The philosophical approach asserts that owners possess absolute control over their shares, even though they are indivisible, granting them the freedom to use or manage them without requiring the consent of their fellow co-proprietors. This approach aligns with the principle of autonomy and resonates with an individual's right to self-determination and their inherent ability to govern their own property without the burden of external coercion, manipulation, or interference from others. More particularly, Article 3:169 of the Dutch Title 3.7 allows each co-proprietor to utilize all community assets, provided that this usage is consistent with the rights of other co-proprietors. Furthermore, under Article 3:168, the Subdistrict Court may, upon the request of a relevant party, create a plan for the enjoyment, use, and administration of community assets. However, this inherent right can be inferred from reading Article 3:175, which mentions that each co-proprietor is allowed to convey (transfer and encumber) their share in a community asset, which explicitly grants each co-proprietor full autonomy over their respective shares.

Nevertheless, the second competing philosophical approach confirms that co-proprietors have limited authority over the use of the entire shared property, indeed. They cannot make decisions about the entire property without the collective permission of their fellow owners. Article 3:169 of the Dutch Title 3.7 allows each co-proprietor to use all community assets, provided that such use is consistent with the rights of other co-proprietors. Furthermore, under Article 3:168 the Subdistrict Court may, upon the request of a relevant party, create a plan for the enjoyment, use, and administration of community assets. Perhaps this approach emphasizes that joint property hinges on the notion of an 'indivisible share', which signifies that each joint owner holds a stake that cannot be physically divided among them, thus

35 Dutch Civil Code (n 2) art 3:7.

creating a unique bond of shared responsibility and collective interest. As a result, in this situation, the principle of autonomy is not upheld because each co-proprietor does not have meaningful individual control over decisions regarding the entire joint property. Furthermore, it seems significantly essential to exercise the right to use the joint property with caution. If such actions inadvertently cause damage to the shared property, the responsible individual will be held liable for any necessary repairs. This issue is supported by Václav Bělohradský, who observed that private property, arguably, includes joint property, is a convention, and is one of the artificial rights, in which each individual with private ownership must, to some extent, consider the public framework that governs it. This framework includes not only legal regulations but also shared ethical principles that impose limits, as private property can significantly impact others.³⁶

From the perspective of Islamic jurists, their philosophical approaches are often similar to those outlined in Dutch Title 3.7. For instance, *ibn 'Ābidīn* (d. AD 1836 / 1252 AH) distinguished between various situations in which each co-proprietor may use their share of a property or, in some cases, the entire property. More particularly, *ibn 'Ābidīn* was asked about a situation where an agricultural land *devoted to farming* is jointly shared between co-proprietors, and one co-proprietor takes the initiative to plant all that shared land without permission from the other proprietor. Then, firstly, this farmland shall be divided between them. The farmer who planted the crops is fully acknowledged for his rightful planting on his share, and whatever plants fall into his co-proprietor's share, he shall be ordered to uproot them and compensate for the value decrease in the farmland. This is if the crop has not yet reached maturity. If it has reached maturity or is close to it, the cultivator must compensate his partner for the decrease of half of his share if it has decreased, because he is a usurper of his partner's share. *Ibn 'Ābidīn* justified his approach by noting that the farmer is considered a usurper if he had knowledge that the planting and cultivation diminishes farmland, primarily, I believe, through soil erosion and degradation,³⁷ yet, he also sees that if he knew that the cultivation would benefit the shared farmland and not diminish it, then he has the right to cultivate all of it.³⁸ In his writings, *Ibn 'Ābidīn* clearly distinguishes between using an individual share and using the entire joint property. A person can use their share as they wish, even if it has a positive or negative impact on its value. However, if

36 Luboš Blaha, 'Theories of Private Property: Ownership and Social Justice' (2018) 18(1) Slovak Journal of Political Sciences 112.

37 Cultivation diminishes farmland primarily through soil degradation (roughly 5.2 million hectares lost annually), which turns productive land into barren or less efficient ground. This degradation is driven by intensive practices like continuous monoculture, excessive tillage, and chemical overuse, which destroy soil structure and fertility, reducing the land's capability to support crops. See, 'Soil Erosion and Degradation' (WWF World Wildlife Fund, 2025) <<https://www.worldwildlife.org/our-work/forests/soil-erosion-and-degradation/>> accessed 20 February 2026.

38 Muhammad Amīn ibn 'Umar ibn 'Abd ar-Raḥīm ibn Najmuddīn ibn Muḥammad Ṣalāḥuddīn al-Shāmī, *Hashiyat Rad al-Mukhtar, on al-Durr al-Mukhtar: Sharḥ Tanwīr al-Absar* (2nd edn, Mustafa al-Babi al-Halabi and Sons Library and Printing Company 1966) vol 6, 304 [in Arabic].

the use of the entire shared property does not decrease its value, each co-proprietor is permitted to utilize the entire property, provided that such use does not diminish the property or reduce its overall value. This perspective distinguishes between personal property (needed for livelihood) and private property (means of production). Nevertheless, this privilege comes firstly with the obligation not to inflict harm on the rights of fellow owners, and secondly, that the property's intended purpose remains intact. A legal observation which seems similar to Article 3:169 and Article 3:168 of the Dutch Title 3.7, echoing the wisdom of *ibn 'Abidīn*.

In the face of disputes over the use of joint property, *al-Maqdisi* (d. 1624 AD / 1033 AH) observed that if the co-proprietors disagree on how to use or benefit from a house, a judge may require them to either divide the benefits equally or rent the property to each party on a rotating basis. This arrangement allows for the sharing of benefits without permanently dividing ownership of the property (*mohaiaah*).³⁹ This (*mohaiaah*) arrangement allows one co-proprietor to have exclusive access to the entire property for an agreed-upon period, in exchange for allowing other co-proprietors to use the shared property for the next same period for themselves. This concept of (*mohaiaah*) was directly inspired from the Quarn: “He said: Here is a she-camel ‘brought forth as a sign from God’ For her is to be her drinking share and for you is to be your drinking share, each on a known day at the watering place”.⁴⁰ Now, the concept of (*mohaiaah*) does not exist under the Dutch Title 3.7, similar to Islamic jurists; however, it potentially fits well with Article (3:168), which handles if no contractual arrangement exists, the subdistrict court has the authority, upon the request of an appropriate party, to create an arrangement for these purposes, which may involve appointing a fiduciary to manage one or more community assets.

In relation to the right of administration, Article (3:170 (2)) of the Dutch Title 3.7 assures co-proprietors' right to ‘administration’ which includes managing and exploiting the shared property, including leasing it to either other co-proprietors or outsiders.

In the Islamic legal jurisprudence context, *al-Zayla'i* (d. 1342 AD / 743 AH) provided a captivating analysis of the complexities of leasing shared assets, sprinkling this issue with his keen observations. On the one hand, as he observed, according to the teachings of both Abu Hanifa and Zufar, it is not permissible for a co-proprietor to lease their share of the shared property, whether it is divisible or indivisible, unless the lessee is another co-proprietor of that property. Abu Hanifa maintains that renting out a joint share to someone who does not hold joint ownership is prohibited. *Abu Hanifa* noted that leasing is inherently a contract designed to derive benefits from leased property. However, the state of joint ownership results in the intended benefits being non-specific to portions of the property,

39 Abdul Rahman bin Muhammad bin Ahmad bin Qudamah Al-Maqdisi Al-Jamaili Al-Hanbali, Abu Al-Faraj, Shams Al-Din, *The Great Explanation of Al-Mughni* (Dar Al-Kitab Al-Arabi Publishing and Distribution) vol 11, 498 [in Arabic].

40 Hammad, *The Gracious Qur'an* (n 5) Surah 26: Al Shuarah (Poets), Verse 155.

and ultimately undeliverable.⁴¹ On the other hand, *al-Qudūri* (d.1037 AD/428 AH) noted that most jurists (fuqaha) of Islamic legal jurisprudence agree that it is permissible to lease a joint asset to either one of the co-proprietors or a third party. This is because a joint property offers benefits, and it can be transferred through abandonment or preparation, as such, leasing is viewed as a form of sale, and similar to sales agreements, if the benefits of the lease are not clearly defined, the lease becomes invalid.⁴²

However, neither Islamic legal jurisprudence nor Dutch Title 3.7 adequately addresses the management issues surrounding joint property, especially the burdens faced by the majority due to a minority's control or refusal to participate in abnormal administration. Critically, the Dutch Title 3.7, specifically under Article 3:170, distinguishes between normal and abnormal exploitation of a common asset that falls outside the conventional management of joint property. Most importantly, the law states that these activities include ordinary maintenance operations useful for the normal management of a common asset. It grants all co-proprietors, jointly, or each co-proprietor, independently, the authority to perform these activities. However, any activities beyond the normal exploitation of a common asset may be performed only jointly by the co-proprietors. Currently, the implications of this limitation are severe because Article 3:170 fails to outline the proper procedures that both majority and minority co-proprietors should follow when a unanimous agreement cannot be reached and urgent decisions are required to conduct abnormal exploitation of a common asset. These activities include abnormal modifications to the intended purpose of the entire joint property to enhance its use and value without disposing of it. This could involve, for example, converting a residential house into a hotel, which typically requires urgent decisions to secure zoning permits, conducting a feasibility study, and upgrading the property to meet commercial safety standards, such as fire safety and accessibility. Such actions are considered unusual exploitation of a common asset. Additionally, Article 3:168 grants the subdistrict court the authority, upon the request of a relevant party, to establish appropriate arrangements to ensure that the needs and concerns of all parties involved are addressed thoughtfully. However, Article 3:168, like Article 3:170, does not address situations in which a majority of co-proprietors is willing to undertake an unusual administrative action, while minority owners refuse to do so. In this context, Article 3:168 allows only the opposing or requesting co-proprietors to file a claim in the subdistrict court to resolve the issue at hand. As a result, neither the majority nor the minority co-proprietors has the power to enforce their decisions on the others without resorting to litigation. This can lead to frequent legal disputes over unusual administrative activities concerning joint property. These disputes may be initiated by one owner against another, or vice versa,

41 Uthman ibn Ali ibn Muhjan al-Bari'i, Fakhr al-Din al-Zayla'i al-Hanafi, *Clarification of the Facts, Explanation of the Treasure of the Minutes and Al-Shalabi's Commentary* (The Grand Amiri Printing Press 1895) vol 5, 126 [in Arabic].

42 Ahmad bin Muhammad bin Ahmad bin Ja'far bin Hamdan Abu al-Hussein al-Qudūri, *Al-Quduri Summary* (Dar Al-Kotob Al-Ilmiyah 1997) vol 7, 3655 [in Arabic].

leading to significant drawbacks. Specifically, this may increase the frequency of court cases requesting permission to engage in unusual exploitation activities of a shared asset, which could result in substantial financial and litigation costs due to disputes among undecided co-proprietors over the management of a common asset. Furthermore, a history of ongoing legal disputes may diminish the property's value and marketability.

In this scenario, this research proposes that Articles 3:168 and 3:170 should be revised to clearly differentiate between normal and abnormal administrative activities. It should require a two-thirds majority to authorize any abnormal exploitation of a common asset, without requiring the majority go to court to enforce their decision. However, the law must stipulate that the enforcement of a two-thirds majority decision is only permissible when there are strong justifications for the benefits it provides to the co-proprietors. Additionally, dissenting minority co-proprietors should be notified of the decision and have the option to seek to have it overturned in court.

Saudi Arabia's new Civil Transactions Law (issued June 2023) under Article 623 deals with this specific issue, more specifically, partners who own at least three-quarters of the jointly owned property may decide, in order to improve the utilization of this property, to make fundamental changes and modifications to its intended purpose that go beyond the scope of ordinary management, provided that they inform the other partners of their decisions. Any dissenting partner has the right to object before the court within thirty days of being notified.⁴³

4.3. The Exit Rights Outside the Joint Ownership

Inherently, both the Dutch Title 3.7 of the DCC and Islamic legal jurisprudence recognize a profound truth: a joint ownership of property is a dynamic, mutable reality that constantly changes, is plural, and is shaped by human action, belief, and perceptions. It can be established and, at times, extinguished, leading to the inevitable transfer of ownership. Perhaps, this profound notion of disposal right potentially hinges on Dagan's insightful acknowledgment that there is no definitive formula for striking the perfect balance in our relationship.⁴⁴ A co-proprietor's freedom to walk away from their prior commitment to others establishing joint ownership, in the pursuit of evolving understanding of the good, inevitably clashes with their own freedom to rely on that commitment as a person strives toward their original vision of the good. This tension captures the complex interplay of our individual pursuits and highlights the delicate nature of our mutual obligations. Therefore, it seems impractical to expect that all co-proprietors will retain joint property indefinitely. For instance, reaching a unanimous agreement on vital matters concerning the use, enjoyment, and management of the joint property can often present significant challenges,

43 Royal Decree no M/191 'Civil Transactions Law' (18 June 2023) <<https://misa.gov.sa/app/uploads/2025/07/Civil-Transactions-Law.pdf>> accessed 20 February 2026.

44 Hanoch Dagan, *A Liberal Theory of Property* (CUP 2021) 202.

making an unwilling co-proprietor more than just an unexpected presence; they can disrupt the harmony and collaboration essential to the effective management of joint property.

Such situations potentially necessitate an exit from joint ownership, which can be achieved through several methods, ranging from amicable agreements to court-ordered actions. When a co-proprietor expresses a desire to dispose of their share, the remaining owners must move quickly to evaluate the legal, financial, and operational impacts. Thus, it seems plausible to explore fundamental legal and valuation questions: Can a co-proprietor unilaterally dispose of the entire joint property, or can they sell individual undivided share? Can a selling co-proprietor force dissenting co-proprietors to sell their shares too? Do the remaining owners have a Right of First Refusal (ROFR) to match an outside bid before shares are sold to a third party? Could the exiting owner legally force a physical division or court-ordered sale of the entire asset if no agreement is reached? To address these questions, the research focuses them simultaneously. The following sections investigate legal-philosophical approaches and the scope of conformity with principles of social justice in relation to both the disposal and partitioning of joint property.

4.3.1. Disposal of a Joint Property

In relation to the co-proprietor's disposal authority of joint property, it seems that it is governed by two approaches as described by Article 3:175 and Article 3:190. More specifically, Article 3:175 describes a simple community, where the law *presumes* that co-proprietors are free to sell their shares, unless they have specifically agreed (or the law has mandated) that they may not. Thus, Article 3:175 of Title 3.7 of the DCC defines the default rule for a co-proprietor's power to manage their individual share in a community of property. The law assumes that your co-proprietor is free to "convey" (transfer or encumber) their specific share in a community asset. For instance, a co-proprietor can sell their 50% share to a third party or use it as collateral (mortgage or pledge) for a loan without the other co-proprietor's permission. If the co-proprietor sells their share, the buyer "steps into their position," becoming the new co-proprietor alongside the original partner. In fact, Article 3:175 establishes the legal basis for asserting that owners exercise complete control over their shares. The immanent theory of property rights may also encompass Hegel's view that an individual reflects themselves through their possessions. Hegel states, "A person has the right to direct his will upon any object, as his real and positive end. The object thus becomes his. As it has no end in itself, it receives its meaning and soul from his will. Mankind has the absolute right to appropriate all that is a thing."⁴⁵

However, this freedom exists only if there is no restricted community in which no independent action is allowed as stated in Articles 3:175 and 3:190. In practice, this exception often overrides the rule. Examples of these restricted communities include

45 GWF Hegel, *Philosophy of Right* (SW Dyde tr, Batoche Books 2001) § 44, 57. See also, Becker (n 13) 209-10.

marital communities, which that generally prohibit a spouse from selling their share in the house or car while the marriage exists. In other situations, co-proprietors place contractual restrictions, often signing agreements that explicitly forbid selling or mortgaging their shares without mutual consent. Currently, in legal discussions, Prof. Wendy Schrama argues that the relationship between cohabiting partners fundamentally challenges this option. Notably, the interactions among co-proprietors are governed by the essential principles of reasonableness and fairness, as outlined in Article 3:166, paragraph 3. It defies these principles to unexpectedly introduce a new co-proprietor of the house to one partner. Despite this important consideration, there is a notable absence of case law on the matter, highlighting a gap in legal clarity that needs to be addressed.⁴⁶ Nevertheless, Article 3:175 still provides a release: if there is an existing contract or court order dictating how a shared asset is used, managed, or disposed of, the subdistrict court can rewrite or end that arrangement. This only happens if events occur that the parties didn't account for when they made the deal, such as extreme inflation, a total breakdown in the relationship, or a physical disaster. Any co-proprietor who is significantly affected by these new circumstances can request this intervention.

In a different context, Islamic legal jurists (fuqaha) hold various opinions on the authority of a co-proprietor to sell their own share, especially regarding whether this action may harm other co-proprietors without a legitimate right. In total, those diverse perspectives seem to align with the scope of Articles 3:175 and 3:190 of Title 3.7 of the Dutch Civil Code, suggesting a nearly systematic approach. A key principle guiding the Islamic approaches is the foundational Islamic legal norm and Prophetic tradition (Hadith) of the Prophet Muhammad: *(There should be neither harming nor reciprocating harm)* (*La darara wa la dirara*), which nearly applies to nearly every aspect of life, including property law and banning unfair practices like hoarding or cheating in trade.⁴⁷ This statement implies that one must not initiate harm against others or themselves. It also refers to causing harm for personal gain. These principals mandate that harm must be eliminated or prevented before it occurs. It also balances interests: if two harms are unavoidable, this rule dictates choosing the lesser of the two evils to minimize overall harm. Overall, this wisdom emphasizes the importance of responsibility and ethics, urging Islamic followers to prioritize fairness and the well-being of others in their interactions. On one hand, *as al-Khārāshī* (d. 1690 AD / 1101 AH) observed that a significant number of Islamic jurists (fuqaha) assert that a co-proprietor should never be compelled to sell their share in a joint property without obtaining permission from other co-proprietors, *because* a co-proprietor has the right to divide, sell, and transfer their share without needing permission from their

46 Wendy Schrama, 'Informal Relationships: Dutch Report' in Katharina Boele-Woelki, Charlotte Mol and Emma van Gelder (eds), *European Family Law in Action*, vol 5: Informal Relationships (Intersentia 2015) 19.

47 A hadith compiled by Imam Ahmad ibn Hanbal (d. 241 AH/855 AD).

co-proprietor.⁴⁸ Furthermore, this right to engage in sales is granted equally to both men and women, a principle astutely noted by *al-Jaṣṣāṣ* (d. 980 AD / 370 AH) that Abu Hanifa, Abu Yusuf, Muhammad, Zufar, al-Hasan ibn Ziyad, and al-Shafi'i stated that if a woman has reached puberty and possesses sound judgment, she is allowed to manage her property, including making gifts, regardless of whether she is a virgin or not.⁴⁹ Potentially, this Islamic legal perception is based on *al-Qarāfi*'s accumulated conclusion (d. 1285 AD / 684 AH) when he acknowledged that the state of joint property does not undermine the essence of ownership as a whole.⁵⁰ In other words, a co-proprietor shall have the ability to sell their own shares freely without restrictions, even in joint ownership, because they are still the owner of the sold share. Furthermore, this issue had been contextualized by the general governing principle established by *al-Kasani* (d. 1191 CE / 587 AH), who compellingly argued that in the state of joint property, each co-proprietor is considered a stranger to the other co-proprietor's share. Therefore, neither co-proprietor can dispose of the other's share without permission.⁵¹ This implies that a co-proprietor shall have the complete authority to dispose of their share without a need for other's consent. Perhaps, *al-Kasani* sees ownership as a fundamental human right, equal to the rights to bodily security and integrity, as observed by Thomas Merrill and Henry Smith in their perspective of a close connection between property rights and human rights in which both categories of rights create powerful duties of non-interference that extend to both co-proprietors.⁵²

On the other hand, even fewer Islamic jurists (*fuqaha*) contend that a co-proprietor cannot sell their share separately without the permission of the other joint proprietor. In this context, *al-Mardāwī* (d. 1480 AD / 885 AH) noted that if someone sells his share of a specific shared thing and delivers it to the new buyer without obtaining their co-proprietor's permission, the seller is infringing upon their partner's rights. If the buyer is aware that the seller lacked permission to transfer their rights, the buyer is liable for any consequences. The decision regarding the situation is up to the buyer. This also applies if the buyer was unaware of the partnership or the need for permission and did not know about any related matters. However, the responsibility ultimately lies with the seller because they had misled the new buyer.⁵³ *Al Sarakhṣī* (d. 1090 AD/ 483 AH) emphatically asserted that the actions of one co-proprietor can harm their partner. If a co-proprietor disposes of their share in a way that negatively affects their partner, those actions will not be considered valid in relation to the

48 Muhammad 'abu Eabd Allah Muḥamad 'Ibn Eabd Allah 'Ibn Eali Al-Kharaashii, *A Brief Explanation by Khalil al-Kharashi* (The Grand Amiri Printing Press 1899) vol 5, 239 [in Arabic].

49 Abū Bakr Aḥmad ibn 'Alī al-Rāzī, *The Rulings of the Qur'an by Al-Jassas* (Dar al-Kutub al-Ilmiyah 1994) vol 2, 352 [in Arabic].

50 Abu al-Abbas Shihab al-Dīn Aḥmad ibn Idrīs ibn Abd al-Rahman al-Maliki, *Lights of Lightning in the Clouds of Differences* (World of Books) vol 3, 232 [in Arabic].

51 Al-Kasani al-Hanafi (n 11) vol 6, 65.

52 Merrill and Smith (n 25) 1851.

53 Alā' al-Dīn Abu al-Hasan Ali ibn Sulayman al-Mardāwī, *Fairness in knowing the most correct of the disagreement by Al-Mardawi* (House for the Revival of Arab Heritage) vol 4, 471 [in Arabic].

partner.⁵⁴ It seems that the view of non-sale rights is best understood as stemming from a direct or indirect relationship that necessitates unanimous agreement among partners to sell private shares to outsiders. This concept is supported by both *al-Mardawī* and *Al-Sarakhsī*, who refer to the term "partnership," which is now comparable to modern business companies and is similar to Articles 3:175 and 3:190 of Title 3.7 of the DCC.

Most critically, however, if a co-proprietor disposes of the entire joint property without prior unanimous agreement from all co-proprietors, this disposal shall be deemed null and unenforceable because the selling co-proprietor disposes of a property which is owned by others. This issue is based on the fundamental principle of the rule of law, as observed by *al-Kasani*, which holds that a person cannot sell what they do not own, as they lack the authority to do so; and, thus the eventual buyer does not acquire good title. Despite this, exceptions have arisen due to the apparent unfairness that the general rule might create, leading innocent buyers to lose their money in difficult circumstances. Still, some scholars, such as Ali Haydar Afandi, consider that if one of the owners of a shared house sells both his own share and his partner's share to another person without obtaining permission from the partner, this sale is considered a voidable act regarding the partner's share. The partner has the option to either rescind the sale of their share or ratify it, as long as the conditions for ratification are met, considering the seller's action as a "meddler," who is a person who interferes in other people's affairs.⁵⁵

4.3.2. Termination of Joint Ownership Through Partition

It seems indispensable to establish independent management and a legal option for co-proprietors in the event of disputes over a joint property when they can no longer agree on its use or sale. Therefore, the termination of joint property can be achieved by partitioning as an escape route, which is essential for converting shared property into clearly defined, individual ownership, eliminating ambiguity and preventing disputes among co-proprietors. It grants each owner the legal right to sell, lease, or mortgage their share independently, and provides a lawful release to terminate co-proprietorship. This dissolution can be effectively achieved through court-ordered actions, such as in-kind partition or forced sale. Both the Dutch Title 7 and Islamic legal scholars offer sophisticated and varied perspectives in this regard. A question arises: What types of partitioning are relevant to joint ownership, and what is the court's preference? To what extent does the termination of partition align with principles of social justice, particularly in protecting vulnerable individuals from losing housing? While modern law supports the principle that property rights should be protected, this principle is not absolute. Still, both Yun-chien Chang and Lee Fennell recognize the partition of a joint property to constitute a legal safety

54 Muhammad ibn Ahmad ibn Abi Sa'd Shams Al-Sarkhsi, *Al-Mabsut* (Dar Al-Ma'arifa) vol 21, 39 [in Arabic].

55 Ali Haydar Khawaja Amin Afandi, *Durar al-Hakam fi Sharh Majallat al-Ahkam (The Pearls of Rulers in Explaining the Journal of Rulings)* (Dar Al-Jil 1991) Vol 3, 29 [in Arabic].

valve that prevents individuals from being tied to an undesired joint ownership.⁵⁶ While a partition is often presented as fulfilling the right to self-determination, it provides a legal method to force long-term residents off their land when a minority shareholder or third party forces a sale, in case disputes arise. This frequently results in the artificial division of homelands and populations, leading to the displacement of vulnerable people. Another critical concern with partitioning is that it often results in a property's value being below market value, causing economic losses for co-proprietors who cannot afford to buy out the others and often disadvantaging disadvantaged or rural landowners.

Recognizing the potential social effects of partitioning joint ownership, it can be achieved either by agreement (extrajudicial partition), which allows co-proprietors to voluntarily divide property without court intervention, usually through a signed contract or partition deed. The primary kinds include physical division (in kind) of the asset, sale of the property to divide proceeds, and buyout of shares by one owner. In a different context, courts can order the partitioning of a joint ownership when extrajudicial partition is not typically an option. In this case, after a co-proprietor initiates a partition action, the courts usually consider two methods of partitioning: "in kind," where the property is divided into separately titled parcels, or by "sale," where the property is sold, and the proceeds are distributed among the co-proprietors. The in-kind method is seen as more consistent with safeguarding the heritage of real property within families, ensuring that it remains in their lineage, while also protecting owners from being compelled to sell against their will. Conversely, ordering a partition in-kind can be problematic when there are multiple interests in a property, as courts may find it impracticable if dividing it would diminish the economic value of the disputed property. The alternative is partition by sale, in which the proceeds are distributed among the owners based on their fractional shares.

Under the Dutch Title 3.7, co-proprietors are allowed to both manage their property independently and participate actively in the apportionment process, usually through agreement, yet if no agreement is available on dividing the community property, the court may intervene to determine the division at the request of an appropriate co-proprietor.⁵⁷ In reference to Article 3:185 of the Dutch Title 3.7, the court may also conduct the division itself, ensuring fairness in apportionment by considering the interests of all parties involved where it can: a. assign a portion of a community asset to each co-proprietor; b. allocate more than their fair share to some co-proprietors, who must then compensate others based on the asset value; c. distribute net sale proceeds of a community asset as directed by the court.

Currently, to what extent do Dutch courts maintain a balance between the legal rules governing joint ownership and principles of social justice? Arguably, courts balance joint ownership rules with social justice by adapting strict property laws to reflect equity,

56 Yun-Chien Chang and Lee Anne Fennell, 'Partition and Revelation' (2014) 81 The University of Chicago Law Review 27.

57 Dutch Civil Code (n 2) art 3:183 and 3:185.

fairness, and human rights, particularly in housing disputes. While property law focuses on formal ownership and certainty, courts use discretion to prevent unjust outcomes, weighing personal rights against public interest. This balance is often struck by ensuring legal decisions serve the broader community. In this context, it seems important to discuss the implications of the recent Dutch case ECLI:NL:RBLIM:2025:4250, in which the Limburg District Court focused its analysis on a civil dispute over the distribution of an estate between a mother and her daughter following the father's death. The daughter sought to dissolve co-proprietorship of assets with her mother, who had been disinherited, despite a prenuptial agreement that stipulated cold exclusion.⁵⁸ In 2023, a father born in 1938 died in southeastern Netherlands. He was married to the defendant under a prenuptial agreement that excluded her from inheritance. His daughter, the plaintiff, is the sole heir and executor under his will dated October 25, 2022, which revoked prior wills and disinherited the defendant. The couple had been living separately since May 30, 2022, and were legally divorced on January 23, 2023, though the divorce decree was not yet registered at the time of his death. The couple has jointly owned a house since December 31, 2004. After disputes, the plaintiff, as the sole heir, requested termination the joint ownership with the defendant, despite a prenuptial agreement that excluded marital community property. The Limburg District Court is considering two court orders: the plaintiff's request for a division of the property and the defendant's request to temporarily exclude this claim under Article 3:178 of Title 3.7 of the DCC. The court determined that there is no marital community of property due to a prenuptial agreement. It ruled that no one should be forced to remain in an undivided community for an unreasonable period. Under Article 3:178 of Title 3.7 of the DCC, a claim for division can be temporarily excluded if one co-proprietor's interests in immediate division significantly outweigh the others. Ultimately, the court prioritized the plaintiff's interest in ending the indivisibility and rejected the defendant's appeal for exclusion from distribution. The court recognized the mother's long-term residence and co-proprietorship of the house since December 31, 2004. Consequently, the house will be assigned to the defendant, who must pay the plaintiff a usage fee. Most critically, the court outlined a detailed plan for dissolving the community home. If the defendant wants to keep the property, she must pay the plaintiff's estimated share within three months; otherwise, the house will be sold to a third party. A thorough investigation of this Dutch legal precedent revealed several practical issues deliberately invented by the Limburg District Court. First, it lies in practice how courts should structure complex settlements surrounding the in-kind and sale partition of an estate to prevent further deadlock between heirs. Second, this legal proceeding demonstrates how courts can intervene in a "simple community" (e.g., a jointly owned house) when heirs cannot reach an agreement, using procedural mandates to force a division that is both equitable and efficient. More precisely, the court did **not** immediately order the house to be sold to a third party. Instead, it established a conditional process, known as a "roadmap," to resolve the

58 Case C/03/331095 HA ZA 24-251 (Court of Limburg, 7 May 2025) ECLI:NL:RBLIM:2025:4250.

dispute between the mother and daughter. The court's primary decision was to grant the mother the first opportunity to take over the entire property (buy out the daughter's share). As such, the court protected a vulnerable mother by prioritizing her housing stability over an immediate forced sale, granting her the first opportunity to take over the marital home. A structured roadmap for financing, combined with a usage fee for continued occupancy and an independent valuation, was utilized to balance her needs against the daughter's inheritance rights.

The daughter sought to terminate the joint ownership of the apartment she shared with her mother, in accordance with the default rule set out in Article 3:175 of Title 3.7 of the DCC. As a co-proprietor, she had the authority to dispose of her specific share in the communal property. While her primary goal was likely to receive her share of the apartment's value, she prioritized her mother's buyout of her 50% ownership. If the mother was unable to secure financing within the court-mandated timeframe, the daughter successfully argued for a mandatory sale of the entire property to a third party. Ultimately, the Limburg District Court's order focused on her being paid out by the mother rather than an immediate public sale.

To ensure a smooth and efficient forced sale process, the court used a self-executing roadmap to bypass a dissenting co-proprietor by granting a substitute consent, allowing the court's ruling to serve as the necessary signature for the sale. This is procedurally significant as it provides a self-executing remedy used when a property co-proprietor refuses to sign documents required for a sale, reducing the need for the parties to return to court if one heir becomes uncooperative during the sale process. The court further authorized the real estate broker to determine the sale price, enforced strict timelines for a public sale, and mandated access to the property, effectively preventing a deadlock in the division of property. In fact, by mandating a valuation, the court ensured a fair valuation process by appointing a jointly selected independent appraiser to determine the current market value rather than the historical claimed value that lacks consensus.

The Limburg District Court ordered a usage fee as a crucial method for financially compensating the non-occupying co-proprietor (the daughter) for the loss of utility from the property while the other co-proprietor (the mother) resides alone in the shared house. The court imposed this fee to ensure a fair division of assets, rejecting a standard "free" grace period intended to encourage prompt resolution of the estate. The total accrued fees are deducted from the occupant's share, thereby ensuring fairness in the final inheritance settlement. The court also indirectly referenced Article 3:169, which governs the right to use community assets. While awarding the vulnerable co-proprietor the right to use the entire community house, the court ensured that this usage was compatible with the rights of the other co-proprietors by granting the plaintiff compensation in the form of a usage fee for not occupying the property.

In the context of social justice, when an in-kind distribution of assets was not feasible, the court provided temporary protection for the vulnerable parties. It allowed the mother to retain her home while ensuring that the daughter received her rightful financial share. This

decision reflects the social goal of intergenerational equity. The court granted the mother the first opportunity to take over the marital home, recognizing the importance of housing stability for surviving spouses who often have a deep emotional and practical connection to their long-term residence. To prevent the daughter from being unfairly deprived of her share's value, the court ordered the mother to pay a user fee for the period during which she lived in the home alone. This arrangement ensures that the mother's right to remain in the home does not impose an unjust financial burden on the other heir.

In the context of partitioning joint ownership under Islamic law, this is a legal issue that has been explicitly addressed. Partitioning a jointly owned property, particularly in inheritance cases, typically occurs when multiple beneficiaries inherit the property together. The Quran graciously mentions this process and provides guidance on it, who mentions: (For men, there shall be a portion of what parents and nearest relatives leave 'behind in death' and for women, there shall be a portion of what parents and nearest relatives leave 'behind' whatever there is of it 'be it' little or much, 'there shall be' an obligatory apportionment 'made'. Moreover, when close relatives or orphans, or the indigent, attend the division 'of inheritance', provide for them out of it. Moreover, say to them a gracious and 'comforting' word)⁵⁹.

Islamic legal jurists (fuqaha) have proposed several methods for partitioning a property (qasama), either through agreements among co-proprietors or by a court's intervention. Notably, *ibn Taymiyyah* (d. 1328 AD / 728 AH) was asked about a scenario involving two men who co-own a house. and if one co-proprietor requested a division of the property, but the other refused. Ibn Taymiyyah's response was that if in-kind partitioning can be accomplished without harm among co-proprietors, such that there would be no diminished value as a result of in-kind partitioning, then the co-proprietor who refuses a division must be compelled to do so. However, *ibn Taymiyyah* continues to hold that if a division is not possible without harm, the party requesting the division may opt for a sale, and the party that refuses may be forced to share the proceeds. According to *ibn Taymiyyah*, forcing a division is the consensus among the four major schools of thought, while forcing a sale is the viewpoint of Malik, Abu Hanifa, and Ahmad.⁶⁰

In addition, *al-Bahuti* (d.1641 AD / 1051 AH) stated that co-proprietors have the option to divide their shared property either according to a ratio they agree upon or by requesting a judge to determine the division. The judge must assist them in resolving their dispute. Furthermore, the salary of the judge will be covered by the co-proprietors in proportion to their respective shares of the property.⁶¹

59 Hammad, *The Gracious Qur'an* (n 5) Surah 4: Al-Nisa (Women), Verses 7-8.

60 Taqi al-Din Abu al-Abbas Ahmad ibn Abd al-Halim ibn Abd al-Salam ibn Abd Allah ibn Abi al-Qasim ibn Muhammad ibn Taymiyyah al-Harrani al-Hanbali al-Dimashqi, *Books, Letters, and Fatwas of Ibn Taymiyyah on Jurisprudence* (Dar al-Kutub al-Ilmiyyah 1987) vol 35, 416 [in Arabic].

61 Mansur bin Yunus al-Bahuti, *Al-Rawd al-Murabba' with Commentary on Zad al-Mustaqni' al-Mukhtasar al-Mukhtaf* (Dar Al-Raka'iz Publishing and Distribution 2016) vol 3, 410 [in Arabic].

Islamic jurists (fuqaha) continue to disagree on the definition of ‘harm’ or ‘injury’ that may restrict the partitioning (qasama) of joint property, which provides equitable relief to co-proprietors, such as heirs who oppose forced sales. Courts should interpret the concept of injury to permit a sale whenever the proponent of the sale can show that a partition in kind of real property would cause financial loss to some or all of the owners. More specifically, *al-Maqdisi* (d. 1624 AD / 1033 AH) noted that the harm preventing partitioning (qasama) occurs when partitioning leads to a decrease in value, which means that neither co-proprietor benefits from the partitioning. Moreover, he observed that, the issue arises when neither party can benefit from their individual share as they did under the joint ownership.⁶² For instance, if two parties co-own a small house and it is divided in-kind, each person may end up with a narrow space that offers no practical benefit. Even if there may be other uses for the divided property, a party is not obligated to proceed with the division, as this scenario represents a harm akin to destruction. In contrast, he brought another perspective, which holds that what prevents division is the possibility that the value of one party's share would diminish upon division, regardless of whether they could use the property differently after it is divided. Consequently, it may be argued that forcing a sale to divide joint property can undermine the integrity of that property and potentially expose vulnerable persons to lose housing. However, adopting the pecuniary-loss standard would reduce the presumption of in-kind partition to a mere procedural hurdle. This hurdle can be easily overcome by simply demonstrating any loss in financial value if the in-kind partition is carried out.

In pursuit of applying the principles of social justice, Islamic jurists (fuqaha) allow preemption or right of first refusal (shufa), permitting a co-proprietor to compel the new purchaser of a share in the joint property to transfer ownership to the requesting co-proprietor at the sold price. This prevents harm from strangers and preserves privacy, applying specifically to sales. In this context, *al-Dasuqi* (d. 1815 CE / 1230 AH) discussed possible ways to resolve the conflict between forced sale partition and the principles of social justice. He emphasized that a primary reason supporting the right of pre-emption is the potential disadvantage faced by the partner who chooses not to sell. In cases involving indivisible items, this disadvantage arises from the risk of a price drop if the partner does not agree to the sale.⁶³

In Saudi Arabia, the implementation of property rights is in accordance with Islamic law, as established by the New Civil Transactions and regulations on joint properties enacted in 2023. However, previously, family-related issues in Saudi courts were governed by both Islamic law principles and additional regulations. This is evident from the investigation of case 8765 from 2021, which was examined in the First Commercial Court in Riyadh. This case addressed the lack of enforcement of a valid partitioning agreement.⁶⁴ Historically

62 Al-Maqdisi (n 39) vol 11, 491 [in Arabic].

63 Muhammad ibn Ahmad ibn Arfa al-Dasuqi al-Maliki, *Al-Dasuqi's Commentary on Al-Sharh al-Kabir* (Dar al-Fikr) vol 3, 476 [in Arabic].

64 Case no 8765 [2021] First Commercial Court in Riyadh.

speaking, a partnership was established in 1962 between the sons of Ibrahim: Badr, Rashid, and Dakhil (...) operating under the name "Rashid Ibrahim and Brothers for Watches." Each brother also owned individual properties, real estate, company shares, shops, and cash that were generally associated with the company. However, these individual holdings were not included in the original partnership deed or its annexes. As a result, the heirs of the partners agreed that all properties held in the names of any of the three brothers would be considered jointly owned, with each brother owning one-third. In 2002, the brothers established a division agreement to formally separate their assets and end their joint ownership, with each brother receiving a specific share.

The heirs of the two founding brothers have refused to relinquish the plaintiff's inheritance and have taken control of the real estate and other funds, completely disregarding the 2002 agreement. In a surprising turn of events, the first commercial court in Riyadh ruled the case inadmissible in 2021 on procedural grounds, stating that it did not comply with the required rules. Specifically, the plaintiff's representative failed to include an inventory of the estate belonging to the heirs in their statement of claim, which is essential for verifying the identities of the plaintiffs. They also did not submit the founding contract for the company involved in the lawsuit. As a result, the court's rejection ruling addressed these shortcomings in its operative part. Currently, there is no further explanation as to why the plaintiff's representative did not submit the necessary documents. However, what is notable is that the case involves a total of twenty-nine plaintiffs and defendants, as indicated by the case documents, underscoring the significance of this dispute surrounding the division of joint ownership.

In this Saudi legal precedent, key issues to note. Initially, the co-proprietors began the process of partitioning their property by mutual agreement. However, since this case involves an agreement made before 2002, the New Civil Transactions Law does not apply. Their actions may have been guided by adherence to Islamic principles and possibly influenced by the views of *Al-Bahuti* (d. 1641 AD / 1051 AH). He noted that co-proprietors can divide their property either through mutual agreement or by requesting a judge to intervene. Notably, *Al-Bahuti* was the primary legal authority on Islamic law in Saudi courts until the introduction of the New Civil Transactions Law. Furthermore, this case highlights a common procedural hurdle in Saudi commercial **courts**, where the complexity of "family-owned" de facto partnerships often clashes with the strict procedural requirements. In cases involving twenty-nine heirs, the court cannot verify legal standing (*locus standi*) without an official Inventory of the estate. The court needs to ensure every person named as a plaintiff or defendant is a legitimate heir and that no one is missing. Even if the 2002 division agreement exists, the court requires the founding documents of "Rashid Ibrahim and Brothers for Watches" to establish the partnership's legal starting point. Additionally, if all procedural requirements have been met, the Saudi court will enforce the agreement made prior to 2002 under Article 626. This article states that if all partners agree to the division, it is valid even if it diminishes

the property's benefit or value. Notably, Article 626 accurately reflects the views of *al-Bahuti* (d. 1641 AD / 1051 AH) and other Islamic legal scholars.

5 CONCLUSIONS

Grasping the distinction between sole and joint ownership as forms of property ownership is vital for effectively navigating the intricate complexities and challenges these arrangements present. Joint property is not the sole property of a single partner; rather, this delicate balance ensures that, while each owner thrives, the collective harmony is preserved, yet remains precarious. From a doctrinal perspective, both Islamic (fiqh) and Dutch property law traditions under Title 3.7 exhibit a surprisingly similar structure in their systematization of joint ownership of a property. Each legal tradition is organized around well-defined principles that, collectively, form a coherent body of law governing various matters related to property. This level of sophisticated organization particularly highlights joint ownership or community assets, primarily as a permanent state rather than a transitional stage (often formed following a death or a divorce), with designed rules as an abstract, overarching framework with a flexible management structure that applies to all forms of joint property.

Two distinct legal philosophies frame the realm of joint property ownership under both Islamic law and Dutch Title 3.7. The first philosophy boldly asserts that the state of joint ownership does not undermine the essence of ownership as a whole, for a co-proprietor wields absolute control over their share, even if the owned share is indivisible. This empowerment empowers a co-proprietor with the liberty to manage, use, or sell the owned portion without the need for consent from the other co-proprietors. This principle finds its roots in the teachings of *al-Shirāzi* (d. 1083 AD / 476 AH) and resonates in Article 3:175, which grants each co-proprietor the authority to determine the fate of their shares in a community asset.

However, the second competing approach explains that a co-proprietor still has limited authority over the entire shared property. They cannot make decisions about the entire property without the permission of their fellow owners. This limitation on freedom may directly conflict with the principle of autonomy in decisions about the use of the entire property and in determining who is authorized to make those decisions, which may require unanimous consent from all owners. An owner cannot be considered fully autonomous, as the interests of the other owners balance this right. Reputedly, this is perhaps partially because of an initial autonomy to forge joint ownership with others. Yet, when heirs inherit property, they find themselves without the autonomy to establish a true state of joint ownership. This paradox highlights the complexities of shared ownership and the limitations placed upon those who may seek to shape their inherited assets collaboratively.

Although both legal systems acknowledge that co-proprietors have significant freedom to set up their own management regulations, they also stipulate that if an agreement cannot be reached, a court can impose a regulation that balances the interests of both parties. However, neither system adequately addresses the management challenges associated with joint property, particularly the burdens borne by the majority due to the control or refusal of minority owners without recourse to the courts, and the lack of differentiation between normal and abnormal administration activities that fall outside the scope of conventional management of joint property. Perhaps they can avoid it by imposing a two-thirds majority to accomplish abnormal exploitation activities.

In a different context, joint ownership can lead to unexpected challenges in a property's use and management, which may eventually result in division. Both Islamic and Dutch legal traditions acknowledge this unescapable issue. Notably, the Limburg District Court addressed it in case ECLI:NL:RBLIM:2025:4250, which concerned an inheritance dispute. In this case, a daughter, who was the sole heir, sought to dissolve a co-proprietorship of assets with her disinherited mother, despite a prenuptial agreement that stipulated cold exclusion.

This research indicates that the process of disposing of and partitioning a joint property can jeopardize several principles of social justice, including distributive justice and the principle of sufficiency. Partitioning a joint property may expose vulnerable individuals to the risk of losing housing. However, both Islamic and Dutch legal perspectives on property law reach a "standard solution" for property disposal by establishing safeguards to prevent such conflicts, including pre-emption (or the right of first refusal). This legal facility gives an exposed, vulnerable owner the first opportunity to purchase either a share or the entire asset before it is offered to others. If partitioning joint property through a forced sale is necessary, it should be conducted at fair market value, ensuring that the interests of all co-owners are respected.

Finally, this research highlighted that while the functional outcomes may be similar, the normative foundations of both the Islamic and Dutch law on property rights remain distinct because they derive authority from fundamentally different sources: divine revelation versus human-centric, secular reasoning. Islamic law is rooted in immutable religious texts (the Quran and Sunnah) and aims to fulfill the divine will, while Dutch law (part of the Civil Law tradition) is based on negotiated, flexible, and codified statutes enacted by human institutions.

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Corresponding author, solely responsible for preparing the manuscript.

Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that his/her opinion and views expressed in this manuscript are free of any impact of any organizations.

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EDITORS

Managing editor – Valentina Krivolapova. **English Editor** – Robert Reddin.
Ukrainian language Editor – Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Mansour A, 'Joint Property Disputes in Dutch and Islamic Legal Traditions: A Social Justice Perspective' (2026) 9(2) Access to Justice in Eastern Europe 242-79 <<https://doi.org/10.33327/AJEE-18-9.2-a0001969>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a0001969>

Summary: 1. Introduction. – 2. Methodology section and selection criteria. – 3. Perception of 'ownership' of an asset under the Dutch & Islamic (Sharia) property laws. – 4. Key Legal Pitfalls of Joint Ownership. – 4.1. *Joint Ownership and the Principles of Social Justice*. – 4.2. *The Use and Administration of a Joint Property*. – 4.3. *The Exit Rights Outside the Joint Ownership*. – 4.3.1. Disposal of a Joint Property. – 4.3.2. Termination of Joint Ownership Through Partition. – 5. Conclusions.

Keywords: *Co-ownership, Dutch Civil Code (DCC), Classical Islamic Jurisprudence, Social Justice, Partition of Property*

DETAILS FOR PUBLICATION

Date of submission: 2 Mar 2026

Date of acceptance: 07 Mar 2026

Online First Publication: 01 May 2026

Last Publication: 20 May 2026

Was the manuscript fast tracked? - Yes

Number of reviewer reports submitted in first round: 3 reports

Number of revision rounds: 2 rounds with major revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

I confirm that I have not used any AI tools for writing, translating, or editing the manuscript, submitted to the Access to Justice in Eastern Europe journal for publication. I understand that if AI usage is discovered without notifying the editor, the article may be retracted. I affirm that the research and content of the manuscript are solely my own work.

ACKNOWLEDGEMENT

The author acknowledges Prince Sultan University for its sponsorship and is grateful to the Governance and Policy Design Research Lab (GPDRL) for the academic assistance provided during the research and publication process.

Furthermore, appreciation is extended to the Faculty of Sharia and Law at Al Azhar University, Egypt, for their educational contribution.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СПОРИ ЩОДО СПІЛЬНОЇ ВЛАСНОСТІ В НІДЕРЛАНДСЬКІЙ ТА ІСЛАМСЬКІЙ ПРАВОВИХ ТРАДИЦІЯХ: ПЕРСПЕКТИВА СОЦІАЛЬНОЇ СПРАВЕДЛИВОСТІ

Ахмед Мансур

АНОТАЦІЯ

Вступ. Встановлення спільної власності, яку в Нідерландах часто називають спільними активами (*community assets*), надає чудову можливість членам сім'ї та друзям об'єднати свої фінансові ресурси та разом придбати майно, значно зменшуючи як початкові внески, так і подальші витрати на утримання. Однак потенційна напруженість у цих стосунках може призвести до безлічі проблем. Можуть виникнути конфлікти щодо одночасного використання майна, або щодо його продажу чи здачі в оренду. Вирішення цих складних питань може перетворити спільну мрію на джерело напруги та невдоволення, що потенційно може перерости в дорогі судові спори, які можуть навіть ігнорувати умови заповіту. Залишається важливе питання: хто повинен здійснювати управління спільною власністю і як співвласникам ефективно та коректно вирішувати конфлікти щодо використання спільного майна та розпорядження ним?

Методи. У дослідженні застосовано якісний, доктринальний та порівняльно-правовий аналіз для критичного розгляду нормативних актів щодо спільної власності через функціональні результати, а також нормативні засади як ісламських, так і нідерландських правових традицій щодо прав власності. У ньому визначено ключові питання, які можуть призвести до несправедливості або тривалих судових процесів. Важливим аспектом цього дослідження є порівняння філософських підходів Лоуренса Беккера, Томаса Меррілла, Генрі Сміта та інших з поглядами класичних ісламських юристів (фукаха) на соціальну справедливість. Три судові прецеденти демонструють, як суди збалансують правила, що стосуються спільної власності, з принципами соціальної справедливості. Це дослідження має на меті дослідити подібності та відмінності в управлінні спільною власністю між ісламською та нідерландською правовими традиціями, зосереджуючись на основних правових принципах, що формують практичні правила її регулювання.

Результати та висновки. Хоча спільна власність на майно є поширеною практикою, існує помітний брак наукових досліджень, присвячених ключовим аспектам права власності, що регулюються класичним ісламським правом. Більше того, жодне дослідження не наважувалося порівняти Цивільний кодекс Нідерландів з принципами ісламської правової доктрини щодо регулювання спільного майна. Таке порівняння є життєво важливим для розуміння того, як ці дві правові системи перетинаються, особливо враховуючи їхній різний історичний та культурний контекст, а також для розуміння їх практичного значення в різних суспільствах. Результати дослідження виявляють значну подібність між цими правовими системами у підходах до вирішення основних спорів щодо спільного майна. У роботі стверджується, що хоча Цивільний кодекс Нідерландів та ісламська правова доктрина вирішують різні ключові питання, пов'язані зі спільним майном, існує нагальна потреба в кількох реформах. Ці коригування можуть сприяти більшій відповідності фундаментальним принципам соціальної справедливості, особливо у питаннях, що стосуються поділу спільного майна через примусовий продаж.

Ключові слова. Спільна власність, Цивільний кодекс Нідерландів (DCC), класичне ісламське право, соціальна справедливість, поділ майна.

ABSTRACT IN ARABIC*

مقال بحثي

منازعات الملكية الشائعة في التقاليد القانونية الهولندية والإسلامية: منظور العدالة الاجتماعية

أحمد منصور

المستخلص

الخلفية: يتيح تأسيس الملكية المشتركة — المعروفة غالباً بالأصول المشتركة في هولندا — فرصة ممتازة لأفراد الأسرة والأصدقاء لجمع موارد هم المالية واقتناء العقارات معاً، مما يقلل بشكل كبير من الدفعات الأولية والتكاليف الجارية. ومع ذلك، فإن احتمال حدوث توتر في هذه العلاقات يمكن أن يؤدي إلى تحديات لا حصر لها. قد تظهر النزاعات حول الاستخدام المتزامن للعقار، أو قد تنشأ خلافات حول بيعه أو تأجيريه. إن التعامل مع هذه التعقيدات يمكن أن يحول ما كان يوماً حُلماً مشتركاً إلى مصدر للتوتر وعدم الرضا، مما قد يتصاعد إلى معارك قانونية مكلفة قد تتجاهل حتى شروط الوصية. ويبقى هناك سؤال جوهري: من الذي يجب أن يتولى زمام الإدارة في هذه الأموال الشائعة، وكيف يمكن للملاك المشتركين خوض النزاعات حول استخدام وتصرف ممتلكاتهم المشتركة بمرونة وفعالية؟

المنهجية: تعتمد هذه الدراسة منهجاً نوعياً وعقائدياً وتحليلياً قانونياً مقارنة لفحص اللوائح المتعلقة بالملكية الشائعة نقدياً من خلال المخرجات الوظيفية والأسس المعيارية لكل من التقاليد القانونية الإسلامية والهولندية بشأن حقوق الملكية. وتحدد الدراسة القضايا الرئيسية التي يمكن أن تؤدي إلى الظلم أو المعارك القانونية الطويلة. ومن الجوانب الهامة لهذا البحث مقارنة المقاربات الفلسفية لـ "لورنس بيكر"، و"توماس ميريل"، و"هنري سميث" وغيرهم مع وجهات نظر الفقهاء المسلمين تاريخياً حول العدالة الاجتماعية. وتوضح ثلاث سوابق قانونية كيف توازن المحاكم بين القواعد المحيطة بالملكية الشائعة ومبادئ العدالة الاجتماعية. يهدف هذا البحث إلى استكشاف أوجه التشابه والاختلاف في إدارة الملكية الشائعة بين التقاليد القانونية الإسلامية والهولندية، مع التركيز على المبادئ القانونية الأساسية التي تشكل القواعد العملية الحاكمة للملكية الشائعة.

*. The publication metadata in Arabic is presented as submitted by the authors.

النتائج والخلاصة: على الرغم من أن الملكية الشائعة ممارسة شائعة، لا يزال هناك نقص مفاجئ في الأبحاث الأكاديمية التي تتناول قضايا حقوق الملكية الأساسية التي يحكمها الفقه الإسلامي الكلاسيكي. لم تتجرأ أي دراسات على مقارنة القانون المدني الهولندي مع مبادئ الفقه القانوني الإسلامي فيما يتعلق بتنظيم الأصول المشتركة. تعد هذه المقارنة حيوية لفهم كيفية تقاطع هذين النظامين القانونيين، خاصة بالنظر إلى سياقاتهما التاريخية والثقافية المتميزة، ولإدراك تداعياتهما العملية في المجتمعات المتنوعة. تكشف النتائج عن تشابه لافت بين هذه الأطر القانونية في كيفية إدارتها للنزاعات الكبرى المتعلقة بالأصول المشتركة. يطرح هذا البحث أنه بينما يعالج القانون المدني الهولندي والفقه الإسلامي قضايا محورية مختلفة تتعلق بالملكية الشائعة، فإن هناك حاجة ملحة لعدة إصلاحات. ومن شأن هذه التعديلات أن تعزز التوافق الأكبر مع المبادئ الأساسية للعدالة الاجتماعية، ولا سيما في المسائل المتعلقة بقسمة الملكية الشائعة من خلال البيوع الجبرية.

كلمات كلىدى :

الفقه الإسلامي الكلاسيكي، (DCC) الكلمات المفتاحية: الملكية المشتركة، القانون المدني الهولندي
العدالة الاجتماعية، قسمة الممتلكات

Research Article

ABORTION-RELATED MATERNAL DEATHS: A COMPARATIVE STUDY OF CRIMINAL LAW IN JORDAN, THE UAE, AND EUROPE

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DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000191>

Date of submission: 19 Dec 2025

Date of acceptance: 02 Mar 2026

Online First Publication: 20 Apr 2026

Last Publication: 20 May 2026

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ABSTRACT

Background: The study looks at the criminal implications for the death of a woman undergoing an abortion in the context of Islamic Sharia and the legal frameworks of Jordan, the United Arab Emirates, and Europe. The main concern of this study is how to preserve the mother's life while protecting the fetus, which raises sensitive questions about the legal definition of abortion that causes death. The study problem stems from the lack of explicit provisions in Emirati law and in the legislation of France and Poland that criminalize this composite conduct, in contrast to the explicit regulation found in Jordanian law. The study aims to clarify the Islamic Sharia's perspective on abortion crimes and the consequential death of the pregnant woman.

Method: The study uses a comprehensive comparative analytical methodology that systematically contrasts relevant Islamic Sharia rulings with the Jordanian, Emirati, French, and Polish legal frameworks governing abortion and the legal consequences of death resulting from it. The study's objectives

are to identify similarities and differences between religious and positive law, assess their impact on criminal liability, and assess how well each legal system balances the protection of fetal life with consideration for individual rights and medical necessity. It accomplishes this by critically examining judicial interpretations, statutory provisions, and doctrinal sources.

Results and Conclusions: *The study draws several important conclusions, chief among them being that both Jordanian and Emirati laws are in line with Islamic Sharia in that they forbid abortion unless necessary, and criminalize both abortion and the killing of a pregnant woman while imposing penalties for both. In contrast to Jordanian law, which specifically forbids abortion that results in death, Emirati and European laws permit abortion in cases of fetal malformation. The study also identifies shortcomings in Emirati law concerning the escalation of penalties. Therefore, in accordance with the Jordanian legislative approach, the study suggests adding a specific clause to Emirati law that criminalizes abortion that results in death and imposes harsher penalties. It also addresses circumstances where criminal liability increases following the issuance of a final judgment for abortion.*

1 INTRODUCTION

Abortion is considered a criminal act under both Jordanian and Emirati law, with the level of harm being the determinant of the severity of the crime, which may be considered a misdemeanor or a felony, and the ensuing punishment. The matter becomes even more complicated when an abortion leads to the accidental death of the woman who is pregnant, creating complex legal issues as to the nature of the crime and the sufficiency of the criminal law. Within this framework, the Emirati criminal law lacks specific provisions regarding the issue of abortion-related deaths of mothers. Conversely, the Jordanian criminal law specifically addresses the issue through clear and unequivocal provisions in the Penal Code.¹ In the UAE, the Medical Liability Law, in particular Article 33 of Federal Law No. 4 of 2016,² restricts criminal liability to instances where the physician performs the abortion. These differences have major implications for the degree of criminal protection extended to women.

This study focuses on two representative legal systems: the French and Polish. Besides these, two Arab legal systems, namely the UAE and Jordanian systems, have been chosen. The common feature of all four legal systems is that they are rooted in the Latin legal tradition. In addition, both the UAE and Jordanian systems highlight Islamic Sharia principles.

1 Jordanian Penal Code No 16 of 1960 (amended 2025) [in Arabic] <<https://jordan-lawyer.com/2017/04/05/jordan-criminal-law/>> accessed 26 February 2026.

2 UAE Federal Decree-Law No (4) of 2016 'On Medical Liability' (amended 4 September 2023) <<https://uaelegislation.gov.ae/en/legislations/1192?keyword=united%20arab%20emirates>> accessed 26 February 2026.

Abortion has been thoroughly studied from a moral, religious, and criminal standpoint in earlier legal and jurisprudential research, especially in relation to the preservation of fetal life and the legality of abortion when necessary.³ However, abortion that results in the death of the pregnant woman has received relatively little attention as a distinct and complicated criminal phenomenon, particularly when comparing Islamic Sharia with modern Arab legal systems. There is a noticeable gap in the literature and in legal practice because of the lack of clear Emirati penal provisions that criminalize abortion that results in the death of the pregnant woman, especially regarding the escalation of criminal liability and the variety of legal characterizations applicable to such conduct.

European legislation treats a woman's death from abortion as a criminal matter, with a doctor held liable in law for gross negligence, whereas death in an illegal abortion itself directly punishes the act and reflects the concern of legislation for the protection of women's lives and clarification of criminal responsibility.

In France, a woman's death due to abortion is classified as a crime in which the physician is liable for gross ignorance in legal abortions (Article 221-6 of the French Penal Code),⁴ while in Poland an illegal abortion that results in the death of the pregnant woman is an offence under Article 152 of the Penal Code in Poland,⁵ which indicates the legislation's concern for the protection of women's lives with regard to criminal liability. The issue identified for the purposes of this study is to determine the optimal criminal qualification of maternal death from abortion within the legislation of Jordan, the UAE, France, Poland, and Sharia law, considering the differences in these states' legislation on criminalization issues. Despite the differences in criminalization scope, criminalization type, and medical necessity limits, it is necessary to determine the type of qualification for a criminal act: What is the optimal criminal qualification of maternal death from abortion within these comparative laws, and on which ground is it possible to determine this qualification in a manner that balances the right to life with modern criminal policy?

The study aims to examine the intricacy of defining abortion-related maternal death under Jordanian and Emirati law, with special emphasis on the legislative lacuna in the Emirati Penal Code beyond the limited scope of regulation under the Medical Liability

3 Dinesh Ashok, Tahir Qureshi and Manvendra Singh, 'Religious, Moral, and Legal Rhetoric of Abortion Argument: A Study of Select Common Law Adhering Nations' (2022) 6(S6) *International Journal of Health Sciences* 6176, doi:10.53730/ijhs.v6nS6.10969; Barbara Pfeffer Billauer, 'Abortion, Moral Law, and the First Amendment: The Conflict between Fetal Rights & Freedom of Religion' (2017) 23(2) *William & Mary Journal of Race, Gender, and Social Justice* 271; Christopher Kaczor, *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice* (Routledge, 2022) doi:10.4324/9781003305217; Hundzukani P Khosa-Nkatini, 'Evaluation into Religious and Global Perspectives on Abortion' (2025) 49(1) *Theologia Viatorum* a341, doi:10.4102/tv.v49i1.341.

4 French Penal Code of 22 July 1992 'Code Pénal' (amended 1 January 2026) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/> accessed 26 February 2026.

5 Poland Penal Code of 6 June 1997 'Kodeks Karny' (amended 4 December 2025) <<https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970880553>> accessed 26 February 2026.

Law. This issue will be compared to Islamic Sharia law and selected European laws on matters of mistake of fact, absence of pregnancy, and reopening of criminal cases after a final judgment. This paper will also analyze the stances of the UAE, Jordan, France, Poland, Islamic Sharia law on abortion-related unintentional death of the mother, the viability of the Emirati Medical Liability law, and the determination of the relevant law in the event of death after a final judgment on abortion, with the aim of enhancing criminal protection for the mother and the fetus.

Accordingly, the study will take a comparative approach, aiming to develop a coherent legal standard that balances the protection of the right to life, the need for legal certainty, and the particularities of each legal system.

2 LITERATURE REVIEW

In the punitive system of Arab legal norms, such as those of Jordan and the UAE, the practice of abortion and the accidental death of the pregnant woman are greatly affected by the rules of the Islamic Sharia in regard to the right to life, as abortion is considered contrary to the right to life, and the legal consequences vary according to the stage of fetal development, the need for the abortion, and the need to preserve the life of the mother.⁶ There's no ambiguity in the separation between the act and the punishment of abortion and the accidental death of the pregnant woman as provided in the Islamic Sharia.⁷ Under Islamic Sharia law, the act of abortion is considered to be an infringement of the fetus's right to life, which is punishable by both heavenly and earthly laws, including diyah or discretionary punishment, particularly after 120 days of pregnancy. On the other hand, an unintentional death is not punishable under the law but may attract compensation in accordance with the applicable jurisprudence.⁸

Kooli examines cases where a brain-dead pregnant woman is on life support due to fetal protection laws, emphasizing the ambiguity of the law between the autonomy of the mother

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- 6 See, Jordanian Penal Code (n 1) arts 322, 323, 324; French Penal Code (n 4) art 222-2. See also, UAE Federal Decree-law No (18) of 2023 'Amending Some Provisions of Federal law No 4 of the year 2016 Regarding Medical Liability', art 16(1)(2) <<https://uaeph.mohap.gov.ae/admin/Attachment/Download?id=429cd1bb-07c3-497b-ac01-abd8a079360b&response=download>> accessed 26 February 2026; Poland Law of 7 January 1993 'On Family Planning, Protection of Human Fetuses, and Conditions Permitting Termination of Pregnancy' (amended 1 October 2021) art 4a(1)(1) <<https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19930170078>> accessed 26 February 2026.
- 7 Ayman Abdelhamid Al-Badarin, 'The Ruling on Aborting the Fetus before the Blowing of the Soul in it: A Comparative Legal Jurisprudential Study' (2022) 19(2) Journal of the University of Sharjah for Sharia Sciences and Islamic Studies 501, doi:10.36394/jsis.v19.i2.14 [in Arabic].
- 8 Abd Allāh ibn Aḥmad ibn Qudāmah al-Maqdisī, *Al-Mughni fī Fiqh al-Imām Aḥmad ibn Hanbal al-Shaybānī* (Dār al-Fikr 1984) vol 9, 9/538 [in Arabic]; Ziad Abdullah Mohammad Tarwah and Mohammad Motlaq Mohammad Assaf, 'The Provisions of Abortion in Islamic Jurisprudence' (2023) 6(57) Arab Journal for Scientific Publishing 142 [in Arabic].

and the personhood of the fetus. He argues that these cases demonstrate legislative loopholes and emphasizes the importance of differentiating between accidental or medical maternal death and criminal reproductive acts.⁹ Mary Ziegler discusses the ambiguity that emerges as a consequence of restrictive abortion regimes and fetal personhood principles when a pregnant woman is deemed brain dead but sustained on life support to carry the pregnancy to full gestation. She posits that the lack of exact statutory regulation does not sufficiently differentiate between unintentional maternal consequences, such as brain death or accidental death, and criminalized forms of reproductive conduct, thus revealing the structural flaws within the law when dealing with complicated and ethically charged issues.¹⁰

The legality of abortion, its definition, and permissibility vary across European countries. Most Western countries, such as France, Germany, and the UK, allow abortions within a certain gestation period, while permitting them after that period only for medical or social reasons.¹¹ Some countries, e.g., Poland and Ireland, only permit abortions to save the mother's life or in cases of severe fetal anomalies.¹² These differences reflect the weighing of a woman's reproductive health rights with ethical and social considerations and impact access to medical services and the experiences of women, including those who travel across borders, and conscientious objection by physicians, which further complicates the relationship between legislation and medical practice within the European context.¹³

The Gissler et al. study reveals gaps in the administration and legal aspects of recording maternal mortality in France, as statistics are based on strict ICD-10 coding and a forty-two-day postpartum period.¹⁴ This shows a need to amend the laws to make it easier to accurately record maternal mortality cases, as cases of pregnancy complications and mental health problems are underreported. In some situations, maternal mortality is due to a lack of proper medical counseling and precautions; both the mother and the newborn suffer from harm that could be prevented. This is also relevant from the European perspective, as it has been noted that fetal abnormalities should be properly dealt with from both a legal and medical point of view in order not to let women die from avoidable reasons.¹⁵

- 9 C Kooli, 'Navigating the Legal Vacuum: An Ethical Analysis of Brain Death, Fetal Personhood, and Maternal Autonomy in the Post-Roe Era: Lessons from Smith v Georgia' (2025) 33 *Ethics, Medicine and Public Health* 2, doi:10.1016/j.jemep.2025.101187.
- 10 Mary Ziegler, 'Fetal Personhood, Legal Ambiguity and the Treatment of Brain Death in Pregnancy' (2026) 26(1) *The American Journal of Bioethics* 40, doi:10.1080/15265161.2025.2594412.
- 11 Danielle Marie Pullan, *The Gap Between Abortion Policy and Abortion Access in Europe: A Mixed-Methods Comparative Study* (IMPRS-SPCE 2024) 17-20, doi:10.17617/2.3614737.
- 12 Kornelia Zaręba and others, 'Abortion in Countries with Restrictive Abortion Laws: Possible Directions and Solutions from the Perspective of Poland' (2021) 9(11) *Healthcare* 1594, doi:10.3390/healthcare9111594.
- 13 Pullan (n 11) 17-22.
- 14 Mika Gissler et al., 'Pregnancy-Related Deaths in Four Regions of Europe and the United States in 1999-2000: Characterisation of Unreported Deaths' (2007) 133(2) *European Journal of Obstetrics & Gynecology and Reproductive Biology* 181-2, doi:10.1016/j.ejogrb.2006.08.013.
- 15 Bianca Selean-Gutan, *The Constitution of Romania: A Contextual Analysis* (Bloomsbury 2016).

Islamic jurists have used several terms, including *isqāt* (miscarriage), *ilqāe* (expulsion), *ikhrāj* (removal), and *ṭard* (ejection), to refer to the act of abortion. These terms are closely related in meaning and collectively refer to the expulsion of the fetus prior to the completion of its development. Ḥanafī jurists defined *isqāt* as the expulsion of the fetus after the initial signs of its formation have appeared.¹⁶ In contrast, Ḥanbalī jurists employed the term *ilqā* and, in certain opinions, permitted a woman to take lawful medication to expel the fetus before its formation.¹⁷ The Ḥanafīs also used the term *istinḡal*, which allows medical intervention to induce uterine bleeding so long as the pregnancy remains at the stage of a drop (*nuṭṭah*) or a clot (*ʿalaqah*), and no bodily organ has yet formed.¹⁸ In the Prophetic tradition, the term *imlāṣ* is used to denote the miscarriage of a fetus before the completion of pregnancy.¹⁹

Muslim jurists unanimously agree on the prohibition of abortion after the ensoulment of the fetus, a stage medically estimated to occur after one hundred and twenty days of pregnancy. After this period, abortion is deemed strictly prohibited by consensus of the Islamic schools of law. Prior to ensoulment, however, juristic opinions diverge. Some Ḥanafī scholars permitted abortion during the pre-formation stage without requiring a specific justification, whereas the majority of Ḥanafī jurists conditioned its permissibility upon the existence of a legitimate necessity aimed at preventing a serious and established harm. In contrast, Mālikī and Shāfiʿī jurists adopted a position of absolute prohibition, both before and after ensoulment, grounded in the principle of safeguarding the origin of human existence and regarding the fetus as a potential human being deserving of legal respect from the moment of conception.²⁰

Even before the 120-day period has elapsed, most scholars tend to favor prohibition, despite the legal dispute over the time frame prior to ensoulment. This stance is based on the idea that human life should be protected and that fetuses should be treated as potential human beings deserving of legal protection. This viewpoint has been embraced by the Jordanian General Iftaa' Department, which affirms in Fatwa No. 287 that abortion is forbidden at all stages of pregnancy, albeit to varying degrees. When a suitably qualified doctor concludes that carrying the pregnancy to term would endanger the mother's life, the fatwa permits abortion under special circumstances. Additionally, it permits abortion after 120 days if the fetus's life endangers the mother's, on the grounds that the mother's life is certain while the fetus's life is still uncertain.²¹

16 Ala al-Din al-Haskafī, *Al-Durr al-Mukhtar Sharh Tanwir al-Absar* (Dar al-Fikr 2002) vol 3, 176 [in Arabic].

17 Shams al-Din Ibn Muflih, *Al-Furu* (Dar al-Kutub al-Ilmiyyah 1997) vol 1, 398 [in Arabic].

18 Muhammad Amin Ibn Abidin, *Hashiyat Radd al-Muhtar ala al-Durr al-Mukhtar* (Dar al-Fikr 2000) vol 1, 202-3 [in Arabic].

19 Sulayman ibn al-Ashath, Abu Dawud, *Sunan Abi Dawud* (Dar al-Risalah al-Alamiyyah 2009), Hadith no 3123 (Kitab al-Imlas) [in Arabic].

20 Fawwaz Salami, 'Provisions of Abortion before the Soul Is Breathed into the Fetus between Islamic Law and Algerian positive law' (2024) 19(1) Journal of Thought 483-6 [in Arabic].

21 Fatwa No 287 (Jordanian General Iftaa' Department, 16 August 2009).

3 METHODOLOGY

The study follows a structured qualitative comparative method along with a well-defined analytical framework. The research covers five different legal systems. These are Islamic Sharia, Jordan, the United Arab Emirates, France, and Poland. The comparison of these systems is made in an organized manner. In the context of these five legal systems, four aspects are analyzed. These are: (1) the classification of abortion and abortion-related maternal death in the legal sphere; (2) the relevant criminal liability and sanctions; (3) the underlying legal justification and policy considerations; and (4) the extent to which moral and or religious and constitutional values are reflected in the regulation of abortion in the statute books.

The primary sources comprise legal provisions, constitutions where applicable, and authoritative sources of Sharia, while the secondary sources comprise juristic literature, scholarly contributions, and comparative legal studies. The comparison begins with a presentation of each legal system in the same format to ensure consistency. The comparison across legal systems is conducted to establish similarities and differences, assess the adequacy of legal responses, and evaluate the compatibility of the frameworks with the aims of Islamic Sharia (maqāṣid), specifically the preservation of life and dignity.

In the present study, the basis for the comparative analysis is established with the focus being on the French and Polish systems in Europe, and the UAE and Jordanian systems in the Arab world, due to the adherence to the Latin tradition and the effect of Islamic Sharia in the UAE and Jordan, to explore the connection between civil law and Islamic law.

4 RESULTS AND DISCUSSION

An examination of both the Jordanian Penal Code and the Emirati Penal and Crimes Law reveals that both legal systems concur on criminalizing abortion along with its prescribed penalties. Such legislative approaches fall squarely within the provisions of Islamic Sharia that impose a general prohibition against abortion. Thus, positive law in both systems reflects and conforms with this basic principle of Sharia law.

Nevertheless, the Jordanian Public Health Law No. 47 of 2008 and the Emirati Medical Liability Law depart from this general rule by introducing legal exceptions, grounded in juristic opinions, that permit abortion in cases of necessity. Under these exceptions, abortion does not constitute a criminal offense, and no criminal liability arises where the procedure is carried out in accordance with specific conditions aimed at protecting the life or health of the pregnant woman.²²

22 Abu Muhammad al-Hasan ibn Ali al-Kattani, *Abortion and Its Rulings in Islamic Law* (Al-Maktabah Al-Shamilah 2021) 10 ff [in Arabic].

4.1. Abortion Regulation in Jordan, the UAE, Europe, and Sharia Islamic Law

Under Jordanian law, abortion is prohibited unless there are exceptions to protect the woman's life or health. These exceptions must come with "written consent, certification by two specialist physicians, and official hospital documentation kept for ten years". Article 12(b) holds neither the woman nor the practitioner criminally responsible if these conditions are met.²³ This exemption applies to situations where abortion leads to the death of the pregnant woman, if the procedure was performed according to the legal requirements. Therefore, there is no criminal responsibility for the doctor or anyone who helped with the procedure. This aligns with the view taken by the Jordanian Council of Iftaa', which allows abortion if continuing a pregnancy goes against saving a mother's life. The question then arises as to whether the death of the pregnant woman due to the pregnancy itself, in the absence of any medical intervention, justifies the invocation of this exception, thereby directly relating the regulation of abortion with the obligation to save the pregnant woman's life.

Article 16 of the Emirati Medical Liability Law presents a comparable exception to that found in Jordanian law. This exception applies to a medical risk that poses a threat to the mother's life. However, Emirati law elaborates on this with more details by requiring that abortion be the only medical means available for saving the pregnant woman's life, that it takes place in a licensed medical facility, and under the supervision of two specialist physicians. It also requires an accompanying detailed medical report, signed by the pregnant woman or by a person legally authorized to make medical decisions on her behalf. In extreme necessity cases, prior consent is waived by the legislator, and immediate intervention is authorized to save the mother's life. In this regard, it can be seen how the dimension related to death caused by pregnancy is postulated as a criterion for measuring the state of necessity, with the risk of death being the legal foundation for justifying the procedure and excluding penal responsibility.

An essential difference between the two legal systems lies in a second exception that is specific to Emirati law. The Emirati Medical Liability Law allows abortion if there is a serious fetal deformity that impacts the fetus's ability to survive or makes post-birth survival impossible, but only under strict conditions.²⁴ These conditions are: (1) confirmation of the deformity via a medical report from a specialized committee made up of at least three consultant physicians; (2) completion of all advanced medical tests required to assess the condition of the fetus; and (3) acquiring consent from the pregnant woman or her legal guardian when necessary. However, this exception is still unique in that it is founded not on the scenario of death caused by pregnancy, but on the interest of the fetus itself. This leads

23 Jordanian Law No 47 of 2008 'Public Health Law' <[https://www.moh.gov.jo/ebv4.0/root_storage/en/eb_list_page/public_health_law_no_\(47\)_for_year_2008_and_its_changes.pdf](https://www.moh.gov.jo/ebv4.0/root_storage/en/eb_list_page/public_health_law_no_(47)_for_year_2008_and_its_changes.pdf)> accessed 26 February 2026.

24 UAE Federal Decree-Law No (4) of 2016 (n 2).

to the question of how one can distinguish between abortion that prevents the risk of the mother's death and abortion that is connected to the non-viability of the fetus.

It is clear then that both Jordanian and Emirati law agree with Islamic Sharia²⁵ in forbidding abortion except when there is a necessity recognized both religiously and medically to save the life or health of the mother, whether before or after one hundred and twenty days of pregnancy. However, Emirati law has widened the grounds for permission by adding fetal deformity as a separate reason for abortion, which is not provided in the Jordanian Public Health Law. It can be argued that the death caused by pregnancy under both systems constitutes the ultimate boundary of the state of necessity, which has priority over all other factors, emphasizing the supremacy of the protection of life over other interests.

Although Jordanian law does not specifically allow for abortion in the case of severe deformities in the fetus, the Jordanian Council of Iftaa' has issued fatwas that allow for abortion in the case of unstable or unviable postnatal life.²⁶ These religious rulings offer guidance in the absence of statutory regulation, which may also form the basis of possible future legislation on the issue.²⁷ In our view, the most compelling criterion in jurisprudence and fatwas is the risk of death to the mother arising from pregnancy, as it presents the strongest ground to prioritize the mother's interests over the fetus's interests. In Jordan, abortion due to fetal deformity is permitted up to 120 days, but in our opinion, death due to pregnancy is a key factor to intervene even beyond the 120 days, while in the Emirati law, abortion due to fetal deformity is permitted, but without any timeframe.

The abortion laws in France and Poland depict a notable difference in addressing the issue of abortion, especially in protecting the life of the pregnant woman.²⁸ In France, abortion is considered an inalienable right that is protected under the constitution and can be carried out in the context of health services, especially in cases that pose a threat to the life or health of the pregnant woman. Therefore, the death of the pregnant woman can be considered a legitimate reason for abortion, making the act legal without exposing the physician or individuals performing the act to any criminal risk.²⁹ Most States follow an

25 The Islamic Sharia is a "system of divine laws that cover all aspects of faith, worship, and social behavior, as well as ethics and punishments," which are intended to "ensure the welfare of humanity in both the world and the hereafter." The Sharia is based on the Qur'an, the Sunnah, the consensus of the community (ijma'), and analogical reasoning (qiyas), and is designed to "attain the Maqasid" of protecting religion, life, intellect, lineage, and property.

26 The technical meaning of fatwa is the clarification of a Shar'i ruling; and the mufti is one who informs about the Shar'i ruling. See, Abdulhameed Bin Saleh Bin Abdulkarim Al-Krrani Al-Ghamdi, 'Electronic Fatwa: Foundations and Application' (2020) 16 Journal of Arts 269, doi:10.35696/vlii16.669.

27 Fatwa No 791 (Jordanian General Iftaa' Department, 21 June 2010).

28 Christian Fiala and others, 'Abortion: Legislation and statistics in Europe' (2022) 27(4) The European Journal of Contraception & Reproductive Health Care 346-7, doi:10.1080/13625187.2022.2057469.

29 ibid 347.

intermediate form that allows abortion after a certain period and on terms like obligatory counseling or a physician's conscientious objection, as in Germany, Italy, and Spain.³⁰ This clearly underlines that abortion continues to remain a divided issue in European society and law, notwithstanding.³¹

On the other hand, the Polish legal system is known to be strict, as abortion is banned in most circumstances and is only legal when the pregnancy threatens the life of the woman.³² In this scenario, the risk of the death of the mother due to pregnancy becomes the only legal reason for abortion,³³ as it allows abortion while maintaining strict rules against it in all other circumstances.³⁴ It is thus clearly understood that the key factor in both systems is death from pregnancy. In French law, it enables an extension of the right to abortion in the interests of the mother's life, while in Poland, it is the only condition under which an abortion is legal under the more restrictive law.

In our view, in the event of death from pregnancy, all four legal systems—Jordanian, French, Emirati, and Polish—agree in giving priority to the protection of the woman's life as the supreme principle, though they differ in the degree of permissibility and conditions: the Jordanian³⁵ and French³⁶ systems allow the performance of medical interventions to prevent death; the Emirati system exempts the physician from liability in cases of necessity to preserve the mother's life³⁷; while the Polish system limits it to cases presenting a direct threat to the woman's life.³⁸ Islamic jurisprudence agrees with this view in considering the threat to the mother's life a legitimate ground to permit abortion, thus giving priority to the protection of the woman's life over the interests of the fetus. This is a meeting point between Sharia law and positive law in considering the woman's life as the fundamental criterion to permit medical interventions.

30 Michael Minkenberg, 'The Policy Impact of Church-State Relations: Family Policy and Abortion in Britain, France, and Germany' (2003) 26(1) *West European Politics* 198, doi:10.1080/01402380412331300267.

31 Barbara Havelková, *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart 2017).

32 Agnès Guillaume and Clémentine Rossier, 'Abortion Around the World: An Overview of Legislation, Measures, Trends, and Consequences' (2018) 73(2) *Population* 234-5, doi:10.3917/pope.1802.0217.

33 Francesca Minerva, 'Conscientious Objection in Italy' (2015) 41(2) *Journal of Medical Ethics* 170, doi:10.1136/medethics-2013-101656.

34 Anna Piecuch, Malwina Gryka and Małgorzata Kozłowska-Wojciechowska, 'Attitudes Towards Conscientious Objection Among Community Pharmacists in Poland' (2014) 36(2) *International Journal of Clinical Pharmacy* 314, doi:10.1007/s11096-013-9878-5.

35 See, Jordanian Penal Code (n 1) arts 322, 323, 324.

36 See, French Penal Code (n 4) art 222-2.

37 See, UAE Federal Decree-law No 18 of 2023 (n 6) art 16(1) (2).

38 See, Poland Law of 7 January 1993 'On Family Planning' (n 6) art 4a (1) (1).

4.2. Islamic Perspective on the Penalties for Abortion Causing the Death of a Pregnant Woman

There are no known provisions in Islamic Sharia that mandate a specific, standalone, and direct punishment for abortion in the case where it results in the death of a pregnant woman as a combined crime in this exact instance.³⁹ Rather, Islamic Sharia stipulates punishments for each of the two separate crimes individually; these being: abortion and unintentional killing.⁴⁰ These two offenses form the factual elements of such composite criminal conduct.

4.2.1. Penalties for Intentional Abortion in Islamic Sharia

The Islamic Sharia law considers the fetus sacred from the moment that the *nuṭfah* embeds in the womb and assumes the shape of a fetus.⁴¹ It is considered a living being with an inalienable right to life that prohibits abortion by anyone, including the parents themselves.⁴² Infringing this right invites punishment in this life and accountability in the afterlife because of the fetus's high status.⁴³ These sanctions are explained as follows:

A. Blood Money for the Fetus (*al-ghurrah*):

Islamic jurists agree that the blood money for the fetus is to be assessed as a *ghurrah*, which is defined as the price of a male or female slave, or their monetary equivalent in those places where slavery no longer exists.⁴⁴ This ruling is based on the judicial precedent of Prophet Muḥammad. It has been reported that 'Umar ibn al-Khaṭṭāb asked some Companions about a case concerning the miscarriage of a woman; al-Mughīrah ibn Shu'bah testified that he had seen the Messenger of Allah judge such a matter by imposing a *ghurrah* - that is, by giving either a male or female slave. 'Umar asked for more evidence and got it from Muḥammad ibn Maslamah.⁴⁵

In the same way, Abū Hurayrah told a story about two women who fought; one hit the other with a stone, killing her and causing her to lose her baby. The Prophet said that for the baby, the payment was a *ghurrah*, which is a slave, either male or female. This establishes that the

39 Alireza Bagheri and Leila Afshar, 'Abortion in Different Islamic Jurisprudence: Case and Commentaries' (2011) 3(4) *Asian Bioethics Review* 353.

40 Farrukh B Hakeem, MR Habersfeld and Arvind Verma, 'The Concept of Punishment under Sharia' in *Policing Muslim Communities: Comparative International Context* (Springer 2012) 7, doi:10.1007/978-1-4614-3552-5_2.

41 Suliman MK Ibrahim, 'The Moral and Legal Status of the Human Foetus: A Critical Analysis from an Islamic Perspective' (PhD (Law) thesis, Lancaster University 2008) 109.

42 *ibid* 110.

43 *ibid*

44 Mudasra Sabreen, 'An Unborn Child's Right to Life: A Study of the Law of Abortion in Pakistan in the Light of Shariah' (2020) 35(53) *Al-Adwa/Al-Azva* 189-90.

45 Alawi ibn 'Abd al-Qādir al-Saqqāf, *Al-Durar al-Saniyyah: The Contemporary Encyclopedia* (2025) [in Arabic] <<https://dorar.net>> accessed 26 February 2026.

baby has its own right to payment, and when both the mother and baby are killed, two separate payments should be made because it is like taking away two lives.⁴⁶

Where no slave is available, jurists assessed the *ghurrah* as one-fifth of the full blood money (*diyyah*)—equivalent to five camels, or fifty dinars, or six hundred dirhams according to the majority of the Islamic jurisprudence. The Ḥanafī school assessed it as five hundred dirhams, based on their valuation of full blood money at ten thousand dirhams, whereas the majority assessed full blood money at twelve thousand dirhams.⁴⁷ Since the blood money for a woman is half that for a man, the *ghurrah* for the fetus amounts to one-twentieth of the full blood money.⁴⁸

Jurists further held that if a mother intentionally causes the miscarriage of her fetus, such as by consuming medication that results in abortion, she is liable to pay the *ghurrah*, as she is deemed to have unlawfully caused harm to the fetus.⁴⁹ Ibn Qudāmah states in *al-Mughnī* that if a pregnant woman consumes medication and thereby causes the miscarriage of her fetus, she must pay the *ghurrah* and is not entitled to inherit from it, as a killer does not inherit from the victim. The same rule applies to the father or any heir who causes the miscarriage; each is liable to pay the *ghurrah* and barred from inheriting from it.⁵⁰

B. Expiation (*Kaffārah*) in Addition to the *Ghurrah*

In addition to the *ghurrah*, some jurists further require the expiation prescribed for unintentional killing, namely the emancipation of a believing slave, and if this is not possible, fasting for two consecutive months. This requirement is derived by analogy from the Qur'anic ruling on unintentional killing, as stated in the verse: "Whoever kills a believer by mistake must free a believing slave and pay blood money to the family of the deceased."⁵¹ This indicates that abortion constitutes a serious offense that entails both financial compensation (*ghurrah*) and a penitential sanction (*kaffārah*).⁵²

4.2.2. Penalties for the Unintentional Death of a Pregnant Woman in Islamic Sharia

Islamic Sharia establishes that the punishment for unintentional killing generally rests upon two complementary components. The first is financial compensation (*diyyah*) payable to the heirs of the deceased, while the second is moral and spiritual reformation of the offender

46 Muhammad Abu Zahrah, *Crime and Punishment in Islamic Jurisprudence: Punishment* (Dar al-Fikr al-Arabi 1999) 430 [in Arabic].

47 Ron Shaham, 'Debates on the Diya (Blood Money): Contemporary Juristic Discourse and Women's Rights' (2019) 19(2) *Hawwa* 129, doi:10.1163/15692086-12341351.

48 Thomas Eich, 'Induced Miscarriage in Early Mālikī and Ḥanafī Fiqh' (2009) 16(3-4) *Islamic Law and Society* 328, doi:10.1163/092893809X12469547140991.

49 *ibid*

50 Abu Zahrah (n 46) 430.

51 Qur'an 4:92.

52 Abu Zahrah (n 46) 430.

through expiation (*kaffārah*). This dual approach seeks to achieve justice for the victim and their family on the one hand, and to reform the offender's conscience and conduct on the other. The Qur'an explicitly sets forth these sanctions in the following verse:

*"It is not for a believer to kill a believer except by mistake. Whoever kills a believer by mistake must free a believing slave and pay blood money to the family of the deceased, unless they remit it as charity..."*⁵³

From this verse, three principal rulings may be derived:

1. **Obligation of Blood Money (*Diyah*).** Blood money constitutes financial compensation payable to the heirs of the deceased as a vested property right, similar in nature to inheritance. It is payable where the deceased is a Muslim or belongs to a community bound to Muslims by a covenant of peace.⁵⁴
2. **Non-Payment of *Diyah* in Cases of Hostile Communities.** Where the deceased belongs to a community hostile to Muslims, despite being a believer, blood money is not paid to the heirs, as such payment would ultimately benefit those who are hostile to the Muslim community.⁵⁵ However, where a covenant exists between the community of the deceased and the Muslims, blood money is payable in fulfillment of that covenant.
3. **Obligation of Expiation (*Kaffārah*).** Expiation consists of emancipating a believing slave, or, failing that, fasting for two consecutive months. In cases of unintentional killing, *kaffārah* serves as a corrective and reformatory sanction, intended to cultivate moral awareness, caution, and a sense of responsibility in the offender, thereby deterring negligence and carelessness.⁵⁶

4.3. The Concept of Abortion Resulting in Death under Jordanian and Emirati Law

Jordanian and UAE laws mainly govern abortion through their respective penal codes; thus, it is a misdemeanor or a felony, depending on the nature of the act. Penal responsibility is established by the Jordanian Penal Code, Arts. 321–325; the UAE Crimes and Penalties Law, Arts. 390–392; supplemented for the UAE by its Medical Liability Law, Art. 33, with limited

⁵³ Qur'an 4:92

⁵⁴ Yusuf Mohammed Gassim Obeidat, 'The Combining Between Blood Money and Compensation in The Jordanian Civil Law and The United Arab Emirates Civil Transactions Law' (2019) 25(4) *Al-Manara Journal for Research and Studies* (Al al-Bayt University) 9 [in Arabic]. See also, Yusuf Mohammed Gassim Obeidat, 'The Efficient Breach Theory under Jordanian Civil Law' (2016) 30(4) *Arab Law Quarterly* 336, doi:10.1163/15730255-12341328 [in Arabic].

⁵⁵ Nurit Tsafir, *Collective Liability in Islam: The Aqila and Blood Money Payments* (CUP 2020) 119 doi:10.1017/9781108654241.

⁵⁶ Abu Zahrah (n 46) 367.

exceptions.⁵⁷ This statutory structure corresponds with Islamic Sharia, which, following its classical interpretation, was opposed to abortion, and with the structure of criminal law doctrine defining abortion as any premature termination of pregnancy, be it by way of expulsion of the fetus, even if born alive, or causing the death of the fetus in utero.⁵⁸

Abortion resulting in death is expressly addressed under Jordanian law in Articles 322 and 323 of the Penal Code, as well as under the Emirati Medical Liability Law. For the offense of abortion resulting in death to be established, several constituent elements must be satisfied, namely the presumed element and the material and moral elements of the crime. Once these elements are fulfilled, the legally prescribed penalty must be imposed in accordance with the relevant statutory provisions. These issues will be examined in detail in the following subsections.

In contrast, the French system, through a public health model, excludes the death of a fetus due to a legal abortion from the crime of homicide. The Public Health Code provides that "abortion constitutes a legitimate medical practice" (Art. L2212-1), that "abortion can, in accordance with the conditions provided for in Article L. 2212-2, be carried out up to the 14th week of gestation" (Art. L2212-2), and that "it can, regardless of the stage of gestation, be carried out when the health or life of the woman is in a grave and immedicable peril or when the fetus presents a mortal congenital defect" (Art. L2213-1).⁵⁹ In this case, criminal responsibility can be engaged in case an abortion turns out to be carried out "in deviation from the conditions provided for in Articles L.

The Polish legislation on abortion persists with the penal framework on the issue. Under the Act of 7 January 1993, abortion is permitted if the pregnancy threatens the life and health of the woman (Art. 4a),⁶⁰ because of the 2020 decision of the Constitutional Tribunal that abolished the entitlement to abortion on the grounds of fetal abnormality. In all other circumstances, the Criminal Code provides that abortion with the woman's consent is an offense (Art. 152) and without the woman's consent (Art. 153), and with an aggravating element if the woman loses her life (Art. 154) to emphasize the precedence of the protection of the fetus over the freedom of the woman to reproduce.⁶¹

57 See, Jordanian Penal Code (n 1); UAE Federal Decree-Law No (31) of 2021 'Promulgating the Crimes and Penalties Law' (amended 1 October 2025) <<https://uaelegislation.gov.ae/en/legislations/1529>> accessed 26 February 2026; UAE Federal Decree-law No (4) of 2016 (n 2).

58 Muhammad Said Namur, *Commentary on the Penal Code*, pt 1: *Crimes against Persons* (14th ed, Dar al-Thaqafah 2025) 142 [in Arabic]. See also, Samih Al-Muhammadi, 'The Criminal Policy of the Egyptian Legislator in Confronting the Crime of Abortion' (2021) 64(3) *al-Majallah al-Jina'iyyah al-Qawmiyyah* 5-9, doi:10.21608/ncj.2021.225838.

59 French Public Health Code 'Code de la santé publique' (amended 22 February 2026) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072665/> accessed 26 February 2026.

60 Poland Law of 7 January 1993 'On Family Planning' (n 6).

61 Poland Penal Code (n 5).

4.3.1. The Presumed Element (Existence of Pregnancy)

Abortion can only occur in relation to a pregnant woman, as pregnancy is defined as the union of the ovum and the sperm from the moment of fertilization until the completion of childbirth.⁶² Accordingly, the establishment of the crime presupposes the actual existence of pregnancy. No criminal liability for abortion arises where the act is committed based on a mistaken belief that pregnancy exists, as such conduct falls within the category of an impossible crime, except in legal systems that recognize punishment for absolute impossibility.⁶³

The criminalization of abortion is not limited to protecting pregnancy as such. Rather, the legislator's prohibition of this act aims to safeguard a set of interrelated interests. Foremost among these is the fetus's right to future life and its natural development within the womb, without necessarily recognizing it as a fully living human being at that stage.⁶⁴ In addition, the law seeks to protect the woman's reproductive capacity and her right to continue her pregnancy, as well as the community's collective interest in reproduction as a prerequisite for social stability and development.⁶⁵

In this regard, the Federal Supreme Court of the United Arab Emirates held that the crime of abortion requires the existence of pregnancy as an essential element, since abortion is intended to terminate a living pregnancy prior to the natural time of delivery.⁶⁶ The act is fundamentally directed against a living fetus, and the subject matter of the crime is the pregnancy protected by law. Consequently, the offense does not arise before pregnancy occurs or after it has ended, nor does it arise if the fetus is already dead. The scope of abortion ends with the commencement of the childbirth process, even if delivery has not yet been completed, because the onset of labor marks the beginning of an independent natural life. At that point, the fetus is regarded as a living human being protected under the legal provisions governing homicide and bodily harm rather than those regulating abortion. Accordingly, where no pregnancy exists, the offense of abortion is not established, even if it was mistakenly believed that pregnancy existed.

62 Walid Suleiman Ali Alaya, Khamis Abd Rabbo Ismail Al Khattab and Moayad Hosni Ahmed Al Khawaldeh, 'Extent of Criminal Liability Arising from Harm to the Fetus under Jordanian Penal Law' (2024) 16(1) *Jordanian Journal of Law and Political Science* 123, doi:10.35682/jjpls.v16i1.638 [in Arabic].

63 Kamel Al-Saeed, *Commentary on the Penal Code: Crimes Against Morality, Public Decency and the Family* (Dar al-Thaqafah 2008) 190 [in Arabic].

64 Mahmud Najib Husni, *Commentary on the Penal Code: Special Part* (Dar al-Nahdah al-Arabiyyah 1986) 503 [in Arabic].

65 Russell Heaton and Claire de Than, *Criminal Law* (3rd edn, OUP 2011) 103.

66 Appeal No 46 [2011] UAE Federal Supreme Court (Criminal).

4.3.2. The Actus Reus Element

The offense of abortion consists of three components: criminal conduct, the criminal result, and the causal relationship between them.⁶⁷

a. Criminal Conduct:

The act of abortion may be committed by any means whatsoever, as neither the Jordanian nor the Emirati legislators have restricted the offense to specific methods. This approach is reflected in Articles 321 and 322 of the Jordanian Penal Code, which respectively provide: "Any woman who aborts herself by whatever means she uses..." and "Whoever, by any means whatsoever, causes a woman to miscarry with her consent..."⁶⁸ Similarly, Articles 390 and 391 of the Emirati Penal and Crimes Law state: "Whoever assaults the bodily integrity of another by any means whatsoever... and if the assault upon a pregnant woman results in abortion, this constitutes an aggravating circumstance," and "Any pregnant woman who deliberately aborts herself by any means whatsoever..."⁶⁹ Article 33 of the Emirati Medical Liability Law likewise refers to the use of "means leading to that result."⁷⁰

The act of abortion may take either a positive form, which is the most common form, or a negative form, manifested in the pregnant woman's omission to prevent another person from committing the act of abortion upon her body.⁷¹ The Jordanian Penal Code adopts the latter form in Article 321, which provides: "Any woman who aborts herself by the means she uses or consents to another person using such means upon her..."⁷² The Emirati Penal and Crimes Law likewise recognizes this form in Article 390, which states: "...whoever deliberately causes her to miscarry with her consent by any means whatsoever."⁷³ Accordingly, all means of abortion are treated equally, with no distinction made between them for purposes of mitigating or aggravating punishment, and such means are numerous and are not exhaustively defined.

b. Criminal Result.

In the offense of abortion resulting in death, the criminal result is realized either by the death of the fetus or by its expulsion from the womb prior to the natural time of delivery, in

67 Diala Altaani and others, 'Virtual justice: Navigating the Challenges of Remote Testimony at the International Criminal Court' (2024) 19(2) International Journal of Criminal Justice Sciences 15, doi:10.5281/zenodo.19202.

68 Jordanian Penal Code (n 1) arts 321, 322.

69 UAE Federal Decree-Law No (31) of 2021 (n 57) arts 390, 391.

70 UAE Federal Decree-Law No (4) of 2016 (n 2) art 33. See, Khalid bin Mohammed bin Abdulaziz Al-Qudaibi, 'Criminal Liability for the Crime of Abortion: A Comparative Study' (2023) 19(1) Omdurman Islamic University Journal 379-81 [in Arabic].

71 Samih Al-Sayyid Jad, *Commentary on the Penal Code: Special Section (Crimes of Assault Against Persons and Property)* (Dar al-Ittihad al-Arabi lil-Tibaah 1988) 102 [in Arabic].

72 Jordanian Penal Code (n 1) arts 321.

73 UAE Federal Decree-Law No (31) of 2021 (n 57) arts 390.

addition to the death of the pregnant woman because of the abortion. The criminal result may take one of two forms: the death of the fetus within the womb, or its expulsion prior to the natural term of pregnancy. The latter form is established even if the fetus is expelled alive and is viable, provided that, in both cases, the mother dies because of abortion.⁷⁴

c. Causal Relationship.

Causation in the offense of abortion resulting in death requires the existence of a causal link between the act of abortion and the death of the pregnant woman. That is, but for the act of abortion, the woman would not have died. Where the causal relationship is absent, the offense loses one of its essential elements and is not made out.⁷⁵

4.3.3. The Mens Rea Element

Generally, crimes are presumed to be intentional.⁷⁶ Accordingly, the offense of abortion is punishable only where it is committed intentionally. The mental element, therefore, takes the form of **criminal intent (mens rea)**. Consequently, a person who causes the miscarriage of a pregnant woman through negligence or error does not incur criminal liability for the offense of abortion.⁷⁷ Criminal intent is established where the offender's will and knowledge are directed toward the constituent elements of the offense as defined by law. In particular, the offender must be aware of the existence of the pregnancy; if the offender is unaware of the pregnancy and nonetheless commits the act, criminal liability under the provisions governing abortion does not arise.⁷⁸

This principle was affirmed by the Jordanian Court of Cassation, which held that where no evidence establishes that the accused knew that the deceased woman was pregnant, Article 323 of the Penal Code—which penalizes anyone who intentionally causes the abortion of a woman without her consent—cannot be applied. In the absence of criminal intent, a finding that the accused is not criminally responsible for the offense is legally sound.⁷⁹

Accordingly, the mental element of the crime of abortion resulting in death is based on two cumulative factors: first, the offender's intent must be directed toward aborting the

74 Salakh Muhammad Lamin, 'Criminal Liability of the Physician for the Crime of Abortion through Medical Prescription' 4(2) (2020) *International Journal of Legal and Political Research* 116-7 [in Arabic].

75 Rizq Khamis Al-Ajour, 'Penalties for the Crime of Abortion and its Incidental Consequences under Palestinian Law' (2022) 6(3) *International Journal of Legal and Political Research* 358 [in Arabic].

76 Abdullah Ehjelah, 'Criminal Modus Operandi in Bahraini Tax Law No 40 of 2017' (2023) 15(4) *Pakistan Journal of Criminology* 389.

77 Farid Bulaidi, 'Criminal Responsibility for the Crime of Abortion in Algerian Law' (2021) 6(2) *Mediterranean Review of Law and Economics* 126 [in Arabic].

78 Raed SA Faqir and Ehab Alrousan, 'Reimagining Criminology: The Transformative Power of the Postmodern Paradigm' (2023) 15(3) *Pakistan Journal of Criminology* 154.

79 Decision No 1523 [2005] Jordanian Court of Cassation (Criminal Chamber).

fetus; and second, the offender's intent must not be directed toward killing the pregnant woman. Once criminal intent is established in this manner, the motives underlying the act—whether revenge or assisting the woman in terminating an unwanted pregnancy—are legally irrelevant.⁸⁰ This may include situations where the pregnancy resulted from a criminal act such as rape. Moreover, the offender may benefit from mitigating circumstances where abortion is committed for reasons of honor, in accordance with Article 324 of the Jordanian Penal Code.

In this regard, the Jordanian Court of Cassation stated that abortion is an intentional offense for which punishment is imposed only where criminal intent is established, namely the will to commit the act as defined by law pursuant to Article 63 of the Penal Code. In abortion offenses, criminal intent requires that the offender's will be directed toward committing the offense with all its constituent elements, with full knowledge thereof. Where the Public Prosecution fails to prove that the act committed by the accused was intended to cause abortion, no punishment may be imposed. Likewise, no punishment may be imposed for killing a fetus in the womb, since the crime of homicide requires an assault against a living human being after birth—a condition not satisfied in such cases. Consequently, a declaration of non-liability is warranted where these elements are absent.⁸¹

Similarly, the Ma'an Court of First Instance⁸² held that abortion is an intentional offense, and that criminal intent requires that the offender's will be directed toward committing the act of miscarriage constituting the material element of the offense, as well as toward achieving the result, namely the abortion the pregnancy. This necessarily presupposes that the offender is aware that the act is being directed against a pregnant woman.⁸³

4.3.4. Penalties for the Offense of Abortion Resulting in Death

The Jordanian legislator has classified abortion resulting in death as a grave offense and has imposed severe penalties. Article 322(2) of the Penal Code states that if an abortion or the means used to perform it result in the death of the woman, the perpetrator shall be punished with hard labor for a term of not less than five years. Article 323(2) further stipulates that if an abortion or means employed lead to the woman's death, the penalty shall not be less than ten years hard labor. This is consistent with the legislator's firm stance due to the gravity of this offense.

It should be noted that an attempt is inconceivable in the felony of abortion resulting in death, as this offense belongs to the category of crimes with probabilistic outcomes. Attempt requires that the offender's intent be directed toward achieving the criminal result—in this

80 Jad (n 71) 104.

81 Decision No 667 [2002] Jordanian Court of Cassation (Criminal Chamber).

82 Ma'an is a city in southern Jordan, 218 km southwest of Amman, and is the capital of Ma'an Governorate.

83 Decision No 20 [2023] Ma'an Court of First Instance (Criminal).

case, the death of the pregnant woman. However, the offender's intent is directed solely toward abortion rather than death. Accordingly, it is not legally possible to characterize such conduct as an attempt to commit abortion resulting in death.⁸⁴

Under Emirati law, the Penal and Crimes Law does not contain provisions equivalent to Articles 322 and 323 of the Jordanian Penal Code. However, Article 33 of the Emirati Medical Liability Law addresses one form of abortion resulting in death, which provides that, subject to Article 16 of the same law, any physician who intentionally performs an abortion on a pregnant woman—by administering medication, using means leading to that result, or guiding her thereto, whether with or without her consent—shall be punished by imprisonment for a period not exceeding four years. Where abortion results in the death of the victim, the penalty shall be imprisonment for a period of not less than five years and not more than ten years. This provision applies to cases in which death occurs at the hands of a physician performing an abortion without lawful justification, as referred to in Article 16 of the same law.

Accordingly, the Emirati Medical Liability Law limits criminal liability to cases where the offender is a physician, whereas Jordanian legislation criminalizes the act irrespective of the offender's status and treats the offender's professional capacity as an aggravating circumstance under Article 325 of the Jordanian Penal Code.

For a person to be regarded as a physician, they must hold a recognized medical qualification. Under Article 2 of the Jordanian Public Health Law, a physician is defined as a person licensed to practice medicine in accordance with applicable laws and regulations. Similarly, Article 1 of the UAE Law Regulating the Practice of Medical Profession No. 5 of 2019 provides that the status of a physician includes both medical doctors and dentists. Jurisprudence defines a physician as a person academically specialized in medicine and duly authorized by the Ministry of Health to practice the medical profession.⁸⁵

5 PROBLEMATIC ASPECTS OF ABORTION RESULTING IN DEATH UNDER JORDANIAN AND EMIRATI LAW

Abortion resulting in death, as a composite model of criminal conduct, raises several intricate legal issues that go beyond the mere application of statutory provisions and extend directly to the limits of legal characterization and the determination of the appropriate legal description of the act, considering the resulting harm. These issues become particularly evident when addressing atypical situations that fall outside the conventional framework of

84 Saadli Zarifa, 'The Specificity of Algerian Law in Aggravating the Crime of Abortion: A Comparative Study' (2022) 7(1) *Al-Ustadh Researcher Journal of Legal and Political Studies* 436 [in Arabic].

85 Mahmoud Al-Shahat Qasim, 'The Physician's Liability for Failure to Provide Medical Assistance: A Jurisprudential and Practical Study' (2020) 35(1) *Journal of the Faculty of Sharia and Law, Tanta University* 492, doi:10.21608/MKSQ.2020.78405 [in Arabic].

abortion, whether due to the absence of pregnancy *ab initio* and the consequent impossibility of abortion, or due to the multiplicity of criminal outcomes arising from a single act, which may range from bodily harm to abortion, unintentional homicide, or abortion resulting in death.

Jordanian and Emirati law address this complexity to varying degrees, given the differences in their legislative structures, particularly with respect to the presence or absence of specific statutory provisions. In this section, we deal with the principal legal issues raised by this criminal model in the following two subsections.

5.1. Maternal Death in Cases of Nonexistent Pregnancy

As previously established, the crime of abortion presupposes that the woman subjected to the act is pregnant. This means that the object of the offense in abortion crimes is pregnancy itself, which begins with fertilization and continues until childbirth.⁸⁶ During this period, the commission of the offense of abortion is legally conceivable. This position was affirmed by the UAE Federal Supreme Court, which held that the existence of pregnancy is an essential element of the offense of abortion, as abortion is intended to terminate a viable pregnancy prior to the natural time of delivery. Accordingly, abortion is fundamentally directed against a living fetus, and the protected legal interest is pregnancy itself. The offense does not arise before pregnancy occurs or after it ends, nor does it arise where the fetus is already dead. Moreover, the limits of abortion end with the commencement of labor, even if delivery has not been completed, as the onset of labor marks the beginning of an independent natural life, at which point the fetus is regarded as a living human being protected by the provisions governing homicide and bodily harm rather than those governing abortion.⁸⁷

On this basis, where pregnancy does not exist, the offense of abortion cannot be established, even if the offender mistakenly and contrary to reality believed that it did. This raises the following question: What is the legal position under Jordanian and Emirati law regarding attempted abortion and criminal liability where the offender erroneously believes that the woman is pregnant?

Jordanian law does not specifically mention this matter. However, one opinion in Jordanian legal scholarship argues that without pregnancy, the offense of abortion cannot exist because the element of pregnancy is missing. Therefore, the accused person cannot be held liable for attempted abortion based on a false belief of being pregnant, as this would be an instance of absolute or legal impossibility, which is not punishable under Jordanian law.⁸⁸

86 Ali Alaya, Al Khattab and Al Khawaldeh (n 62) 123-4.

87 Appeal No 46 [2011] UAE Federal Supreme Court (Criminal).

88 Al-Saeed (n 63) 191.

The same conclusion applies under Emirati law. There is no express regulation of this issue in Emirati law. However, the UAE Federal Supreme Court has explicitly ruled that the absence of pregnancy makes abortion an impossible offense in the absolute sense. This rule excludes both the completed offense and an attempt. One of its judgments held that abortion does not take place before pregnancy occurs or after it has ended, even if the offender imagines or believes otherwise. The absence of pregnancy renders the act legally and factually impossible; where the completed offense is impossible, an attempt is equally inconceivable.⁸⁹

A further fundamental question, therefore, arises: What is the criminal liability of the offender if the means used in an impossible abortion result in the death of a woman mistakenly believed to be pregnant?

In such cases, where the intended abortion constitutes an impossible offense and is, therefore, not punishable under either Jordanian or Emirati law, criminal liability is limited to the offense of homicide. The legal characterization of that offense depends on the existence of criminal intent. Where direct or eventual intent is established, the offender is liable for intentional homicide; where intent is absent, liability arises for unintentional homicide.

5.2. Conflicting Legal Classifications of Fatal Abortion

The ideal concurrence of offenses presupposes a single act committed by the offender that falls under multiple legal provisions. The issue here is not the commission of multiple acts, but rather a single act violating several criminal norms. This form of concurrence is based on two elements: unity of the act and the multiplicity of legal characterizations. Jordanian law regulates this matter in Article 57 of the Penal Code, while Emirati law addresses it in Article 88 of the Penal and Crimes Law. The effect of these provisions is that the judge examines the various legal characterizations of the act and limits the judgment to the most severe description, namely the one carrying the most severe penalty.⁹⁰

Accordingly, if a person strikes a pregnant woman with the intention of causing the termination of her pregnancy and the woman dies as a result, the act may be characterized as bodily harm resulting in death, or as abortion. This raises the question of whether the rules governing ideal concurrence apply to abortion accompanied by death.

Both Jordanian and Emirati legislation adopt a general rule for ideal concurrence in the absence of any specific provision governing the relevant situation. In Jordanian law, however, the legislation has departed from this general rule in Articles 322(2) and 323(2) of

89 Appeal No 46 [2011] UAE Federal Supreme Court (Criminal)

90 Fahd Hadi Habtour, 'Multiplicity of Crimes and Its Effect on Rules of Criminal Jurisdiction in the Saudi Legal System: A Comparative Study' (2023) 57 *Journal of Legal and Economic Research* 821-3, doi:10.21608/jslem.2023.196934.1218.

the Penal Code that specifically govern cases of abortion, whether with or without the woman's consent, resulting in death. As special provisions, these articles take precedence over general rules on concurrence and exclude their application by recourse to general provisions. On the other hand, Emirati law does not have a special provision regarding death resulting from abortion in Articles 390 and 391, whether committed with or without the consent of the woman. Here, death is viewed as an aggravating circumstance changing a misdemeanor into a felony but not creating a separate offense; hence Article 88 of the Penal and Crimes Law calls for aggregation of legal characterizations and application of the severest penalty which is that prescribed for felonies concerning assault on bodily integrity culminating in death under Article 387 together with that for abortion under Articles 390 and 391. A systematic reading of these provisions leads one to conclude that an Emirati judge must impose a penalty prescribed under Article 387, as it is the most severe.

An exception to this approach exists in Emirati law under Article 33 of the Medical Liability Law, which establishes a special legal characterization where abortion is committed by a physician. In this case, the general rules of "ideal concurrence" are set aside, and the special provision applies. Outside this specific situation, the general rules of concurrence under the Penal and Crimes Law apply.

It should be noted that the general rule of "ideal concurrence" is closely linked to the principle that no person may be prosecuted more than once for the same act.⁹¹ This principle grants final judgments *res judicata* effect, preventing their reconsideration except through legally prescribed avenues of appeal. Once exhausted, the judgment becomes final and immune from challenge, even if it is flawed, in order to preserve legal stability and prevent indefinite litigation.⁹² However, a practical difficulty arises where an offender is prosecuted for a criminal act resulting in a certain outcome, a final conviction is rendered, and the consequences later escalate into a more serious result. For example, a person may be convicted by a final judgment for the misdemeanor of abortion with the woman's consent, after which the woman dies because of the abortion. The question then arises as to whether the principle of *res judicata* bars renewed prosecution.

Jordanian law deals with this matter explicitly by allowing a further prosecution as an exception to the general rule. Article 58(2) of the Penal Code states that if the consequences of a criminal act increase after the initial prosecution, making the act fall under a more serious legal description, then the offender can be prosecuted again for that more serious offense, and will only be subject to the more severe penalty with any previously executed penalty deducted from it. This was confirmed as recently as 2023 by the Jordanian Court of

91 Abdullah Ehjelah and Shaima Bani Amer, 'Impact of Confessions Taken Remotely via Modern Technology on the Conscientious Conviction of the Criminal Judge' (2023) 15(3) *Pakistan Journal of Criminology* 211 [in Arabic].

92 Nizam Al-Majali, *Commentary on the Penal Code: General Part* (9th edn, Dar al-Thaqafah 2025) 478 [in Arabic].

Cassation.⁹³ On the other hand, Emirati law has no equivalent provision to Article 58(2) of the Jordanian Penal Code. Therefore, where abortion takes place and a final conviction is handed down, and subsequently, she dies for some reason, then the offender cannot be tried for the death since judgment has become final with no possibility of renewed prosecution, even though such an act would otherwise call for a more severe penalty.

From this analysis, two major observations can be made. The first is that applying the rules of ideal concurrence in Emirati law equates punishment for abortion that leads to death with that of assault leading to death; thereby merging two different offences into one. Assault leading to death is an intentional crime against bodily integrity, while abortion leading to death involves intentionality in terminating pregnancy and resulting in the death of a pregnant woman. Second, the two legal systems differ in the severity of their penalties. According to Emirati law, the maximum punishment that can be applied, by applying ideal concurrence, is ten years in prison, which is the maximum penalty specified under Article 387 for assault that results in death. In contrast, Article 323(2) of the Jordanian law stipulates that an abortion that results in death carries a minimum sentence of ten years of hard labor.

Therefore, in line with the Jordanian legislative approach, it is suggested that the Emirati legislator adopt a specific legal characterization for abortion that results in death, like that established under the Medical Liability Law, by explicitly criminalizing this conduct in a dedicated provision and prescribing a minimum sentence of ten years in prison. Such a reform would reduce the burden on courts in determining legal characterizations, enhance criminal protection for both the mother and the fetus, and avoid confusion between assault that results in death and abortion that results in death.

6 ANALYZING ABORTION AND MATERNAL DEATHS IN EUROPE: FRANCE AND POLAND COMPARATIVE PERSPECTIVE

In the European legal setting, maternal deaths due to abortion are seldom addressed in a straightforward manner regarding the impact of criminalization or adverse laws. Rather, in Europe, these deaths are increasingly becoming a case of systemic failure related to accessibility, procedure, and the rule of law. Although most countries in Europe provide for abortion on certain grounds, the case law on the European Court of Human Rights (ECtHR) raises a fundamental worry: difficult laws combined with difficult processes can foreseeably endanger the health and sometimes the life of women.

Unlike in other regions, where the issue of maternal mortality due to abortion is straightforwardly associated with clandestine abortion, the issue in Europe is complex. This is due to delays, refusal, legal uncertainty, unavailability of legal recourse, and forced traveling, which may ensure that even if the abortion is lawful, it is unsafe. The human rights organizations in Europe, therefore, moved from focusing on the morality of

93 Decision No 4692 [2023] Jordanian Court of Cassation (Criminal Chamber).

abortion to the moral obligations of the state regarding the safety of the lives of women once abortion is legalized.

The decision of *Tysiack v. Poland* (2007) of the ECtHR is an important step in recognizing the link between legalized abortions, harm to women, and, by extension, maternal mortality.⁹⁴ The applicant in this case suffered from severe myopic vision; she was not allowed an abortion even though it was indicated that her health might be compromised if she continued with her pregnancy. After giving birth, she lost her eyesight.

Even though there was no maternal death in the case, it is significant for understanding abortion-related maternal mortality, as it emphasizes that the problem in Poland was not, or at least did not consist in, its abortion Act itself, but in it lacking procedural guarantees that enable women to contest medical denial within a reasonable time limit, thus putting women at risk even if they are authorized to have an abortion under the law.

In terms of maternal mortality, *Tysiack* has set down an important precedent: if legal abortions are available but not possible to access in practice, then any ensuing health repercussions, possibly but not necessarily resulting in death, can be imputed to the state. The Court has been specific about recognizing that it is "not only a medical issue, but a question of law" in such cases.⁹⁵

The connection between abortion and life-threatening outcomes is further analyzed in the case of *P. and S. v. Poland* (2012), which refers to a fourteen-year-old rape victim who has a right to an abortion under the law.⁹⁶ The applicant was subjected to certain obstacles despite having a legitimate reason, including misleading advice, harassment, disclosure, and delays.

Although the case is not associated with mortality, it is widely applicable to maternal mortality vis-à-vis abortion because the Court's finding is immediately pertinent to abortion-related maternal mortality cases. It underlines that time is the critical determinant of abortion services because a delay leads to increased risks of complications and even threatens life. It is also important to note that if the states create barriers that impinge upon having an abortion on time, it may fall foul of Article 3 of the European Convention on Human Rights⁹⁷ because it is dehumanizing and degrades people.⁹⁸

In this regard, it must be noted that the Court has been well aware of the fact that being forced to remain pregnant under stressful and hostile circumstances may in itself amount to a form of harm, specifically for minors or vulnerable women. In this regard, as it

94 *Tysiack v Poland* App no 5410/03 (ECtHR, 20 March 2007) <<https://hudoc.echr.coe.int/eng?i=001-79812>> accessed 26 February 2026.

95 *ibid*

96 *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012) <<https://hudoc.echr.coe.int/eng?i=001-114098>> accessed 26 February 2026.

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

98 *P and S v Poland* (n 96).

pertains to Europe in general, it may well be determined that maternal deaths resulting from late abortions are in themselves non-accidental but structurally caused by inaction or obstruction by the state.

In *M.L. v. Poland* (2023), there is a more modern and emergent risk to mothers' health, as it arose from abrupt legal and medical uncertainties.⁹⁹ The applicant qualified for a legal abortion because of her fetal abnormality. Nevertheless, due to the constitutional court's judgment that came into force on the eve of her abortion, her legal entitlement was invalidated. The European Court of Human Rights ruled that this abrupt and clinically unclear legal turnabout violated the applicant's right to respect for private life under Article 8 of the ECHR. Most important, however, is the Court's acknowledgment of how legal unpredictability within abortion regulation necessitates that women seek high-risk alternatives, including cross-border travel, delayed procedures, or continuation of medically dangerous pregnancies.¹⁰⁰

Regarding maternal mortality, *M.L. v. Poland* points out an important truth concerning European conditions: forced travel is not an insurmountable alternative. However, it may entail costs, stress, and lack of continuity of care, all of which are conditions that increase the risk of complications and, potentially, maternal mortality. Finally, this case is important because it evidences how maternal mortality caused by abortions may occur even under advanced systems of healthcare due to conditions of legal instability.

The European Parliament Resolution of 11 April 2024 is a major political recognition of the relationship between restricted abortion, maternal illness, and maternal mortality. While aligning an argument for incorporating rights to abortions as an essential right in the EU Charter of Fundamental Rights and seeking total decriminalization, this resolution clearly points out restricted policy as a cause for preventable maternal mortality rates.¹⁰¹

The Resolution states: "Criminalisation implies compulsory travel, too often delayed care, and unsafe procedures. Although maternal mortality ratios remain low for Europe overall, it is fully understood that any death, no matter how remote or due to unsafe or inequitable access to abortion, should not happen in a rights-based legal system."¹⁰² This reflects a preventive approach to maternal mortality: to end any maternal death that can be avoided through legal abortion rather than addressing it after it has happened.

The Council of Europe Recommendation CM/Rec(2007)17 on gender equality supports the idea that the promotion of women's health is fundamental to guaranteeing the health

99 *ML v Poland* App no 40119/21 (ECtHR, 14 December 2023) <<https://hudoc.echr.coe.int/eng?i=001-229424>> accessed 26 February 2026.

100 *ibid*

101 European Parliament Resolution of 11 April 2024 'On Including the Right to Abortion in the EU Charter of Fundamental Rights (2024/2655(RSP))' [2025] OJ C 1279 <<http://data.europa.eu/eli/C/2025/1279/oj>> accessed 26 February 2026.

102 *ibid*

requirements for reproductive health for women and is, therefore, a necessary approach for women's equality and security.¹⁰³ Although a recommendation designed for the reduction of reproductive health disparities does not contain a point on abortion deaths in mothers, its strong appeal for non-discriminative access to healthcare fundamentally establishes a relevant framework for addressing such risks.

In categorizing reproductive health barriers as expressions of gender inequality, it can be inferred from the Recommendation that maternal mortality due to unsafe or inadequate abortion care is more than a failure to provide adequate health care, but fails to deliver equity for women. Women are shouldering more of the burdens of possible injuries due to restrictive laws on abortion.

The Council of Europe Commissioner for Human Rights' Follow-Up Report on Sexual and Reproductive Health and Rights (2017–2021) emphasized that liberalizing laws alone are insufficient. Legal equality in several European countries has been obstructed by a number of factors, including a lack of information, geographical disparities, conscientious objections, or stigma.¹⁰⁴

Implicitly, the Report links these barriers to unsafe abortions and delays, mainly among marginalized groups such as migrants, minors, rural women, and poor women. From the maternal mortality perspective, this indicates that deaths due to abortion in Europe are under-recorded and are distributed unevenly, falling disproportionately among women with already high social and medical risk.¹⁰⁵

The European situation shows that maternal mortality due to abortion is not only a consequence of illegal practices but rather a consequence of legal ambiguity, obstruction of procedures, and delays within legal frameworks. Indeed, the case law of the ECtHR has repeatedly clarified that when a country legalizes abortion, it follows a positive obligation to provide effective procedures. Delays in this respect can cause serious health risks to women, including maternal mortality, triggering potential state responsibility under human rights law. Modern European law is slowly acknowledging that maternal mortality can be prevented not only by legality but also by legal certainty, accountability, and equity of reproductive healthcare practices.

103 Recommendation CM/Rec (2007)17 of the Committee of Ministers to Member States on Gender Equality Standards and Mechanisms (adopted on 21 November 2007) <<https://search.coe.int/cm?i=09000016805d4aa3>> accessed 26 February 2026.

104 Council of Europe, *Sexual and Reproductive Health and Rights in Europe: Progress and Challenges: Follow-up Report to the 2017 Issue Paper by the Council of Europe Commissioner for Human Rights* (Council of Europe 2024).

105 *ibid*

7 PHILOSOPHICAL BASIS AND CRIMINAL POLICY OF THE PROPOSED PENALTIES

In criminal philosophy, punishment must strike a balance between protecting human life and the functions of criminal law in preventing crime and promoting justice. It is suggested that Emirati law should consider abortion that leads to death as a separate offence from other abortion laws.¹⁰⁶ This can be achieved through a specific provision in the Federal Penal Code that distinguishes between legal and illegal abortion, providing punishment that gives priority to the preservation of the mother's life.¹⁰⁷ Thus, improving the role of criminal justice, such as deterrence and rehabilitation, rather than just focusing on the problem through an administrative or medical approach.¹⁰⁸

Under Jordanian law, abortion is criminalized with some exceptions for the life or health of the mother under Articles 321-325 of the Penal Code. Penalties include jail sentences for both the perpetrator and accomplices, increasing in duration if the woman succumbs to a botched illegal abortion.¹⁰⁹ This differentiation between pre- and post-ensoulment stages is intended to ensure consistency with Islamic law while providing a clear rule for necessity cases to avoid ambiguity in the imposition of penalties.¹¹⁰

The criminalization of fatal abortion is inextricably related to the legal process that protects the rights of the individuals involved. The legal process in both the Arab and European systems requires immediate review procedures, timelines, and the responsibility of the healthcare providers.¹¹¹ These elements are crucial in avoiding the risk to the mother's life because of administrative delays in the legal process.¹¹² In addition, the legal process is vital in ensuring compliance with international human rights standards, including the European Convention on Human Rights, which requires prompt legal action in the event of a threat to the life or health of the woman.¹¹³

106 Fatiha Mohamed Gourari, 'Criminal Liability of the Physician in Light of Legislation and Jurisprudence in the United Arab Emirates: A Comparative Study' (2004) 28(3) *Journal of Law* 254, doi:10.34120/jol.v28i3.1359 [in Arabic].

107 *ibid* 255.

108 Irene Maffi and Liv Tønnessen, 'The Limits of the Law: Abortion in the Middle East and North Africa' (2019) 21(2) *Health and Human Rights* 2.

109 Hisham Jadallah Mansour Shakhathreh, and others, 'Medico-Legal Aspects of Abortion: Updates of the Literature' (2022) 76(5) *Medical Archives (Sarajevo, Bosnia and Herzegovina)* 375, doi:10.5455/medarh.2022.76.373-376.

110 *ibid* 374.

111 Leila Hessini, 'Abortion and Islam: Policies and Practice in the Middle East and North Africa' (2007) 15(29) *Reproductive Health Matters* 80, doi:10.1016/S0968-8080(06)29279-6.

112 *ibid*

113 Rebecca J Cook, 'International Human Rights and Women's Reproductive Health' in Susan Sherwin and Barbara Parish (eds), *Women, Medicine, Ethics and the Law* (Routledge 2017) 73, doi:10.4324/9781003073789.

In France, abortion is enshrined in the constitution as a right that focuses on the woman's health.¹¹⁴ There is the provision for the termination of the fetus during certain stages without any legal consequences for the woman or the doctor.¹¹⁵ Poland has restrictive abortion laws that only permit abortion in certain circumstances, with the possibility of the doctor facing criminal charges if the mother dies because of delayed medical attention.¹¹⁶

At the European level, the responsibility is to create an enabling environment that weighs access to safe abortion services against the right to life and health. The European Parliament urges that abortion should be considered a basic right to ensure a level of standardization among the member states and minimize discrepancies in the law. This should be accompanied by the collection of reliable information on unsafe abortions, equality in access to care, and protection against "forced medical travel" from punitive states to countries that permit abortion.¹¹⁷

From the above comparative analysis of the laws of Jordan, the UAE, France, and Poland, it is evident that the following comprehensive framework of amendments can be proposed for the criminal law on fatal abortion, making it balanced, clear, and effective both legally and philosophically.

In the UAE and Jordan, abortion resulting in the death of the mother ought to be distinguished from ordinary abortion or general medical criminalization, becoming an independent offense with stringent penalties. This ensures that the offenders are punished for the death of the mother, which aligns with the principles of criminal justice and deterrence.

A system of cumulative penalties should be established, increasing criminal responsibility in cases of the mother's death, distinguishing between minor negligence, gross negligence, and intention. This approach is in accordance with the dual principles of Islamic Sharia law, combining retribution and compensation, to meet both deterrent and reparative goals.

Under Jordanian law, clear provisions must be made to distinguish between the period before ensoulment and the period after it, with the punishment varying accordingly. This way, the Sharia law guidelines can be followed, and the general criminalization of abortion can be maintained.

There should also be legal provisions that clearly outline cases of medical and social necessity that justify legal abortion, with specific criteria for evaluating such cases. The amendments should also provide clear guidelines on how cases are reviewed and specific

114 Hazal Atay and Guillaume Levrier, 'Constitutionalizing Abortion in France: A "Civilizational Imperative" to Safeguard Access and Counter International Backlash?' 11(1) (2025) *Interdisciplinary Political Studies* 39, doi:10.1285/i20398573v11n1p30.

115 *ibid* 40.

116 Marta Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon' (2022) 14(1) *Hague Journal on the Rule of Law* 86, doi:10.1007/s40803-022-00167-9.

117 *ibid*

timelines, as well as the accountability of service providers to ensure that the mother's rights are protected and health hazards are minimized.

The amendments must take into account the provisions of the European Convention on Human Rights and other international treaties to ensure the protection of the rights to life and health. At the European level, in France and Poland, it is recommended that a complete framework and policy of prevention be established to ensure fair and safe access to abortion services, without violating the protection of life and health, and without "forced medical travel" from restrictive countries to permissive ones.

8 CONCLUSIONS

This study looks at how Islamic Sharia, Jordanian law, and Emirati law regulate the offense of abortion that results in a pregnant woman's death. It has evaluated the effectiveness of the current legislative solutions and made clear the areas where these systems overlap and diverge. The research has produced a set of integrated conclusions and suggestions that can be summed up as follows:

Primarily, the research shows that the impeding point for abortion as per Islamic Sharia is when the ensoulment of the fetus occurs (120 days), after which abortion is forbidden as a rule and allowed only in cases of necessity. Different fatwas distinguish the viewpoints about abortion before this developmental stage of the fetus. By and large, this stance agrees with that of the laws of Jordan and the UAE, according to which abortion is considered a criminal act as a general principle and is permitted only in cases of medical necessity or for the protection of the mother's life, whether it is before or after 120 days of pregnancy.

It also demonstrates that, according to Islamic Sharia, the fetus is protected from the very moment it is implanted in the mother's womb and that abortion is considered a sin. It sets two main penalties for abortion: *al, ghurra*, denoting the blood money that is to be paid for the fetus, and *al, kaffara*, where some scholars suggest the mixture of *al, ghurra* and the atonement normally assigned to unintentional killing.

It explains that, according to Islamic Sharia, the accidental killing offense is regulated by a dual system of sanctions that includes the payment of compensation to the heirs of the deceased, in the form of *diya*, as well as a moral and corrective sanction in the form of *kaffara*, thus constituting a harmony between the elements of redress and reform of the offender.

It exposes a legislative gap in the law of the UAE, as the Penal and Crimes Law does not have a specific provision that criminalizes abortion causing death, and, therefore, it is necessary to rely on the rules of ideal concurrence of crimes. On the other hand, the Jordanian Penal Code gives a separate and independent legal characterization for this offense.

It compares the medical liability laws in the UAE and Jordan, showing that the former restricts the classification of abortion leading to death as a special offense only to a doctor, thus reducing the area of criminal responsibility.

The comparative analysis points to a significant difference in the severity of punishment: the Emirati law, the punishment provided in the case of ideal concurrence, is less than ten years imprisonment, thus the penalty for bodily harm resulting in death, while the Jordanian law imposes a sentence of temporary hard labor for a period of not less than ten years.

The study finds that the Jordanian law specifically mentions the cases of an increase in the criminal result, thus allowing the offender to be retried under a more serious legal description if the pregnant woman dies because of a prior final judgment for abortion. On the other hand, Emirati law lacks a similar provision; it does not allow further prosecution and limits the offender's liability to the offense of abortion only.

Maternal mortality related to abortion in Europe results mainly from procedural barriers and legal uncertainty, not illegality. Delays, lack of remedies, and abrupt legal changes heighten health risks. ECtHR jurisprudence shows that such failures may engage state responsibility under human rights law.

Health risks and deaths from abortion in Europe have been largely skewed in numbers in reference to minors, immigrants, and so-called socio-economic disadvantage. Such cases have shown abortion-related mortality as an issue with gender and social inequality.

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Competing interests: No competing interests were disclosed. Any potential conflict of interest must be disclosed by authors.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.

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EDITORS

Assistant Editor – Valentina Krivolapova. **English Editor** – Robert Reddin. **Ukrainian language Editor** – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Ehjelah AJr, Faqir RJr, Obeidat Y, Al-Adwan MHMJr and Amer SBJr, 'Abortion-Related Maternal Deaths: A Comparative Study of Criminal Law in Jordan, the UAE, and Europe' (2026) 9(2) Access to Justice in Eastern Europe 280-319 <<https://doi.org/10.33327/AJEE-18-9.2-a000191>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000191>

Summary: 1. Introduction. – 2. Literature Review. – 3. Methodology. – 4. Results and Discussion. – 4.1. *Abortion Regulation in Jordan, the UAE, Europe, and Sharia Islamic Law.* – 4.2. *Islamic Perspective on Abortion Causing the Death of a Pregnant Woman.* – 4.2.1. – *Penalties of Intentional Abortion in Islamic Sharia.* – 4.2.2. *Penalties for the Unintentional Death of a Pregnant Woman in Islamic Sharia.* – 4.3. *The Concept of Abortion Resulting in Death under Jordanian and Emirati Law.* – 4.3.1. *The Presumed Element (Existence of Pregnancy).* – 4.3.2. *The Actus Reus Element.* – 4.3.3. *The Mens Rea Element.* – 4.3.4. *Penalties for the Offense of Abortion Resulting in Death.* – 5. *Problematic Aspects of Abortion Resulting in Death under Jordanian and Emirati Law.* – 5.1. *Maternal Death in Cases of Nonexistent Pregnancy.* – 5.2. *Conflicting Legal Classifications of Fatal Abortion.* – 6. *Analyzing Abortion and Maternal Deaths in Europe: France and Poland Comparative Perspective.* – 7. *Philosophical Basis and Criminal Policy of the Proposed Penalties.* – 8. *Conclusions.*

Keywords: *Islamic Sharia, Abortion, Death, Pregnancy, Expiation, Jordanian law, Emirati law, European laws.*

DETAILS FOR PUBLICATION

Date of submission: 19 Dec 2025

Date of acceptance: 02 Mar 2026

Online First Publication: 20 Apr 2026

Last Publication: 20 May 2026

Was the manuscript fast tracked? - No

Number of reviewer reports submitted in first round: 2 reports

Number of revision rounds: 2 rounds with major and minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

This article was prepared with the assistance of AI tools. Specifically, Grammarly was employed for proofreading during the drafting process (version reviewed: December 2025). The authors confirm that all content, arguments, and conclusions were generated independently and remain their sole responsibility. No AI tool was used for generating original research findings or analysis.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

МАТЕРИНСЬКА СМЕРТНІСТЬ, ПОВ'ЯЗАНА З АБОРТАМИ:

ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ КРИМІНАЛЬНОГО ПРАВА В ЙОРДАНІЇ, ОАЕ ТА ЄВРОПІ

***Абдулла Ехджелак-молодший, Раїд Факір-молодший*, Юсуф Обейдат,
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АНОТАЦІЯ

Вступ: У дослідженні розглядається смерть жінки внаслідок абортів в контексті ісламського шаріату та правових баз Йорданії, Об'єднаних Арабських Еміратів та Європи. Головним завданням цього дослідження є збереження життя матері та

захист плоду, що порушує делікатні питання щодо юридичного визначення абортів, який спричиняє смерть. Проблема дослідження виникає через відсутність чіткого положення в законодавстві Еміратів та європейському законодавстві Франції та Польщі, яке б криміналізувало цю складну поведінку, на відміну від чіткого регулювання, що міститься в законодавстві Йорданії. Мета дослідження — з'ясувати погляд ісламського шаріату на злочини, пов'язані з абортів та зі смертю жінки внаслідок абортів.

Методи. У дослідженні використовується комплексна порівняльно-аналітична методологія, яка систематично порівнює відповідні рішення ісламського шаріату з правовими базами Йорданії, Еміратів, Франції та Польщі, що регулюють питання абортів та правові наслідки смерті, що виникли через них. Мета дослідження полягає у визначенні подібностей та відмінностей між релігійним та позитивним правом, оцінці їхнього впливу на кримінальну відповідальність та оцінці того, наскільки добре кожна правова система збалансовує захист життя плода з урахуванням особистих прав та медичної необхідності. Це досягається за допомогою критичного аналізу судових тлумачень, законодавчих положень та доктринальних джерел.

Результати та висновки. Дослідження робить кілька важливих висновків, головним з яких є те, що як йорданське, так і еміратське законодавство відповідають ісламському шаріату, оскільки вони забороняють абортів, якщо це не є необхідністю, та криміналізують як абортів, так і вбивство вагітної жінки, одночасно встановлюючи покарання за обидва види діяльності. На відміну від йорданського законодавства, яке спеціально забороняє абортів, що призводять до смерті, еміратське та європейське законодавство дозволяють абортів у випадках вад розвитку плода. Дослідження також визначає недоліки еміратського законодавства щодо посилення покарань. Тому, відповідно до йорданського законодавчого підходу, дослідження пропонує додати до еміратського законодавства спеціальне положення, яке криміналізує абортів, що призводять до смерті, та встановлює суворіші покарання. Воно також розглядає обставини, коли кримінальна відповідальність посилюється після винесення остаточного рішення про аборт.

Ключові слова. Ісламський шаріат, аборт, смерть, вагітність, спокута, йорданське законодавство, законодавство Еміратів, європейське законодавство.

ABSTRACT IN ARABIC*

مقال بحثي

الإجهاض المفضي الى وفاة الأم الحامل: دراسة مقارنة للقوانين الجنائية في الأردن، والإمارات، وأوروبا

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الملخص

الخلفية: تتناول الدراسة الآثار الجنائية الناجمة عن وفاة المرأة الحامل بسبب خضوعها لعمليات الإجهاض، وذلك في ضوء أحكام الشريعة الإسلامية والأطر القانونية في كل من الاردن والإمارات العربية المتحدة وأوروبا. أما إشكالية الدراسة الرئيسية تتمثل في كيفية حماية حياة الأم مع صون الجنين. وهذا يثير تساؤلات دقيقة حول التعريف القانوني للإجهاض المفضي الى الوفاة. فمشكلة الدراسة تنطلق من غياب النصوص الصريحة في القانون الاماراتي وبعض التشريعات الأوروبية، ولا سيما في فرنسا وبولندا، التي تجرم هذا السلوك المزدوج، خلافاً للتنظيم الصريح في القانون الأردني. كما تهدف الدراسة الى بيان موقف الشريعة الإسلامية من جرائم الاجهاض وما قد يترتب عليها من وفاة المرأة الحامل.

المنهجية: تتبنى الدراسة المنهج التحليلي المقارن الذي يقوم على الموازنة بين أحكام الشريعة الإسلامية والتشريعات الوضعية في كل من الاردن، والإمارات وفرنسا وبولندا فيما يخص موضوع الوفاة الناجمة عن الإجهاض والنتائج القانونية الناشئة عنه. وترمي الدراسة الى حصر أوجه الإتفاق والاختلاف بين أحكام الشريعة والقانون الوضعي، بالإضافة الى تقييم أثر ذلك على المسؤولية الجزائية، ومدى تحقيق كل نظام من هذه النظم القانونية التوازن بين حماية الجنين ومراعاة حقوق الأم والضرورة الطبية، وتوضيح ذلك من خلال تحليل النصوص القانونية والسوابق القضائية والأراء الفقهية.

النتائج والخاتمة: خلصت الدراسة الى مجموعة من النتائج المهمة، أبرزها أن كل من القانون الأردني والإماراتي يتوافقان مع أحكام الشريعة الإسلامية في حظر الإجهاض إلا للضرورة، وتجريم فعل الإجهاض والتسبب بوفاة الأم الحامل مع تقرير العقوبات الملزمة لهذه الأفعال. ولكن على خلاف

*. The publication metadata in Arabic is presented as submitted by the authors.

القانون الاردني الذي ينص صراحة على تجريم الإجهاض المفضي الى الوفاة، تجيز بعض التشريعات الأوروبية والإماراتية الإجهاض في حالات ثبوت تشوه الجنين. وكشفت الدراسة عن أوجه القصور في القانون الاماراتي فيما يخص تشديد العقوبات. وبناء على ذلك توصي الدراسة بضرورة تبني نهج المشرع الاردني من خلال اضافة نص خاص في القانون الاماراتي يجرم الإجهاض المفضي الى الوفاة مع تشديد العقوبات، بالإضافة الى معالجة الحالات التي تتفاقم فيها النتيجة الجنائية بعد صدور الحكم النهائي في جريمة الاجهاض.

الكلمات المفتاحية: الشريعة الإسلامية، الإجهاض، الموت، الحمل، الكفارة، القانون الأردني، القانون الإماراتي، القوانين الأوروبية.

Research Article

PRE-TRIAL RESTRICTIONS ON THE RIGHTS OF THE ACCUSED IN A TRANSITIONAL CRIMINAL PROCEDURE SYSTEM: VIETNAM IN THE LIGHT OF EUROPEAN HUMAN RIGHTS LAW

Hung Dinh The

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000192>

Date of Submission: 13 Dec 2025

Date of acceptance: 9 Mar 2026

Online First Publication: 20 Apr 2026

Last Publication: 20 May 2026

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ABSTRACT

Background: *This article examines the human rights limitations imposed on suspects and accused persons in criminal proceedings in Vietnam. The focus is on pre-trial practice. This stage concentrates on the most intrusive measures. It directly affects liberty, privacy, and defence rights. The article uses European standards as the main benchmark. It draws on the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR). The core test is familiar: measures must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. Necessity is read together with proportionality and robust safeguards against arbitrariness. Against these standards, the article poses a single guiding question: How do Vietnamese criminal-procedure law and practice design, apply, and justify limitations on the rights of*

suspects and accused persons, and what gaps remain when such limitations are assessed against European requirements of legality, necessity, proportionality, and safeguards against arbitrariness? The study is situated in Vietnam's commitment to building a rule-of-law state, advancing judicial reform, and strengthening the protection of human rights in line with the international obligations to which it has acceded.

Method: *The study combines doctrinal and functional-comparative analysis with a practice-facing assessment. It first reconstructs the European rights-limitation framework under the ECHR and ECtHR case law (legality, legitimate aim, necessity, proportionality, and safeguards against arbitrariness). It then analyses Vietnam's constitutional and criminal procedure rules on coercive and investigative measures restricting liberty, privacy, and defence rights, and contrasts their operationalisation, judicial authorisation, structured reasoning, time limits, and remedies with recurring patterns in Vietnamese practice.*

Results and Conclusions: *The study finds partial convergence between Vietnam's framework and European human rights standards, but also persistent gaps. Normatively, Vietnamese criminal procedure does not consistently operationalise a structured test of legality, necessity, and proportionality for coercive measures. In practice, pre-trial decision making remains strongly detention-oriented, with limited use of less restrictive options and uneven case specific-reasoning. Institutionally, independent judicial scrutiny at the investigative stage is relatively weak, and key safeguards emphasised in European jurisprudence, such as early access to defence, meaningful review, and effective remedies, are not always robust.*

The article concludes that closer alignment is feasible if Vietnam shifts toward a criteria-based limitations model. This requires codified necessity and proportionality tests, stronger and more intrusive measures of sensitive judicial control, structured reasoning, prioritisation of options other than detention, and enforceable consequences for unlawful restrictions.

1 INTRODUCTION

There are two approaches to human rights. The first approach views them as “conditions that human nature requires to exist adequately”¹ or as “universal legal guarantees” that protect individuals and groups against actions or omissions that interfere with fundamental freedoms, entitlements, and human dignity.² The second approach views rights from the perspective of rights limitation, whereby the State does not permit rights holders to enjoy such rights in an absolute manner.³ This second approach is particularly visible in criminal procedure, where the State applies coercive measures that restrict the rights of suspects and accused persons in order to detect and process crime and to protect the community. Yet restriction is not a negation of rights, but rather a part of the

1 Ayn Rand, *Journals of Ayn Rand* (David Harriman ed, Dutton 1997).

2 Leah Levin, *Human Rights: Question and Answers* (6th edn, UNESCO 2012).

3 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 102.

mechanism for rights protection.⁴ Properly understood, rights limitation marks the point where public power must stop, and it supplies safeguards to prevent abuse of power and arbitrary interference with human rights.

This article adopts the rights-limitation approach and focuses on restrictions imposed on suspects and accused persons in criminal proceedings, with emphasis on the pre-trial stage. This stage concentrates the most intrusive measures and directly affects liberty, privacy, and defence rights. The need for a limitation-based analysis is reinforced by the practical reality that extensive pre-trial coercion can generate severe individual harm and systemic pressure, including prolonged deprivation of liberty and wider institutional costs that challenge the legitimacy of the justice system.

A large body of scholarship has approached the rights of the accused from a traditional direction. It primarily focuses on conceptualising rights, listing and describing rights, and presenting procedural guarantees as the main language of protection. A typical formulation is that “as traditionally conceptualised in criminal procedure scholarship, the rights of suspects and defendants are framed as procedural safeguards within the criminal process rather than as instances of the restriction of pre-existing human rights.”⁵ Much of the literature also concentrates on regulating arrest, detention, questioning, and trial guarantees, rather than analysing the legality and legitimacy of interferences with pre-existing human rights as such. Another influential line of work highlights that the classic distinction between the “crime control” and “due process” models is primarily concerned with balancing efficiency and fairness within the process, rather than developing a general theory of rights limitation.⁶

This article differs from that traditional view. It approaches the issue from the perspective of rights limitation theory and treats interference with the human rights of the accused during the pre-trial stage as a manifestation of rights restriction subject to strict principles. In general terms, the test requires that restrictive measures must be prescribed by law, pursue a legitimate aim, be necessary in a democratic society, and be proportionate to the aim pursued.⁷ In this framing, rights restriction is intended to prevent excessive impact from public authority through abuse of power and arbitrary infringement upon the human rights of the accused. The focus is therefore not only on whether the State has competence and follows procedure, but also on whether a restrictive measure is justified by structured criteria that can be publicly explained, scrutinised, and reviewed.

4 UNCHR, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (E/CN.4/1985/4, 28 September 1984) <<https://www.refworld.org/legal/resolution/unchr/1984/en/57200>> accessed 15 February 2026.

5 Andrew Ashworth and Mike Redmayne, *The Criminal Process: An Evaluative Study* (4th edn, OUP 2010).

6 Herbert L Packer, ‘Two Models of the Criminal Process’ (1964) 113(1) *University of Pennsylvania Law Review* 1, doi:10.2307/3310562.

7 Robert Alexy, ‘Constitutional Rights and Proportionality’ (2014) 22 *Revus* 51, doi:10.4000/revus.2783.

Limitations on the rights of the accused are not only a domestic issue. They are expressed in international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the UN Convention against Torture and other universal and regional instruments.⁸ Based on the view that interpretation is not merely a transfer of international law, but a process of translation from international standards into national law,⁹ this study focuses on interpreting theoretical norms and international legal requirements regarding human rights restrictions, and on examining how those requirements can be transposed into domestic criminal procedure.

Vietnam provides a particularly relevant setting for this inquiry. The country has been transforming its political and judicial institutions in line with rule-of-law standards, while criminal procedure remains a domain in which State power is exercised most intensively through coercive measures. In Vietnam, the 2013 Constitution approached the issue of human rights limitations for the first time by stipulating that “Human rights and citizens’ rights may only be restricted by law in cases of necessity.”¹⁰ This constitutional recognition creates expectations for a principled approach to limiting rights. However, constitutional language does not automatically produce an operational limitation framework within criminal procedure. In reality, the Vietnamese criminal procedure law has not been designed on the basis of a rights-limitation theory and does not yet meet international standards for human rights restrictions; factors still exist that may render limitations arbitrary and lead to infringements on the human rights of the accused.

Against this background, the article proceeds from an overarching hypothesis: Vietnamese criminal procedure law is not in line with international standards regarding limitations on the rights of the accused and continues to face significant challenges in both law and practice. The purpose of the study is to build a structured analytical basis for evaluating pre-trial restrictions and to identify where Vietnam converges with, and departs from, the requirements of a principled rights limitation regime. It asks how the restriction of the rights of the accused should be understood in theory and international law, how far Vietnamese criminal procedure complies with international standards on pre-trial restrictions, and what reforms are necessary for a transitional criminal justice system. The article’s significance is therefore twofold. It reframes pre-trial coercive measures as rights

8 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200A (XXI)) [1983] UNTS 999/171; Council of Europe, *European Convention on Human Rights: As amended by Protocols Nos 11, 14 and 15, supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECHR 2013); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 UNGA Res 39/46) [1996] UNTS 1465/85.

9 Karen Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32(2) New York University Journal of International Law and Politics 501.

10 Constitution of the Socialist Republic of Vietnam (adopted 28 November 2013) art 14 [in Vietnamese] <<https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Hien-phap-nam-2013-215627.aspx>> accessed 15 February 2026.

restrictions that require strict justification and effective safeguards against arbitrariness, and it offers a basis for evaluating and improving Vietnam's law and practice during a period of rule of law and judicial reform. We believe this study may be of interest to other jurisdictions and provide experience for nations currently in the process of adopting international standards on fair trials.

2 APPROACH AND RESEARCH METHODOLOGY

To address the issue of human rights restrictions in Vietnamese criminal procedure, we adopt a human rights limitation perspective rather than limiting ourselves to an analysis of the content of the accused's rights. Rights limitation, if designed correctly, is not a violation of human rights, but a measure to protect human rights from the abuse of public power.

This study narrows the comparative framework to Europe because the European Convention on Human Rights and the case law of the European Court of Human Rights provide the most detailed and operational guidance on pre-trial rights restrictions, structured around legality, legitimate aim, necessity, proportionality, and safeguards against arbitrariness. The analysis is complemented by the International Covenant on Civil and Political Rights (1966) as the universal baseline for liberty and fair-trial guarantees. Europe is also an appropriate focus because it offers a dense body of practical standards on pre-trial detention, intrusive investigative measures, and effective judicial review, allowing human rights principles to be translated into workable decision criteria rather than remaining at an abstract level.

This approach helps identify the degree of compatibility between Vietnamese law and universal standards while highlighting differences that require further improvement. We also apply doctrinal analysis to clarify concepts such as "the accused", "human rights restriction", "proportionality principle", and "necessity". The author analyses the content of the 2013 Constitution, the 2015 Criminal Procedure Code, the 2015 Law on Temporary Detention and Custody, and International human rights treaties to which Vietnam is a party.

The study employs a comparative method involving functional and historical comparisons to identify similarities and differences between Vietnam and other countries in establishing the grounds, procedures, and scope of application for human rights restriction measures. This approach helps explain the causes of differences and assess the appropriateness of Vietnamese law in the context of international integration.

An empirical - normative review was applied, drawing on official data from the Supreme People's Procuracy and the Judicial Committee of the National Assembly on arrest, custody, temporary detention, prosecution, and adjudication during the 2015-2025 period. These data are used to contrast norms with practical application, thereby evaluating the level of compliance with principles of human rights restriction.

To strengthen internal validity, the article explicitly links its doctrinal benchmarks to the empirical–normative review by operationalising the European criteria-based test, legality, legitimate aim, necessity, proportionality, and safeguards against arbitrariness, through corresponding observable indicators. The official statistics are used as system-level proxies for how far these criteria operate in practice (e.g., reliance patterns, review outcomes, time-discipline, and corrective measures). These indicators do not establish unlawfulness in every individual case; they support a principled assessment of whether the standards function as substantive constraints or merely as formal labels. Normative recommendations are advanced only where doctrinal requirements and the empirical indicators jointly point to a persistent implementation gap.

3 RESTRICTIONS OF HUMAN RIGHTS IN INTERNATIONAL LAW

3.1. The Accused and the Rights of the Accused

We begin with the concept of “the accused”. This concept is not uniform across international law and domestic systems, including Vietnam. Clarifying it is necessary to identify when rights-restricting measures are triggered and when procedural safeguards must apply. In the ECtHR’s case-law, illustrated by *Blokhin v. Russia* (Application No. 47152/06), the relevant trigger is the existence of a “criminal charge” within the meaning of Article 6, which is an autonomous Convention concept. Domestic classification is relevant but not decisive: a “criminal charge” may arise from the official notification by a competent authority that a person is alleged to have committed a criminal offence, or from any measure that substantially affects the individual’s situation. From that point, the person is treated as “the accused” for Article 6 purposes, and the corresponding safeguards must be activated.¹¹

In *Deweert v Belgium*, the Court emphasised that, for the purposes of Article 6, a person is to be regarded as “the accused” from the moment a “criminal charge” arises within the meaning of the Convention.¹² That moment may be identified in two situations: (i) when a competent authority officially notifies the individual that he or she is alleged to have committed a criminal offence; or (ii) even in the absence of any formal notification or designation, when measures taken by the authorities substantially affect the individual’s legal position and interests, thereby placing him or her in a position of having to confront the prospect of criminal prosecution. From that point onwards, the individual must be treated as an accused person for Article 6 purposes, and the corresponding procedural safeguards must be put in place. Similarly, in *Eckle v. Germany*, the Court reiterated that

11 *Blokhin v Russia* App no 47152/06 (ECtHR, 23 March 2016) para 179 <<https://hudoc.echr.coe.int/eng?i=001-161822>> accessed 15 February 2026.

12 *Deweert v Belgium* App no 6903/75 (ECtHR, 27 February 1980) para 46 <<https://hudoc.echr.coe.int/eng?i=001-57469>> accessed 15 February 2026.

Article 6 safeguards apply from the moment an individual is “substantially affected” by a suspicion that has been officially communicated.¹³ We argue that, while the ECtHR adopts a substantive (fact-sensitive) approach to determining whether a “criminal charge” exists, its case-law does not provide a single, ex ante operational threshold capable of guiding public authorities in a uniform manner. Consequently, the point at which a “criminal charge” arises remains highly context-dependent and is assessed case-by-case. This reduces ex ante predictability and creates scope for discretionary or inconsistent practice at the domestic level.

We find that Dutch criminal procedure provides a particularly effective supplement to the ECtHR’s concept of a “criminal charge” by offering a clear legal basis for determining the status of the person concerned. Under Article 27 of the Dutch Code of Criminal Procedure, a person is regarded as a suspect (*verdachte*) where there is a reasonable suspicion that he or she has committed a criminal offence.¹⁴ Moreover, Dutch legal terminology does not draw a sharp formal distinction between a “suspect” and an “accused or defendant” at later stages: the same term *verdachte* is commonly used both before and after indictment. This statutory, stage-spanning concept enhances ex ante clarity as to when procedural rights apply in domestic practice, compared with the Convention approach, which is more fact-sensitive and is often reconstructed on a case-by-case basis.¹⁵

In Vietnam’s 2015 Criminal Procedure Code, the notion of a “charged person” is shaped through officially designated procedural statuses. The Code expressly states: “Charged persons include persons being arrested, held in temporary custody, the accused and the defendant.”¹⁶ This definition effectively links “charged person” status to the existence of a formal procedural decision or a coercive measure (for example, arrest, emergency custody, detention, or a decision to prosecute or designate an individual as the accused, defendant). Accordingly, where the authorities merely institute a criminal case without identifying a specific person or imposing coercive measures, there is, technically, no “charged person” under this status-based model.

In Vietnam’s 2015 Criminal Procedure Code, the notion of a “charged person” is defined in formal procedural terms: “Charged persons include persons being arrested, held in temporary custody, the accused and the defendant.”¹⁷ In practice, this means that a person

13 *Eckle v Germany* App no 8130/78 (ECtHR, 15 July 1982) para 73 <<https://hudoc.echr.coe.int/eng?i=001-57476>> accessed 15 February 2026

14 Dutch Code of Criminal Procedure ‘Wetboek van Strafvordering’ (amended 1 January 2026) <<https://wetten.overheid.nl/BWBR0001903/2026-01-01>> accessed 15 February 2026.

15 Karolina Krenmans, ‘The Protection of Accused International Criminal Law According to Human Rights Law Standard’ (2011) 1(2) *Wroclaw Review of Law Administration & Economics* 26, doi:10.2478/wrlae-2013-0026

16 Criminal Procedure Code of the Socialist Republic of Vietnam no 101/2015/QH13 (adopted 27 November 2015) art 4 (1) [in Vietnamese] <<https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Bo-luat-to-tung-hinh-su-2015-296884.aspx>> accessed 15 February 2026

17 *ibid*

is more likely to receive “accused-type” safeguards only after the authorities have taken an official step that assigns one of these statuses. This can create a timing problem: investigative actions may already interfere with a person’s interests or reputation before the law clearly treats the person as “charged”. Compared with the European approach, where fair-trial safeguards are expected to operate from the earliest meaningful stage of State accusation, Vietnam’s later activation point risks leaving a protection gap during early or “free investigation” stages, unless safeguards (especially early access to counsel and the practical effect of the presumption of innocence) are provided in substance even before formal status is conferred.

To analyse what rights should apply once a person is “charged”, modern criminal-procedure theory distinguishes between (i) general human rights that limit State coercion and (ii) specific procedural rights of the accused that rebalance the inherent asymmetry between the individual and prosecuting authorities. As Trechsel and Ashworth emphasise: Modern criminal procedure is structured around a dual relationship between general human rights, which set outer limits to State coercion, and specific rights of the accused that seek to rebalance the inherent asymmetry between the individual and the prosecuting authorities.¹⁸ Under the first category, restrictions are permissible only for qualified rights and only under strict conditions.¹⁹ The ICCPR framework further separates qualified rights from absolute (non-derogable) rights, which cannot be limited or justified by balancing; these include freedom from torture or inhuman treatment, slavery, imprisonment for failure to fulfil a contractual obligation, and retrospective criminal laws, reflected in ICCPR Articles 6, 7, 8, 11, 15, 16, and 18.²⁰ The second category, procedural rights, forms the core of fair-trial guarantees and aims to provide safeguards more immediately rather than wait for the close of proceedings against them. Such guarantees are not merely interests that may be restricted; they function as structural safeguards to balance State coercive power and the accused’s vulnerability.²¹ They also imply corresponding State responsibilities, especially duties to protect right-holders and to implement positive measures giving full effect to rights. His analytical distinction has important normative implications in contemporary criminal justice and human rights research, particularly when assessed through ICCPR Articles 9, 14, and 17 and the Human Rights Committee’s General Comment No. 32 on Article 14.²²

18 Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell 2002); Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) 45.

19 Barak (n 3) 27.

20 International Covenant on Civil and Political Rights (n 8).

21 Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides, *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 174.

22 International Covenant on Civil and Political Rights (n 8); CCPR, *General Comment No 32: Article 14 (Right to Equality Before Courts and Tribunals and to Fair Trial)* (CCPR/C/GC/32, 23 August 2007) <<https://digitallibrary.un.org/record/606075?ln=en>> accessed 15 February 2026.

3.2. International Principles and Standards on Restricting the Rights of the Accused

Restricting the human rights of the accused is invariably a problem of balancing individual liberty against the aims of criminal law, crime prevention, punishment, and the protection of society.²³ Under the Siracusa Principles, the limitation clauses of the ICCPR are designed to prevent arbitrary exercises of state power, rather than to furnish the state with a legal “tool” to curtail rights at will.²⁴ Accordingly, rights may be restricted only where this is genuinely necessary to safeguard public order and security.²⁵ In criminal proceedings, the accused occupies a structurally vulnerable position: the state may need to apply coercive measures to secure investigation, prosecution, adjudication, and public safety, yet it must still preserve a minimum core of essential entitlements (humane detention conditions, access to medical care, and effective contact with counsel and family). Coercive measures, therefore, should not be understood simply as “violations” of rights, but as restrictions with clear legal boundaries, subject to checks and balances, and constrained by absolute limits such as the prohibition of torture and cruel, inhuman, or degrading treatment. Put differently, the doctrine of permissible restrictions proceeds from the premise that restrictions are not meant to expand state power; rather, they form part of the human-rights framework intended to prevent arbitrariness and to protect the rights and lawful interests of others and of the community. This premise is operationalised through core standards of international human rights law: legality, a legitimate aim, necessity, and proportionality.²⁶

3.2.1. The Principle of Legality

This is the starting point for any analysis of restrictions on the accused’s rights. In practice, the risk of arbitrary restrictions in criminal proceedings is pervasive; moreover, substandard detention conditions or inhuman treatment can effectively disable the exercise of fundamental procedural rights, most notably the right of access to a lawyer and the right to adequate time and facilities to prepare a defence. For this reason, compliance with law and procedure is foundational to the imposition of arrest and detention measures, and it also

23 Elena Maculan and Alicia Gil, ‘The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts’ (2020) 40(1) *Oxford Journal of Legal Studies* 132, doi:10.1093/ojls/gqz033.

24 UNCHR, *The Siracusa Principles* (n 4).

25 Ronald Bayer, ‘The Continuing Tensions Between Individual Rights and Public Health’ (2007) 8(12) *EMBO Reports* 1099, doi:10.1038/sj.embor.7401134.

26 UNCHR, *The Siracusa Principles* (n 4); CCPR, *General Comment No 27: Article 12 (Freedom of Movement)* (CCPR/C/21/Rev.1/Add.9, 2 November 1999) <<https://www.refworld.org/legal/general/hrc/1999/46752>> accessed 15 February 2026; CCPR, *General Comment No 35: Article 9 (Liberty and Security of Person)* (CCPR/C/GC/35, 16 December 2014) <<https://digitallibrary.un.org/record/786613?ln=en>> accessed 15 February 2026; Barak (n 3) 119–45. See also, ECtHR case law on “prescribed by law” in *Sunday Times v United Kingdom (No 1)* App no 6538/74 (ECtHR, 26 April 1979) <<https://hudoc.echr.coe.int/eng?i=001-57584>> accessed 15 February 2026.

serves to curb the overuse of pre-trial detention and its systemic consequences, including overcrowding and undue pressure on penitentiary systems.²⁷ Historically, the idea of legality can be traced back to Magna Carta (Clause 39), with its well-known formulation that no one shall be arrested, imprisoned, dispossessed, outlawed, exiled, or otherwise destroyed except by the “lawful judgment of his peers or by the law of the land.”²⁸

In modern human rights law, the legality principle is reflected in the requirement that an interference be “prescribed by law” or “in accordance with the law” under the ICCPR and the ECHR, but the key question remains what qualifies as “law” The ECtHR has consistently held that “law” must be accessible and foreseeable, formulated with sufficient precision, and accompanied by safeguards against abuse, standards developed in *The Sunday Times v United Kingdom (No 1)*²⁹ and applied in secret-surveillance cases such as *Kruslin v France* and *Huvig v France*.³⁰

3.2.2. The Principles of Necessity

In the context of pre-trial restrictions on liberty, the requirement of necessity cannot be reduced to the mere existence of a legal rule authorising arrest or detention. The decisive question is whether the deprivation of liberty is genuinely required in the circumstances of the individual case. Under European human-rights law, a clear distinction must be drawn between the justificatory threshold for the initial arrest and that for continued pre-trial detention. At the initial stage, Article 5 § 1(c) ECHR permits arrest or detention only where there is a “reasonable suspicion” that the person has committed an offence. This threshold functions as a basic safeguard against arbitrariness by requiring objective facts or information capable of persuading an objective observer that the person concerned may have been involved in the alleged crime.³¹

27 Piet Hein van Kempen, ‘Pre-Trial Detention in National and International Law and Practice: A Comparative Synthesis and Analysis’ in Piet Hein van Kempen (ed), *Pre-Trial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law* (Intersentia 2012) 3.

28 *Nullus liber homo capiatur, vel inprisonetur, aut dissaisatur, aut utlaghetur, aut exuletur, aut aliquo alio modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre.* See, Magna Carta (1215) art 39 <<https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/>> accessed 15 February 2026; Joshuac C Tate, *Power and Justice in Medieval England: The Law of Patronage and the Royal Courts* (Yale UP 2022) 139.

29 *Sunday Times v United Kingdom* (n 26).

30 *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) <<https://hudoc.echr.coe.int/eng?i=001-57626>> accessed 15 February 2026; *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) <<https://hudoc.echr.coe.int/eng?i=001-57627>> accessed 15 February 2026.

31 Council of Europe, *Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security* (ECtHR 2025) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_5_eng> accessed 15 February 2026.

However, once the process moves from initial deprivation of liberty to the question of whether detention should continue, the legal standard becomes more demanding. The persistence of reasonable suspicion remains a necessary starting point, but it is no longer sufficient on its own to justify prolonged custody. At that stage, the competent authorities must provide relevant and sufficient reasons for continuing detention in the concrete circumstances of the case. In Strasbourg jurisprudence, such reasons normally relate to identifiable procedural risks, including absconding, interference with evidence, pressure on witnesses or victims, collusion, or the risk of further offending; importantly, they must be grounded in an individualised assessment rather than in abstract assumptions or formulaic references to the seriousness of the charge.³²

This detention-specific logic is reinforced by international human-rights standards beyond the ECHR. General Comment No. 35 of the Human Rights Committee stresses that pre-trial detention should be the exception rather than the rule and must be based on an individualised determination that it is both reasonable and necessary in all the circumstances. Detention pending trial is justified only to the extent that it is required to prevent flight, interference with evidence, recurrence of crime, or other comparable risks, and States must consider whether less intrusive measures would suffice in the particular case.³³ In the same vein, the Siracusa Principles support a narrow approach to restrictions on liberty by requiring that limitations pursue a legitimate aim, respond to a pressing need, and remain strictly proportionate to that aim. Within the pre-trial context, this supports a preference for non-custodial alternatives whenever they are capable of securing the legitimate procedural objective.³⁴

Accordingly, the critique of pre-trial detention in human-rights terms is not exhausted by the abstract language of proportionality. More precisely, the legal defect lies in the failure to satisfy the detention-specific requirements of necessity, individualised reasoning, and non-arbitrariness. A person may not be kept in pre-trial detention merely because the alleged offence is serious, because suspicion exists, or because detention is administratively convenient. Where the authorities do not demonstrate concrete, and case-based reasons why summons, bail, supervision, or other less restrictive alternatives would be inadequate, continued detention becomes difficult to reconcile with Article 5 ECHR and Article 9 ICCPR. On this understanding, necessity operates not as a rhetorical formula but as a substantive discipline of justification: it requires the State to explain, by reference to the facts of the particular case, why deprivation of liberty remains indispensable and why no less restrictive measure can adequately secure the proper administration of justice.³⁵

32 *ibid*

33 CCPR, *General Comment No 35* (n 26).

34 UNCHR, *The Siracusa Principles* (n 4).

35 Council of Europe, *Guide on Article 5* (n 31).

Finally, even where detention is lawfully imposed and shown to be necessary in this narrow sense, the State remains bound by non-derogable obligations toward the detainee. No balancing logic can legitimise torture, cruel, inhuman, or degrading treatment, or detention conditions incompatible with human dignity. Thus, the requirement of necessity in pre-trial detention must always be understood within the broader structure of human-rights protection: it limits the State's power to resort to custody, while absolute rights set an outer boundary that no justificatory framework may cross.³⁶

3.2.3. The Principle of Proportionality

The principle of proportionality is closely connected to substantive due process and the requirement of substantive reasonableness: it is not sufficient that a legal rule formally authorises arrest or detention; the content of that rule must itself be reasonable and capable of objective justification. Such substantive reasonableness is assessed by reference to standards including the State's legitimate need to perform its functions, the importance of the interest pursued, and the urgency of that need. On this logic, any restriction of the accused's rights must remain proportionate to the nature and seriousness of the alleged offence. Typically, the pre-trial detention of an accused charged with a less serious offence is regarded as a violation of this principle because it is unnecessary.³⁷

Accordingly, in the pre-trial context, proportionality cannot be understood merely as an abstract correspondence between the seriousness of the charge and the severity of the measure imposed. It also requires the State to demonstrate that detention is truly a measure of last resort, in the sense that no less intrusive measure would be sufficient to secure a legitimate procedural objective in the circumstances of the individual case. Before maintaining a deprivation of liberty, the competent authorities must therefore give genuine consideration to alternatives such as summons, bail, judicial supervision, reporting duties, or other non-custodial restrictions. On this understanding, pre-trial detention cannot be justified by a general invocation of the gravity of the alleged offence alone; rather, it must be tested against the stricter question whether less intrusive means would adequately secure the accused's appearance, prevent interference with the proceedings, or address other concrete procedural risks.

This point is especially clear in *Letellier v France*, where the European Court of Human Rights held that continued detention is compatible with Article 5 § 3 ECHR only where the domestic authorities provide reasons that are both relevant and sufficient to show why the deprivation of liberty remains necessary.³⁸ The Court accepted that, at certain stages, the

36 Council of Europe, *European Convention on Human Rights* (n 8).

37 Hung Dinh The, 'Due Process, from Magna Carta to the Transitional Criminal Procedure Models- The Case of Vietnam' (2025) 29 *Journal of Law & Social Deviance* 2.

38 *Letellier v France* App no 12369/86 (ECtHR, 26 June 1991) <<https://hudoc.echr.coe.int/?i=001-57678>> accessed 15 February 2026.

seriousness of the offence and the disturbance caused to public order might be taken into account, particularly where a real threat to public order persists; however, those considerations cannot by themselves sustain continued detention unless they are supported by specific facts showing that release would genuinely endanger the proceedings or public order. In other words, *Letellier* makes clear that the justification for detention must evolve and be reassessed over time rather than rest indefinitely on the seriousness of the accusation or on the initial existence of reasonable suspicion.

The same approach is reinforced by General Comment No. 35 of the UN Human Rights Committee on Article 9 ICCPR, which treats pre-trial detention as exceptional and requires an individualised determination that detention is reasonable and necessary in all the circumstances. Detention pending trial is justified only to the extent that it is needed to prevent flight, interference with evidence, recurrence of crime, or comparable risks, and the State must consider whether less restrictive alternatives would suffice. Accordingly, where the authorities fail to demonstrate concrete, case-specific risks or fail to explain why summons, bail, supervision, or other options are inadequate, pre-trial detention ceases to satisfy the strict requirement of necessity and becomes vulnerable to characterisation as arbitrary detention.

The legal criticism in such cases, therefore, is not confined to the abstract claim that detention is “disproportionate.” More precisely, the defect lies in the failure to satisfy the detention-specific standards governing pre-trial custody, namely necessity, the duty to give reasons, individualised assessment, the requirement to prefer the least intrusive sufficient measure, and the prohibition of arbitrariness. On this view, proportionality at the pre-trial stage does not permit detention to be maintained merely for administrative convenience or by abstract reference to the seriousness of the offence. Rather, it requires the authorities to explain, at each stage of the proceedings, why continued detention remains genuinely necessary and why no less restrictive measure can adequately protect the proper administration of justice.

Finally, whatever justificatory framework is invoked to support restrictions at the pre-trial stage, the State must never encroach upon absolute rights, most notably the prohibition of torture and of cruel, inhuman, or degrading treatment or punishment. Even where detention is lawfully imposed and deemed necessary in the narrow procedural sense, the State remains under a non-derogable obligation to protect the detainee’s life, bodily integrity, and dignity; no balancing logic may be used to legitimise violence, inhuman detention conditions, or treatment destructive of the essence of protected rights.

Although legality and necessity are often presented as transparent constraints on state power, scholarly debate has shown that balancing-based reasoning in human-rights adjudication is not always neutral in operation and may, in practice, legitimise coercive forms of state control. For that reason, the application of these principles to the accused at the pre-trial stage should not be treated as a purely descriptive matter, but examined in light of the broader debates outlined below.

3.2.4. European Debates on Rights-Limitation Principles

First, the principle of legality does not automatically guarantee procedural rigour or protection against arbitrariness. Formally, the requirements that arrest or detention be “provided by law” under the ICCPR and “in accordance with the law” or “prescribed by law” under the ECHR are often treated as safeguards against arbitrary deprivation of liberty. Yet the ECtHR’s jurisprudence under Article 5 makes clear that formal compliance with domestic law does not, by itself, exclude arbitrariness: Convention “lawfulness” also requires fidelity to the rule of law and to the Convention’s own guarantees. In that sense, legality is not exhausted by the mere existence of a statutory basis; it also depends on whether the legal framework possesses sufficient quality- especially accessibility, foreseeability, and safeguards against abuse, to discipline coercive power.³⁹

At the same time, legality contains an important internal paradox. Detailed legal regulation of coercive measures may constrain state action, but it may equally normalise coercion by making restrictive practices appear lawful once prescribed steps have been formally observed. The critical issue, therefore, is not simply whether arrest, custody, and detention are regulated by law, but whether the law requires the State to justify those measures in a manner capable of genuinely restraining arbitrariness. Otherwise, legality risks sliding from a limit on power into a technique for legitimising power.⁴⁰ This, in turn, poses a difficult question for systems such as Vietnam: do detailed rules on arrest, custody, and detention primarily protect the accused, or do they also provide a legal infrastructure through which coercive measures may operate more smoothly in practice?

Second, in Strasbourg practice, legitimate aims such as “the prevention of disorder or crime”, “public safety”, or “national security” are often treated as relatively easy to invoke, with the real scrutiny shifting to legality safeguards and the necessity analysis.⁴¹

Against this background, the more persuasive view is that “legitimate aim” has real limiting force only when it is linked to a concrete burden of justification: the State should identify which protected interest is actually threatened, to what degree, and why

39 *Kruslin v France* (n 30); *Huvig v France* (n 30); *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 4 December 2015) <<https://hudoc.echr.coe.int/fre?i=001-159324>> accessed 10 December 2025; *Sunday Times v United Kingdom* (n 26).

40 Barak (n 3); Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002); Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2016); Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7(3) *International Journal of Constitutional Law* 468, doi:10.1093/icon/mop011. Critique of the neutrality of the balancing model and proportionality.

41 *Roman Zakharov v Russia* (n 39). See also, Council of Europe, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (ECtHR 2025) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng> accessed 10 December 2025. Noting that legitimate aims are often accepted/not disputed, while the decisive assessment concerns safeguards/necessity.

the chosen measure is directed to that specific risk, rather than relying on generic invocations of “security” or “order.”⁴²

Importantly, the Convention itself contains an additional backstop in Article 18 ECHR, which “restricts the restrictions” by prohibiting the use of permissible limitations for purposes other than those for which they were prescribed; this provides a doctrinal route for challenging measures that are formally framed as crime-control but in reality, pursue ulterior objectives.⁴³

For pre-trial decisions affecting the accused, the implication is straightforward: it is not enough merely to invoke “detention to ensure prosecution”; decision-makers should specify the relevant risks, such as flight, interference with evidence, or reoffending, or other concrete procedural dangers, the factual basis for those risks, and whether such assertions are capable of verification.

Third, necessity and proportionality are both the strongest and the weakest points of the doctrine of rights limitation. At their strongest, they require a structured inquiry: whether the measure is suitable to achieve the stated objective, whether it is genuinely necessary in the sense that no less intrusive alternative would suffice, and whether a fair balance has been struck between the public interest and the burden imposed on the individual. In the context of pre-trial detention, this means that custody cannot be treated as a default response. The authorities must explain why summons, bail, judicial supervision, reporting obligations, or other alternatives are insufficient, and why detention remains the least intrusive measure capable of securing the proper administration of justice. The Strasbourg case law in detention cases such as *Letellier*, *Kudła*, *McKay*, and *Buzadji* points in precisely this direction.⁴⁴

That same line of case law also shows that the justification for detention must become more demanding over time. While the initial deprivation of liberty may rest on reasonable suspicion, continued detention requires more than the persistence of that suspicion alone; it must be supported by relevant and sufficient reasons grounded in the concrete

42 Necdet Umut Orcan, ‘Legitimate Aims, Illegitimate Aims and the ECtHR: Changing Attitudes and Selective Strictness’ (2022) 7(1) *Bologna Law Review* 7, doi:10.6092/issn.2531-6133/14860.

43 Council of Europe, *Guide on Article 18 of the European Convention on Human Rights: Limitation on Use of Restrictions on Rights* (ECtHR 2025) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_18_eng> accessed 15 February 2026; ‘Restrictions on the Right to Liberty and Security for Reasons Other than Those Prescribed by the European Convention on Human Rights’ [2024] ECtHR Factsheet: Limitation on the Use of Restrictions on the Right to Liberty <https://www.echr.coe.int/documents/d/echr/fs_article_18_restrictions_liberty_eng> accessed 15 February 2026.

44 *Letellier v France* (n 38); *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000) <<https://hudoc.echr.coe.int/fre?i=001-58920>> accessed 15 February 2026; *McKay v United Kingdom* App no 543/03 (ECtHR, 3 October 2006) <https://hudoc.echr.coe.int/eng?i=001-77177> accessed 15 February 2026; *Buzadji v The Republic of Moldova* App no 23755/07 (ECtHR, 5 July 2016) <<https://hudoc.echr.coe.int/eng?i=001-164928>> accessed 15 February 2026.

circumstances of the case. Read in this light, *McKay* is significant not only because it addresses prompt judicial control, but also because it clarifies the judicial character of the safeguard required under Article 5: the review must be independent and judicial in substance, not merely formal or confirmatory.⁴⁵ On that basis, this article argues that prosecutorial approval cannot simply be equated with independent judicial supervision. An authority that remains institutionally or functionally aligned with the prosecuting side lacks the structural distance necessary to serve as an external, impartial guarantor of liberty. If review is exercised from within, or too close to, the prosecutorial apparatus, the safeguard required by Article 5 is weakened at its core.

At the same time, necessity and proportionality are also the most vulnerable parts of the doctrine. If courts are satisfied with generic references to “balance”, “public interest”, “the seriousness of the offence”, or “the needs of the investigation”, almost any deprivation of liberty can be redescribed as proportionate. The problem, then, is not proportionality as such, but proportionality without strict evidential discipline, without concrete reasons, and without genuinely independent review. In that form, the language of rights limitation risks functioning less as a restraint on coercive power than as a legal technique for rendering that power acceptable.⁴⁶

Finally, when these principles are considered in relation to transitional systems such as Vietnam, their practical force may be weakened by structural conditions. Vietnamese scholarship has described the pre-trial process as strongly crime-control oriented, with prosecutors playing a pivotal steering role in the pre-trial phase.⁴⁷ International human-rights materials have likewise raised concerns about limits on effective judicial oversight, while recent analyses of Vietnam’s detention regime continue to note persistent implementation problems and an over-reliance on custody, including broad statutory grounds and the relative ease of extension in certain categories. These features risk entrenching detention as a routine investigative default rather than a genuine measure of last resort.⁴⁸

Against this background, the central question is not merely whether Vietnamese law has incorporated the keywords of legality, legitimate aim, necessity, and proportionality into constitutional and criminal procedure texts. The more demanding question is whether those principles are institutionally and practically strong enough to transform detention from a routine coercive technique into an exceptional measure subject to strict and independent

45 *McKay v United Kingdom* (n 44).

46 *Buzadji v The Republic of Moldova* (n 44).

47 Minh Ky Vo, ‘The Crime Control Model of Vietnam’s Criminal Justice System: The Vital Role of Prosecutors and the Need for Plea Bargaining’ (2025) 13(1) Vietnamese Journal of Legal Sciences 100, doi:10.2478/vjls-2025-0007.

48 Hien Thi Thu Tran and Tuan Van Vu, ‘Some Reflections on Pre-trial Detention: Contrasting Vietnamese Legal Provisions with Established International Instruments’ (2026) 26(1) International Criminal Law Review 137, doi:10.1163/15718123-bja10254.

justification. These tensions provide the foundation for the next part of this article, which evaluates Vietnamese law and practice not by checking formal textual convergence alone, but by asking whether the underlying safeguards have been substantively realised.

Thus, the discussion above has outlined the general doctrine of human-rights limitation and its implications for restrictions on the rights of the accused at the pre-trial stage. The following section compares these standards with the 2013 Constitution, the 2015 Criminal Procedure Code, and other legal rules on custody and detention in order to assess the extent to which Vietnamese criminal procedure law has incorporated, or failed to incorporate, the doctrine of rights limitation in the criminal field. In doing so, the article examines not only points of normative compatibility and gap, but also the institutional and practical conditions of a post-socialist procedural system in which pre-trial coercive measures are still often treated as ordinary investigative tools rather than as exceptional restrictions requiring strict justification.

4 ASSESSMENT OF THE COMPATIBILITY OF VIETNAMESE LAW WITH INTERNATIONAL STANDARDS ON RESTRICTING THE RIGHTS OF THE ACCUSED

4.1. Vietnam's Political-Legal Context

Prior to the 1992 Constitution, Vietnam's political institutions were deeply influenced by communist states utilizing a centralised power model based on Marxist theory; for a long period, bourgeois theories of the rule of law, such as the separation of powers, human rights, and judicial independence, were present only as subjects of criticism and were not deeply studied, leading to a theoretical gap. In previous Constitutions, the term “human rights” did not appear; instead, they referred to the rights and obligations of citizens. This avoidance of human rights issues is attributed to the strong influence of the 1977 Constitution of the Soviet Union.⁴⁹

The transition toward a rule-of-law state began vigorously with the 2001 Constitutional amendments, which recognised that the Socialist Republic of Vietnam is a rule-of-law state of the people, by the people, and for the people.⁵⁰ This was a crucial starting point for Vietnam to accept rule-of-law values, particularly human rights. Consequently, research on the rule of law and human rights flourished starting in the 2000s, following the strong constitutional commitment to these principles. Legal science in Vietnam has since examined rule-of-law values, including human rights in terms of their theory and

49 Hong Quy Mai, ‘Human Rights, Fundamental Rights and Obligations of Citizens in the Constitutions of Vietnam and Orientations for Reform’ (2012) 7 *Journal of Law* 47 [in Vietnamese].

50 Constitution of the Socialist Republic of Vietnam (n 10) art 2.

applicability. Vietnamese academia's research into the rule of law has yielded initial results, specifically in distinguishing between "Rule of Law" and "Rule by Law" and approaching international standards such as: declaring sovereignty belongs to the people, recognizing, guaranteeing, and protecting human rights; the rule of law, control of power, judicial independence,⁵¹ the contents of human rights, including human rights in criminal procedure, carry a universal and international normative character that has been acknowledged, accompanied by provisions prohibiting the arbitrary restriction of human rights.⁵²

It was not until the 2013 Constitution that the issue of limiting human rights was officially recognised. Compared with this provision, Article 29 of the UDHR fully embodies the spirit of the UDHR. This indicates that Vietnam pursues a relative theory of human rights. From this provision, a system of standards forms that the state must adhere to when limiting human rights, such as reason, legitimacy, necessity, proportionality, and specifically the requirement to be "according to law", covering both substantive and procedural processes.

This Constitutional provision is expected to curb arbitrary restrictions, especially in the current context where the Constitution and laws often lack direct applicability and require guidance documents for enforcement. However, we argue that limiting human rights through a statute enacted by the National Assembly, or legislation in general, is perhaps less important than the quality of such laws. A specific point of contention regarding the interpretation of "according to law" stems from research on Magna Carta, as Vietnamese jurists distinguish between "according to law" and "according to legislation". In Vietnam, "sources of law" in the broad sense include statutes and sub-law documents guiding their implementation, such as Government Decrees and Ministerial Circulars. If interpreted broadly, this would allow executive bodies and local authorities to arbitrarily impose regulations that limit human rights. Therefore, "according to law" is interpreted here as statutes enacted by the National Assembly.⁵³ In other words, the authority to enact statutes restricting human rights is exclusively vested in the National Assembly. It is noteworthy that the 1948 Universal Declaration of Human Rights, as well as the constitutions of many nations, employ the term 'law' rather than 'legislation', yet with the specific connotation of legislative acts promulgated by the legislature. This does not imply that limiting rights via legislation is inherently arbitrary. Crucially, any restriction, whether by statute or legislation generally, must have a mechanism for control and adjudication of unconstitutional legal documents. If such a mechanism exists, the distinction becomes less critical. More importantly, the legal provisions limiting rights, including those of the accused, must ensure substantive and procedural due process and strict enforcement.

51 Khanh Vinh Vo, 'The Principle of the Rule of Law: Theoretical Issues' (2017) 4 Journal of Law and Practice 1 [in Vietnamese].

52 Constitution of the Socialist Republic of Vietnam (n 10) art 14.

53 Cong Giao Vu and Quoc Toan Trinh (eds), *Implementation of Constitutional Rights in the 2013 Constitution* (Hong Duc 2015) 704 [in Vietnamese].

The provisions of the Constitution and laws restricting human rights have already been present and implemented in practice. For example, in Vietnam's criminal procedure in the past, there was the measure of emergency arrest of a suspect. Under this measure, the police had the authority to immediately arrest a suspect if there was clear evidence that they had committed a crime and to prevent them from fleeing. After the arrest, the police were required to report to the Procuracy for approval⁵⁴; if rejected, the suspect would be released immediately. This was deemed unconstitutional because the Constitution mandates that no one may be arrested without a decision by the Court or a decision or approval by the Procuracy, except for flagrante delicto cases.⁵⁵ Arresting without prior Procuracy approval was thus unconstitutional. Consequently, the Criminal Procedure Code of Vietnam abolished this specific measure to align with the Constitution.

Thus we can see that the Constitution still leaves gaps regarding human rights in criminal procedure, with some rights not recognized as fundamental or lacking clear definition, such as: protection against retroactive application, the right to review the legality of arrest (habeas corpus), the right to silence or privilege against self-incrimination, the right to appeal, the right to bail, the right to use one's ethnic language, the right to call and examine witnesses, and the right not to be imprisoned for contractual inability.⁵⁶

A debated issue on the restriction of human rights in Vietnam is the reason for the restriction. What constitutes public order, national security, or social morality? Due to the civil law tradition and lack of a constitutional interpretation mechanism, these concepts are not clarified by case law but left to specialised laws. Regarding the restriction of the accused's rights, what are the justifications? We will discuss this in a later part regarding coercive measures in criminal procedure in Vietnam.

Also, Vietnam has joined most international human rights conventions, including the UDHR, ICCPR, ICESCR, CRC, UNCAC, and UNTOC. However, Vietnam maintains reservations on certain conventions, such as Article 8, Clause 2, and Article 62, Clause 2, of UNCAC, and Article 30, Clause 2, of CAT.

54 See, Criminal Procedure Code of the Socialist Republic of Vietnam (n 16) art 81.

55 See, Constitution of the Socialist Republic of Vietnam (n 10) art 20.

56 Cong Giao Vu, 'Human Rights, Fundamental Rights and Obligations of Citizens' in Dang Dung Nguyen, Quoc Toan Trinh and Minh Tuan Dang (eds), *Scientific Commentary on the Constitution of the Socialist Republic of Vietnam 2013* (National Political Publishing House Truth 2016) 120 [in Vietnamese].

4.2. Assessment of Vietnam's Legal Framework on Restrictions of the Rights of the Accused

To evaluate restrictions on the rights of the accused in Vietnamese criminal procedure, this section applies a four-step framework grounded in European human rights reasoning: legality, legitimate aim, necessity, and proportionality. Accordingly, we examine whether arrest and related pre-trial restrictions are prescribed by law and embedded in an adequate legal framework.⁵⁷

4.2.1. Legality

Notably, Vietnamese criminal procedure possesses the principle of legality (rule by law).⁵⁸ Principle of legality is understood as a requirement for all individuals and organisations to strictly comply with the regulations of the Constitution and statutes.⁵⁹ Accordingly, all criminal procedural activities, including the implementation of coercive measures, must be ensured in accordance with the law. Textually, this principle reflects the spirit of due process, meaning “according to law”. However, in Vietnam, this principle is interpreted in the sense of rule by law rather than rule of law, which signifies not only following the law but also demanding high quality in the statutes themselves.⁶⁰ Rule by law implies strict adherence to the law without considering whether that law ensures fairness. In Vietnam, under rule by law, police may arrest and detain, whereas under the rule of law, arrest might not be strictly necessary. However, in practice, Vietnamese police refer to an idiom that we believe fully embodies the spirit of rule of law: “If an arrest is possible but not arresting is also possible, then absolutely do not arrest”. Regarding this issue, the Human Rights Committee has explained that detention following a lawful arrest must not only be “lawful” but also “reasonable” and “necessary” in all circumstances for the stated purpose. The duty of the State Party concerned is to demonstrate that these elements are present in specific cases.⁶¹

In Vietnamese criminal procedure law, there are three groups of coercive measures that restrict the human rights of the accused, including: (i) preventive measures: arrest, temporary custody, temporary detention, prohibition from leaving the place of residence,

57 See: International Covenant on Civil and Political Rights (n 8) arts 9, 14; ; Council of Europe, European Convention on Human Rights (n 8) arts 5, 6; CCPR, *General Comment No 35* (n 26); UNCHR, *The Siracusa Principles* (n 4); UNODC, *Handbook on Pre-trial Detention: A Guide to Effective Use and Alternatives* (UN 2017); *Buzadji v The Republic of Moldova* (n 44); *Kudla v Poland* (n 44); *Letellier v France* (n 38); *McKay v United Kingdom* (n 44).

58 Criminal Procedure Code of the Socialist Republic of Vietnam (n 16) art 11.

59 Ngoc Hai Do, ‘On Socialist Legality in the Context of Building and Perfecting the Socialist Rule-of-Law State in Vietnam’ (2009) 12 *Journal of State Organization* [in Vietnamese].

60 *ibid*

61 CCPR Communication No 305/1988 *Hugo van Alphen v The Netherlands* (CCPR/C/39/D/305/1988, 15 August 1990) para 5.8 <<https://hrlibrary.umn.edu/undocs/session39/305-1988.html>> accessed 15 February 2026.

surety or guarantee, depositing money or valuables as security; (ii) coercive measures to collect evidence, including: search of persons, residences, workplaces, locations; examination of traces on the body; seizure of correspondence, telegraphs, parcels, packages; temporary seizure of objects as evidence, documents directly related to the case, access to electronic devices and data, wiretapping; and (iii) preventive measures to ensure investigative activities; asset distraintment; escorting the suspect/defendant; and temporary suspension of the suspect's position or office. Here, we primarily analyse the measure of arrest in Vietnamese criminal procedure, as this is the most common measure in the country's criminal proceedings (accounting for 83% of accused persons).⁶²

Vietnam does not have measures for managing suspected persons or accused minors, house arrest, judicial supervision, or entrapment.⁶³ We believe that the application of specific measures depends on the practice and effectiveness of each measure chosen by each nation, provided that the principles of limiting human rights are ensured. However, if measures limiting human rights that do not involve deprivation of physical liberty can be diversified, the application of custodial measures, such as temporary custody and detention will be narrowed.

As set out above, Article 5 ECHR treats the legality of deprivation of liberty as more than the existence of a domestic legal basis: it also requires “quality of law” safeguards capable of preventing arbitrariness, including effective review and strict compliance with time limits. Building on that framework, Vietnam's criminal procedure regime largely satisfies the formal “prescribed by law” requirement. The 2015 Criminal Procedure Code (CPC) establishes a system of preventive measures and sets out comparatively specific grounds for pre-trial detention in Article 119. However, when legality is assessed in its substantive sense, legality in operation and protection against arbitrariness, several weaknesses remain, limiting overall alignment with European standards.

First, Article 119(1) of the CPC 2015 permits pre-trial detention for suspects or defendants charged with very serious or especially serious offences, without requiring additional risk-based conditions. This design risks conflating the gravity of the offence (or prospective penalty) with the threshold for imposing custodial measures. In contrast, the European legality logic demands case-specific justification grounded in concrete procedural risks (such as absconding, interference with proceedings, destruction of evidence, or reoffending). Where detention can be authorised primarily by reference to charge classification, the law's capacity to discipline discretion is weakened, and detention is more likely to operate as a default response rather than a narrowly tailored procedural measure.

62 Report of the Supreme People's Procuracy at the 4th Session of the 14th National Assembly, November 2024.

63 See, French Code of Criminal Procedure ‘Code de procédure pénale’ (amended 1 February 2026) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/> accessed 15 February 2026; German Code of Criminal Procedure ‘Strafprozeßordnung – stop’ (amended 17 July 2025) <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> accessed 15 February 2026

Second, reported practice points to recurrent breakpoints affecting both the factual basis for detention and compliance with time limits, two core components of lawfulness. In particular, annual figures on persons placed in pre-trial detention who were later released following decisions to discontinue investigations remain consistently present over time: 179 cases (2018), 148 (2019), 124 (2020), 166 (2021), 199 (2022), 239 (2023), and 212 (2024).⁶⁴ While such numbers may be small relative to the overall volume of pre-trial detention, their persistence across consecutive years suggests that detention is sometimes authorised and approved when the evidentiary foundation or the individualised conditions for deprivation of liberty are insufficiently robust, leading to subsequent cancellation and release. Time-limit compliance concerns are also reflected in data on resolved instances of over-time detention, recorded as 138 cases (2018), 24 (2019), 14 (2020), 11 (2021), 0 (2022), 3 (2023), and 6 (2024).⁶⁵ In European terms, these patterns matter because detention may become unlawful where statutory limits are exceeded, or extensions are not supported by rigorous, transparent justification.

Third, supervisory outcomes further underline the fragility of legality in operation. Oversight activity in 2020 identified 1,242 instances of legal violations in the administration of temporary custody and detention. This indicates that, alongside decisions that comply with competence and formal procedure, there remain cases in which preventive measures are imposed without an adequate factual and legal basis, requiring remedial intervention and, in some instances, the annulment of detention and release of the affected individuals.

Finally, a structural constraint concerns the limited role of an independent judicial authority in controlling pre-trial detention at the earliest stage. The European legality model links safeguards against arbitrariness to prompt appearance before a judge or another independent judicial authority and to an effective avenue to challenge detention before a court. In Vietnam, control is centred on procuratorial approval and supervision, an internal check within the accusatorial system. This configuration can encourage file-driven and formalistic review, restrict meaningful adversarial engagement, and reduce the pressure to articulate and test individualised, case-specific grounds for detention.

In sum, Vietnam has a relatively developed statutory framework governing preventive measures, but its conformity with European legality standards remains constrained by: (i) a normative opening that allows detention to rest heavily on offence classification; (ii) year-on-year indicators of discontinuation-related releases and over-time detention, together with documented violations detected through oversight; and (iii) the absence of robust independent judicial control at the earliest stage to strengthen protection against arbitrariness.

64 'Annual Work Summary Reports of the People's Procuracy Sector, 2018–2024' (*Supreme People's Procuracy of Vietnam*, 2025) [in Vietnamese] <<http://vksndtc.gov.vn/>> accessed 10 December 2025.

65 *ibid*

4.2.2. Legitimate Aim in Vietnam's Arrest and Pre-Trial Detention Regime

Next, we assess the substantive criteria governing human rights restrictions in Vietnamese criminal procedure (substantive due process), i.e., when custodial measures are applied. This inquiry is crucial for determining whether deprivation of liberty operates as a rights-respecting procedural safeguard or, conversely, becomes a matter of convenience that risks departing from international standards on legitimate aim, necessity, suitability, and proportionality, standards that are particularly salient in comparative criminal-procedure systems.

First, Vietnamese procedural theory and positive law conceptualise pre-trial detention as a coercive measure intended to secure the effective conduct of investigation, adjudication, and the execution of criminal judgments.⁶⁶ In principle, Vietnamese criminal procedure does not treat detention as mandatory for all offenders: preventive measures are to be applied only where necessary, signalling alignment with proportionality and necessity as structural constraints on State coercion.⁶⁷ This legislative statement matters normatively because it indicates that custodial interference must pursue a procedural objective (preserving the integrity of proceedings), rather than a punitive or symbolic purpose (pre-judging guilt, “sending a message,” or satisfying public sentiment). However, the effectiveness of this “aim limitation” depends on how the statutory grounds are framed and applied. Where grounds are broadly formulated, decision-makers may satisfy the formal requirement of “procedural purpose” without demonstrating, on the facts and in an individualised manner, why detention is necessary in the particular case. Vietnamese law includes grounds such as a sufficient basis to believe a person is preparing to commit a very serious or especially serious crime, a likelihood of obstructing investigation, prosecution, or trial, and other grounds that, while intelligible, confer wide evaluative discretion on procedural authorities. In this design, the “aim” requirement risks becoming overly elastic: it may shift from a concrete, case-specific preventive objective (e.g., preventing flight or interference with evidence) to a general “safety-first” logic, under which detention is chosen as the default because it is administratively secure and institutionally risk-averse. Discretion, in itself, is not inconsistent with modern regulatory design. The comparative difference, however, is not simply the presence of discretion; it concerns how tightly the law links detention to specific operational objectives, and how robustly the system demands individualised justification and meaningful review. Many jurisdictions specify pre-trial detention grounds in more concrete terms, such as lack of stable residence, concealment or destruction of evidence, flight risk, or reasonable grounds to suspect flight (e.g., France, Germany).

66 Article 109 of the Vietnamese Criminal Procedure Code stipulates the purpose of applying preventive measures: to promptly prevent crime, or when there are grounds to prove that the accused will cause difficulties for investigation, prosecution, or trial, or will continue committing crimes, or to ensure the enforcement of judgments.

67 Nguyen Van Nguyen, *Preventive Measures and Issues of Improving Effectiveness* (People's Police 1995) 39 [in Vietnamese].

Some systems go further by enumerating exhaustive statutory objectives for custodial measures thereby structuring decision-making and facilitating judicial control. In France, pre-trial detention is treated as a last resort and permitted only to achieve one or more listed aims: preserving evidence; preventing pressure on witnesses or victims (and their families); preventing collusion; protecting the accused; ensuring appearance before justice; ending the offence or preventing repetition; and ending an exceptional and persistent disturbance to public order; non-compliance with judicial-supervision obligations may also trigger detention.⁶⁸ Similar “aim-specification” can be found in other contexts: for example, a requirement to declare identity and risks relating to national security, public security, social order, self-harm, or flight are articulated as legally cognisable bases in certain systems.

The salient comparative point is that, beyond the seriousness of the accusation, custody is expected to be justified by a concrete procedural objective grounded in the circumstances of the individual case, rather than by broadly framed formulae.

Second, Article 119 of the Criminal Procedure Code: offence seriousness as a “proxy” and the risk of routinised detention. In Vietnam, the principal statutory framework for temporary detention is Article 119 of the Criminal Procedure Code. A critical issue arises where the provision permits detention for suspects or defendants charged with very serious or especially serious crimes in a manner that, in practice, may rely primarily on offence seriousness and the severity of anticipated punishment, rather than requiring additional, case-specific conditions demonstrating why detention is necessary to achieve a concrete procedural objective in that case. Illustratively, if a suspect is prosecuted for a crime punishable by up to fifteen years’ imprisonment (very serious crime) or up to twenty years, life imprisonment, or the death penalty (especially serious crime), for example, homicide under Article 123(1) of the Penal Code, investigative authorities may issue a detention order without needing further conditions such as a specific flight risk, interference risk, or a structured necessity assessment.⁶⁹ This design has been criticised in Vietnamese legal commentary for effectively using charge gravity as a proxy for the “aim” of detention, thereby weakening the practical constraint that detention should be justified by necessity, suitability, and proportionality rather than by offence category alone.⁷⁰

A predictable practical consequence is a pattern familiar to many systems: where detention is legally available on broad or charge-based grounds, authorities may follow an institutional “safety” logic, detention is possible, and non-detention is also possible, yet detention is chosen to minimise perceived responsibility should the suspect abscond or reoffend. Vietnamese research has explicitly linked this tendency to risk-averse decision-making and

68 French Code of Criminal Procedure (n 63) art 144.

69 Criminal Procedure Code of the Socialist Republic of Vietnam (n 16) art 110.

70 Duc Anh Nguyen, ‘Arresting Suspects for Pre-Trial Detention under Vietnam’s Criminal Procedure Law: Shortcomings and Recommendations’ [2024, 1 March] The Online Journal of the People’s Courts [in Vietnamese] <<https://tapchitoaan.vn/bat-bi-can-tam-giam-theo-luat-to-tung-hinh-su-viet-nam-bat-cap-va-kien-nghi10385.html>> accessed 15 February 2026.

structural incentives to “maintain detention” in serious cases. In such circumstances, the “aim” requirement risks being reframed from a concrete procedural objective (ensuring appearance or preventing obstruction) into a general policy preference for incapacitation. From a rights perspective, this approach is difficult to reconcile with the presumption of innocence and the requirement that restrictions be justified by individualised necessity rather than by the nature of the accusation alone.⁷¹

Third, Empirical signals: custodial dominance over alternative preventive measures. This concern is not merely theoretical. Vietnamese empirical accounts consistently indicate that detention has long been applied at a high rate, suggesting the dominance of custodial measures over non-custodial alternatives. A recent peer-reviewed Vietnamese study reports that: The number of persons subjected to pre-trial detention also increased steadily over the years. In 2018, the number of persons placed in pre-trial detention was the lowest in the period under review, at 102,106; by 2024, the number of detainees had risen to 172,499. The proportion of suspects or defendants placed in pre-trial detention among all persons against whom criminal charges were initiated during 2018–2024 was relatively high (approximately 80.11%), whereas the number of charged persons not subjected to pre-trial detention was very small, accounting for only 19.89%.⁷² These figures reflect a substantial reliance on custodial measures in a system that formally recognises deprivation of liberty as a measure to be used only when it is “necessary.”

Equally important is the low rate of cancellation or replacement of detention orders. The same study reports that during 2012–2020, only 7.1% of detainees were released or had detention replaced by other preventive measures; during 2021–2023, the figure was 12.9%.⁷³ These numbers are analytically significant because where detention is rarely replaced or cancelled, it becomes harder to demonstrate that custodial interference remains continuously tethered to a concrete procedural objective that persists over time. Instead, detention may operate as a stable default condition throughout key procedural stages, even when the original rationale (e.g., preserving evidence) has weakened. Accordingly, the empirical profile reinforces the doctrinal critique of an Article 119-type design: where detention is readily available by offence category and rarely substituted by less restrictive measures, the “aim” requirement risks being satisfied by formulaic references to “procedural needs” rather than by an individualised demonstration that detention is genuinely necessary in the particular case.

71 Ngoc Kien Nguyen and Khanh Linh Nguyen, ‘*Abuse of Detention Measures in Criminal Proceedings and Prosecutorial Measures of the People’s Procuracy*’ (2025) 134(6C) Hue University Journal of Science: Social Sciences and Humanities 5, doi:10.26459/hueunijss.v134i6C.7585 [in Vietnamese].

72 ‘Annual Work Summary Reports of the People’s Procuracy Sector, 2018–2024’ (n 64).

73 Nguyen NK and Nguyen KL (n 71). In sum, the foregoing limitations within Vietnam’s legal framework create a structural vulnerability: detention may operate as a routine tool of risk management, rather than as a measure tightly justified and individually tailored to the circumstances of each case.

4.2.3. Necessity in Vietnam's Arrest and Pre-Trial Detention Regime

Assessing the necessity of pre-trial detention cannot stop at stating that, in theory, the measure serves procedural objectives; the decisive question is whether detention is genuinely necessary in the individual case, and whether it remains necessary over time. As a matter of law, Vietnam's 2015 Criminal Procedure Code recognises that pre-trial detention is an exceptional measure, to be applied in principle only where procedural risks exist and detention is necessary to ensure the proper conduct of the proceedings. The core limitation, however, is not that the system is unaware of the necessity requirement, but that necessity has not been designed or operated as a mandatory, individualised, evidence-based test. Where statutory grounds are expressed through broad formulas (e.g., "there are grounds to believe...", "there is a possibility...", "there are indications..."), decision-makers may satisfy the formal requirement of "procedural risk" without having to demonstrate, on the case file and in an individualised manner, why deprivation of liberty is necessary in the particular case. As a result, "necessity" can readily drift toward a "safety-first" logic, under which detention becomes the default option because it is administratively secure and reduces institutional exposure, rather than a last-resort measure adopted only after serious consideration of less intrusive alternatives.

Drawing on the statistical data for 2018–2024, several limitations can be identified in the practical realisation of the "necessity" criterion. First, with respect to time discipline, a minimum component of "necessity over time", the data record 196 instances of "resolved over-detention", most of which arose at the trial stage (187 cases). In 2024, over-detention at trial was reported at 0.02% of the total detainee population. Although numerically small, this remains normatively significant: once the lawful temporal limits are exceeded, detention can no longer be justified as "necessary", and instead reflects the risk that custody becomes anchored to case-processing capacity or trial scheduling constraints. Notably, the data also record sixteen unresolved instances of "continuing over-detention" during 2018–2024.⁷⁴

The persistence of this unresolved category indicates that detection-and-remediation mechanisms, and the duty to terminate or substitute detention once its basis no longer obtains, are not fully effective. Where there is no decisive temporal "cut-off", the "necessity" standard is liable to be displaced by file-management considerations.

Second, regarding the effectiveness of oversight, the number of instances in which the Procuracy did not ratify arrest-to-detain orders and detention orders during 2018–2024 was 2,291, equivalent to 0.65% of the ratified decisions. A low rejection rate does not automatically establish that every detention request was substantively sound; rather, from a necessity perspective, it serves as a proxy suggesting that the screening of grounds and necessity may not be sufficiently robust to provide a meaningful counterweight, particularly

74 'Annual Work Summary Reports of the People's Procuracy Sector, 2018–2024' (n 64).

where asserted risks (flight or obstruction) can be invoked through formulaic reasoning. An effective oversight mechanism should require the requesting authority to demonstrate, with reference to concrete case facts, why the risk is real and why detention is indispensable. If non-ratification remains negligible, the justificatory burden risks being diluted in practice.

Third, regarding risk calibration, the data record of 622 instances (2018–2024) in which defendants who were not detained absconded and became the subject of wanted notices. This figure confirms that flight risk is real while simultaneously reinforcing the core requirement of necessity: risk must be individualised and evidence-based, rather than presumed in general terms and then translated into a broad “safety-first” logic that makes detention routine. Finally, necessity must operate as a dynamic standard subject to periodic reassessment. Among 560,788 resolved detention cases (2018–2024), detention was cancelled in 6,536 cases ($\approx 1.17\%$) and substituted with other measures in 58,846 cases ($\approx 10.49\%$).⁷⁵

Read against the requirement of regular review of both legality and necessity, these proportions suggest that reassessment leading to termination or downgrading of detention may not be sufficiently robust to ensure that custody is maintained only while procedural risks genuinely persist. In sum, even where the stated aims are legitimate, the combined patterns, over-detention, very low non-ratification rates, measurable absconding risk, and modest cancellation or substitution, indicate that the “necessity” standard in Vietnamese criminal procedure risks remaining declaratory, rather than functioning as a substantive constraint that compels authorities to justify- and continuously re-justify, the indispensability of pre-trial detention in each individual case.

4.2.4. A Cumulative Assessment of Proportionality

In the present analysis, proportionality is not treated as a wholly separate inquiry that merely repeats the tests of legality, legitimate aim, and necessity. Rather, it is derived from the combined evaluation of those three requirements and functions as a synthetic judgment on whether the Vietnamese framework, taken as a whole, keeps pre-trial detention within the bounds of what can genuinely be justified. Looked at in that cumulative way, the difficulty in Vietnamese law does not lie in the complete absence of legal grounds, procedural aims, or rights-oriented language. The deeper problem is that, once these elements are read together, the system still appears to authorise detention with a breadth and ease that sit uneasily with a strict last-resort logic. Broadly framed statutory grounds, the continuing weight attached to offence seriousness, the weak practical position of less intrusive options, and the comparatively permissive structure governing the continuation or extension of custody in certain categories of cases all contribute to a framework in which detention is not confined with sufficient rigour to situations of demonstrable and individualised necessity.

75 *ibid*

What emerges, therefore, is not simply a series of isolated shortcomings under separate doctrinal headings, but a broader pattern of structural disproportionality. Even where legality can formally be established, and even where detention is linked to aims such as securing the proceedings or preventing interference with the administration of justice, the overall framework still leaves substantial room for liberty to be restricted more readily, more extensively, and for longer than a strict rights-limiting model would warrant. The statistical picture discussed above reinforces that conclusion. The sustained scale of arrest and detention, the continuing predominance of custodial measures among preventive measures, and the existence of cases later resulting in release, cancellation, non-extension, or transfer to administrative handling together suggest that deprivation of liberty continues to operate not merely as an exceptional response to concrete procedural risks, but also, in practice, as a relatively routine technique of criminal procedure. From the standpoint of proportionality, that is the central concern: the combined design and operation of the current Vietnamese framework do not yet ensure with sufficient force that the degree, duration, and incidence of detention remain limited to what is strictly justified in the individual case.

5 CONCLUSION AND RECOMMENDATIONS

This article shows that restrictions on the rights of the accused in Vietnamese criminal procedure are situated within a relatively developed legal framework, yet their level of compatibility with European standards remains only partial. At the formal level, Vietnamese law has established legal grounds for arrest, temporary custody, and pre-trial detention, and recognises that such measures should be imposed only where necessary. However, when assessed against the substantive requirements of the rule of law and European standards on protection against arbitrariness, individualised justification for detention, preference for less intrusive alternatives, and independent judicial control, the limitations of the current model become increasingly apparent. In particular, pre-trial deprivation of liberty in Vietnam remains strongly shaped by a risk-management logic that is biased toward detention; the seriousness of the offence continues to play a significant practical role in justifying detention; non-custodial options remain weak in both design and application; and independent oversight at the early stages of the process is still insufficiently robust to function as an effective safeguard against arbitrariness. In addition, certain specific provisions of the Criminal Procedure Code do not fully reflect the spirit of the principles already recognised at the constitutional and statutory levels, especially with regard to the right of defence, equality of arms, and the conditions necessary for preparing adversarial proceedings from the investigation stage onward. Accordingly, the gap between Vietnam and European standards does not lie in the complete absence of a legal basis, but rather in the fact that the principles governing the restriction of rights have not yet been fully transformed into mechanisms of substantive control over prosecutorial and investigative power.

On the basis of these findings, the article advances four recommendations.

First, Vietnam should further develop a fuller, more coherent understanding of judicial power in a rule-of-law state and institutionalise it consistently. Under the 2013 Constitution, the courts exercise judicial power; however, the substantive implications of that constitutional principle have not yet been fully realised. A core requirement of human rights protection in criminal procedure is that serious interference with personal liberty should be decided by a court, or at a minimum, be promptly subjected to effective judicial scrutiny. In contrast, in Vietnam's pre-trial stage, the approval of arrest and detention measures still primarily rests with the Procuracy, which raises doubts about the objectivity, legitimacy, and reasonableness of such decisions and heightens concerns about arbitrariness. It is, therefore, necessary to continue strengthening the constitutional and institutional foundations of judicial protection by enhancing the effective powers of the courts in matters affecting human rights, while also amending the Criminal Procedure Code so that pre-trial deprivation of liberty is progressively brought within a framework of independent judicial control.

Second, the Criminal Procedure Code should be revised to codify more rigorously the mandatory tests of necessity and proportionality for arrest, temporary custody, and pre-trial detention. The competent authority should be required to demonstrate, by reference to specific reasons, why deprivation of liberty is genuinely necessary in the individual case, what concrete procedural risks are present, and why less restrictive alternatives, such as bail, prohibition on leaving one's place of residence, or financial security, would be insufficient to achieve the relevant procedural objectives. At the same time, the law should reduce its reliance on offence classification as a direct pathway to detention, thereby ensuring that restrictions on liberty are calibrated to individualised procedural risk rather than to the abstract seriousness of the charge.

Third, both the Criminal Procedure Code and the law on the execution of temporary custody and pre-trial detention should be further reviewed to ensure closer compliance with the Convention against Torture, especially in relation to the questioning and interrogation of detained persons. This is a procedural space in which the rights of the accused are particularly vulnerable to torture, coercion, and inhuman or degrading treatment. The law should, therefore, regulate in greater detail the conditions under which interrogation may be conducted, the assessment of the detainee's health before and during questioning, the place of interrogation, the timing and duration of questioning, the mandatory use of audio-video recording, the permissible scope of questions posed by competent authorities, and the suspect's or accused person's right to refuse to answer questions that are unrelated to the allegations against them. Such reforms should be accompanied by stronger guarantees of transparency, monitoring, and effective access by defence counsel, so as to reduce the risk of torture, coercion, and forced confessions.

Fourth, the legal framework should be improved to ensure the timely termination or suspension of arrest and detention measures that are no longer necessary or that have been imposed unlawfully, while also addressing inconsistencies between broad procedural principles and specific implementing rules governing the rights of the accused. Vietnamese criminal procedure law does not provide a clear mechanism to suspend the execution of arrest measures or promptly terminate detention when it is no longer justified. This is a gap that should be addressed, with due regard to comparative experience. At the same time, specific rules governing the right of defence, access to case files, the gathering of evidence, and preparation for adversarial proceedings at the investigation stage should be reviewed to ensure that principles such as the right of defence and adversarial proceedings do not remain merely declaratory, but are supported by effective mechanisms of implementation. Only under such conditions can restrictions on rights in criminal procedure truly be brought within a framework of criminal justice that is more respectful of human rights and more closely aligned with European standards.

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Corresponding author, solely responsible for the manuscript preparation.

Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that his opinion and views expressed in this manuscript are free of any impact of any organisations.

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EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** Robert Reddin.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Dinh TH, 'Pre-Trial Restrictions on the Rights of the Accused in a Transitional Criminal Procedure System: Vietnam in the Light of European Human Rights Law' (2026) 9(2) Access to Justice in Eastern Europe 320-55 <<https://doi.org/10.33327/AJEE-18-9.2-a000192>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000192>

Summary: 1. Introduction. – 2. Approach and Research Methodology. – 3. Restriction of Human Rights in International Law. – 3.1. *The Accused and the Rights of the Accused*. – 3.2. *International Principles and Standards on Restricting the Rights of the Accused*. – 3.2.1. *The Principle of Legality*. – 3.2.2. *The Principles of Necessity*. – 3.2.3. *The Principle of Proportionality* – 3.2.4. *European Debates on Rights-Limitation Principles*. – 4. Assessment of the Compatibility of Vietnamese Law with International Standards on Restricting the Rights of the Accused. – 4.1. *Vietnam's Political-Legal Context*. – 4.2. *Assessment of Vietnam's Legal Framework on Restrictions of the Rights of the Accused*. – 4.2.1 *Legality*. – 4.2.2. *Legitimate Aim in Vietnam's Arrest and Pre-Trial Detention Regime*. – 4.2.3. *Necessity in Vietnam's Arrest and Pre-Trial Detention Regime*. – 4.2.4. *A Cumulative Assessment of Proportionality*. – 5. *Conclusion and Recommendations*.

Keywords: *accused persons; limitation of rights; Vietnamese criminal procedure; arrest and pre-trial detention; European Convention on Human Rights; judicial control; proportionality.*

DETAILS FOR PUBLICATION

Date of Submission: 13 Dec 2025

Date of acceptance: 9 Mar 2026

Online First Publication: 20 Apr 2026

Last Publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in the first round: 4 reports

Number of revision rounds: 2 rounds with major and minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

This article was prepared with the assistance of AI tools. Specifically, Grammarly was employed for proofreading during the drafting process (version reviewed: December 2025). The author confirms that all content, arguments, and conclusions were generated independently and remain their sole responsibility. No AI tool was used for generating original research findings or analysis.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДОСУДОВІ ОБМЕЖЕННЯ ПРАВ ОБВИНУВАЧЕНОГО В ПЕРЕХІДНІЙ СИСТЕМІ КРИМІНАЛЬНОГО ПРОЦЕСУ: В'ЄТНАМ У СВІТЛІ ЄВРОПЕЙСЬКОГО ЗАКОНОДАВСТВА У СФЕРІ ПРАВ ЛЮДИНИ

Хунг Дінь

АНОТАЦІЯ

Вступ. У цій статті розглядаються обмеження прав людини, що накладаються на підозрюваних та обвинувачених у кримінальному провадженні. Основна увага приділяється досудовій практиці. Цей етап зосереджується на заходах, що найбільше обмежують права. Він безпосередньо впливає на свободу, право на приватність та захист. У статті європейські стандарти використовуються як основний орієнтир. Дослідження спирається на Європейську конвенцію з прав людини (ЄППЛ) та прецедентне право Європейського суду з прав людини (ЄСПЛ). Основний критерій такий: заходи повинні бути передбачені законом, мати законну мету та бути необхідними в демократичному суспільстві. Необхідність розглядається разом із пропорційністю та надійними гарантіями захисту від свавілля. Відповідно до цих стандартів, стаття ставить одне ключове питання: як кримінально-процесуальне законодавство та практика В'єтнаму розробляють, застосовують та обґрунтовують обмеження прав підозрюваних та обвинувачених, і які прогалини залишаються, коли такі обмеження оцінюються відповідно до європейських вимог законності, необхідності, пропорційності та гарантій захисту від свавілля? Дослідження зосереджено на зобов'язанні В'єтнаму побудувати правову державу, провести судову реформу та посилити захист прав людини відповідно до міжнародних зобов'язань, які він взяв на себе.

Методи. Дослідження поєднує доктринальний та функціонально-порівняльний аналіз з оцінкою, орієнтованою на практику. Спочатку реконструюється європейська система обмеження прав згідно з прецедентним правом ЄСПЛ та ЄСПЛ (законність, легітимна мета,

необхідність, пропорційність та гарантії захисту від свавілля). Потім аналізуються конституційні та кримінально-процесуальні норми В'єтнаму щодо примусових та слідчих заходів, що обмежують свободу, недоторканність приватного життя та права на захист, та здійснюється їх порівняння з практикою застосування, зокрема щодо судового рішення, структурованого обґрунтування, строків та засобів правового захисту.

Результати та висновки. Дослідження виявляє не тільки часткову конвергенцію між системою В'єтнаму та європейськими стандартами у сфері прав людини, але також і стійкі прогалини. Нормативно, в'єтнамський кримінальний процес не послідовно застосовує структурований тест на законність, необхідність та пропорційність для примусових заходів. На практиці, досудове ухвалення рішень залишається сильно орієнтованим на тримання під вартою, з обмеженим використанням менш обмежувальних альтернатив та нерівномірним обґрунтуванням конкретних справ. Інституційно, незалежний судовий контроль на стадії розслідування є відносно слабким, а ключові гарантії, на яких наголошується в європейській судовій практиці (зокрема ранній доступ до захисту, змістовний перегляд та ефективні засоби правового захисту) не завжди є надійними. У статті зроблено висновок, що тісніша відповідність можлива, якщо В'єтнам перейде до моделі обмежень, що ґрунтується на зазначених критеріях. Це вимагає кодифікованих тестів на необхідність та пропорційність, посиленого та більш інтенсивного судового контролю за заходами, що істотно обмежують права, структурованого обґрунтування рішень, пріоритетності альтернатив тримання під вартою та наслідків, що підлягають виконанню, за незаконні обмеження.

Ключові слова. Обвинувачені особи; обмеження прав; кримінальний процес у В'єтнамі; арешт та досудове ув'язнення; Європейська конвенція з прав людини; судовий контроль; пропорційність.

TÓM TẮT BẰNG TIẾNG VIỆT*

Bài báo nghiên cứu

HẠN CHẾ ĐỐI VỚI QUYỀN CỦA NGƯỜI BỊ BUỘC TỘI Ở GIAI ĐOẠN TIỀN XÉT XỬ TRONG MỘT HỆ THỐNG TỔ TỤNG HÌNH SỰ ĐANG CHUYỂN ĐỔI:
TRƯỜNG HỢP VIỆT NAM DƯỚI ÁNH SÁNG CỦA LUẬT NHÂN QUYỀN CHÂU ÂU

Hung Đình Thế

TÓM TẮT

Bối cảnh: Bài viết này phân tích việc hạn chế quyền con người đối với người bị tình nghi và người bị buộc tội trong tổ tụng hình sự, với trọng tâm là giai đoạn tiền xét xử. Đây là giai đoạn tập trung

* The publication metadata in Vietnamese is presented as submitted by the authors.

những biện pháp can thiệp nghiêm khắc nhất và tác động trực tiếp đến quyền tự do, quyền riêng tư và quyền bào chữa. Bài viết sử dụng các tiêu chuẩn châu Âu làm cở sở đối chiếu chủ yếu, dựa trên Công ước châu Âu về quyền con người (ECHR) và án lệ của Tòa án Nhân quyền châu Âu (ECtHR). Theo các tiêu chuẩn này, việc hạn chế quyền chỉ được chấp nhận khi được quy định rõ trong luật, nhằm theo đuổi mục đích chính đáng và là cần thiết trong một xã hội dân chủ. Yêu cầu về tính cần thiết phải được xem xét cùng với tính tương xứng và các bảo đảm hữu hiệu nhằm ngăn ngừa sự tùy tiện. Trên cở sở đó, bài viết đặt ra câu hỏi trung tâm: pháp luật và thực tiễn tố tụng hình sự Việt Nam đang thiết kế, áp dụng và biện minh cho việc hạn chế quyền của người bị tình nghi và người bị buộc tội như thế nào, và còn tồn tại những khoảng trống gì khi các giới hạn này được đánh giá theo các yêu cầu của châu Âu về tính hợp pháp, tính cần thiết, tính tương xứng và các bảo đảm chống tùy tiện? Nghiên cứu được đặt trong bối cảnh Việt Nam cam kết xây dựng Nhà nước pháp quyền, thúc đẩy cải cách tư pháp và tăng cường bảo vệ quyền con người phù hợp với các nghĩa vụ quốc tế mà Việt Nam đã tham gia.

Phương pháp: Nghiên cứu kết hợp phân tích học thuyết pháp lý, so sánh chức năng và đánh giá từ góc độ thực tiễn. Trước hết, bài viết tái dựng khuôn khổ giới hạn quyền theo ECHR và án lệ ECtHR, gồm các yếu tố: tính hợp pháp, mục đích chính đáng, tính cần thiết, tính tương xứng và các bảo đảm chống tùy tiện. Tiếp đó, nghiên cứu phân tích các quy định của Hiến pháp và pháp luật tố tụng hình sự Việt Nam về các biện pháp cưỡng chế và biện pháp điều tra hạn chế quyền tự do, quyền riêng tư và quyền bào chữa; đồng thời đối chiếu các quy định này với thực tiễn áp dụng, đặc biệt ở các khía cạnh như cở chế phê chuẩn tư pháp, yêu cầu quyết định phải nêu rõ căn cứ và lý do, thời hạn áp dụng biện pháp, cũng như cở chế xem xét lại và khắc phục vi phạm.

Kết quả và Kết luận: Nghiên cứu cho thấy pháp luật tố tụng hình sự Việt Nam có sự tương thích nhất định với các tiêu chuẩn nhân quyền châu Âu, nhưng vẫn còn những khoảng trống đáng kể. Xét về phương diện pháp lý, pháp luật tố tụng hình sự Việt Nam chưa quy định một cách nhất quán các tiêu chí đánh giá về tính hợp pháp, tính cần thiết và tính tương xứng đối với các biện pháp cưỡng chế. Về phương diện thể chế, cở chế kiểm soát tư pháp độc lập ở giai đoạn điều tra còn tương đối hạn chế; đồng thời, những bảo đảm quan trọng được nhấn mạnh trong án lệ châu Âu, như quyền tiếp cận người bào chữa từ sớm, quyền được xem xét lại một cách thực chất và quyền được khắc phục hữu hiệu, chưa phải lúc nào cũng được bảo đảm đầy đủ.

Bài viết kết luận rằng Việt Nam hoàn toàn có nền tảng pháp quyền để tiệm cận gần hơn với các chuẩn mực châu Âu nếu chuyển sang mô hình hạn chế quyền dựa trên các tiêu chí rõ ràng. Điều này đòi hỏi pháp luật phải quy định cụ thể các tiêu chí về tính cần thiết và tính tương xứng; tăng cường kiểm soát tư pháp theo hướng chặt chẽ hơn, phù hợp với mức độ xâm phạm của từng biện pháp; bảo đảm các quyết định tố tụng phải nêu rõ căn cứ và lý do áp dụng; ưu tiên các biện pháp thay thế tạm giam; và quy định rõ hậu quả pháp lý đối với các trường hợp hạn chế quyền trái pháp luật.

Từ khóa: người bị buộc tội; giới hạn quyền; tố tụng hình sự Việt Nam; bắt và tạm giam trước xét xử; Công ước châu Âu về quyền con người; kiểm soát tư pháp; tính tương xứng.

Research Article

REDUCED VAT RATES ON HOUSING WITHIN SOCIAL POLICY AND LEGAL CERTAINTY: A COMPARATIVE ANALYSIS OF SLOVENIA AND SELECTED EUROPEAN JURISDICTIONS

Aleksandra Heinzer

ABSTRACT

Background: Article 98 and Annex III (10) of the EU's Directive 2006/112/EC permit reduced VAT rates for "the supply, construction, renovation and alteration of housing, as part of a social policy". While the provision grants Member States discretion, the Court of Justice of the European Union (CJEU) requires strict interpretation and compliance with the principles of legal certainty and proportionality. Slovenia applies a reduced VAT rate based almost exclusively on technical parameters such as maximum floor area, without income thresholds, formal certification or links to national housing policy. This raises questions about the coherence of the Slovenian regime with EU requirements and comparative practice.

Method: This article applies a doctrinal and comparative legal methodology. At the EU level, it examines Article 98 and Annex III (10) of the VAT Directive, as well as relevant CJEU case law, to determine the requirements of legal certainty, proportionality, and targeted social policy implementation.

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000186>

Date of submission: 24 Nov 2025

Date of acceptance: 09 Feb 2026

Publication: 20 May 2026

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At the national level, it analyses the Slovenian Value Added Tax Act and the Rules on the Implementation of the VAT Act. The comparative component covers twelve Member States and the United Kingdom, focusing on eligibility criteria, social targeting mechanisms, and administrative certification.

Results and Conclusions: *The analysis shows that Slovenia's technically elaborate reduced VAT regime lacks a coherent social policy focus. Undefined legal concepts, reliance on construction-law classifications, ambiguous treatment of appurtenant parts and leisure facilities, and the absence of income-based or certification mechanisms undermine legal certainty and targeting. In contrast, Member States such as France, Spain, Italy, Luxembourg, Portugal, and Romania employ income thresholds, administrative certification, value caps or claw-back mechanisms, while Slovenia and Hungary rely exclusively on technical parameters. Slovenia thus satisfies formal legal certainty but fails to meet the substantive requirements of proportionality and social targeting under the VAT Directive. This article recommends income-based eligibility criteria, administrative certification, clearer statutory definitions, and closer alignment with national housing policy objectives.*

1 INTRODUCTION

Value added tax (VAT) is the most important source of indirect tax revenue in the EU and a central pillar of national tax systems. In Slovenia, VAT accounted for more than one-third of total tax revenue in 2022.¹ While VAT is designed as a broadly neutral general consumption tax, concerns about its distributional impact reflect the long-standing view in the public-finance literature that consumption taxes may place a relatively heavier burden on lower-income households, raising questions of distributive fairness and social-policy design, a concern long recognised in the economic literature.² De la Feria has nevertheless emphasised that the widespread characterisation of VAT as inherently regressive is more nuanced than often assumed, and that policy responses based on reduced rates and exemptions are frequently poorly targeted instruments for achieving social objectives.³

A distinct question arises under EU law with regarding the principle of proportionality. In the VAT context, proportionality operates as a legal constraint on Member States' discretion and as a balancing tool in *CJEU* case law, alongside the structural principle of neutrality.⁴ The Court has repeatedly underlined that the discretion conferred by Article 98 of the Directive 2006/112/EC (VAT Directive) must be exercised consistently with the general

1 European Commission, *Taxation Trends in the European Union: Data for the EU Member States, Iceland and Norway* (Publications Office of the EU 2022) 25, doi:10.2778/259544.

2 Anthony B Atkinson and Joseph E Stiglitz, *Lectures on Public Economics* (McGraw-Hill, 1980); James A Mirrlees (ed), *Tax by Design: The Mirrlees Review* (OUP, 2011).

3 Rita de la Feria, 'Addressing VAT Regressivity' (2021) 132 *Revista Técnica Tributaria* 134-8.

4 Marco Greggi, 'Neutrality and Proportionality in VAT: Making Sense of an (Apparent) Conflict' (2020) 48(1) *Intertax* 123-5, doi:10.54648/taxi2020009.

principles of EU law, including legal certainty and proportionality. Against this background, and to mitigate the regressive tendencies of VAT, Article 98 of the VAT Directive allows Member States to apply reduced VAT rates to goods and services listed in Annex III, including, under point 10, “the supply, construction, renovation and alteration of housing, as part of a social policy”. This provision gives Member States the discretion to tailor VAT measures to social objectives, yet EU law simultaneously requires compliance with the principles of legal certainty and proportionality, as underscored by CJEU case law.⁵

Consumption taxes such as VAT are traditionally regarded as regressive because lower-income households allocate a larger share of their budget to consumption; however, recent empirical evidence suggests a more nuanced picture. Thomas, using household-level expenditure data across twenty-seven OECD countries, finds that when VAT is measured relative to consumption rather than income, the tax tends to be broadly proportional or even slightly progressive, largely due to the compensatory effect of social transfers that mitigate its regressivity.⁶ Nevertheless, this does not diminish concerns about the distributional burden of VAT, nor does it justify the widespread policy reliance on reduced rates and exemptions. As de la Feria demonstrates, an extensive body of legal and economic evidence shows that exclusions from the VAT base, introduced on equity grounds, are ineffective in achieving meaningful redistributive goals and persist primarily for political rather than economic reasons.⁷ Empirical microsimulation results for Croatia further confirm this view: Rubil finds that “socially motivated” reduced VAT rates benefit all consumers, including higher-income households, while redirecting the fiscal cost of these reduced rates into targeted social transfers produces superior outcomes, reducing poverty and post-fiscal income inequality despite the VAT becoming mechanically more regressive.⁸ Together, these findings indicate that equity concerns linked to VAT regressivity are best addressed not through reduced VAT rates, but through well-designed, targeted transfer mechanisms outside the VAT system.

The 2022 reform of the VAT Directive⁹ introduced Articles 105a and 105b, establishing specific, partly transitional derogation regimes within the general framework of Article 98 and

5 Case C-416/85 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (CJEU, 21 June 1988) EU:C:1988:321; Case C-161/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* (CJEU, 4 June 2015) EU:C:2015:355; Case C-278/24 *PK v Dyrektor Izby Administracji Skarbowej we Wrocławiu* (CJEU, 30 April 2025) EU:C:2025:299.

6 Alastair Thomas, *Reassessing the Regressivity of the VAT* (OECD Taxation Working Papers no 53, OECD Publishing 2020) 11, doi:10.1787/b76ced82-en.

7 De la Feria (n 3).

8 Ivica Rubil, ‘Distributivni učinci ukidanja “socijalno motiviranih” sniženih stopa PDV-a radi povećanja izdašnosti i obuhvata cilja’ (2022) 29(2) *Revija za socijalnu politiku* 129-30.

9 Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax [2006] OJ L 347/1, arts 98, 105a, 105b; Annex III pt 10; Directive (EU) 2022/542 of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as Regards Rates of Value Added Tax [2022] OJ L 107/1.

Annex III. Article 105a lays down the conditions under which Member States may continue to apply super-reduced or zero rates and certain 'parking rates' that were in force on 1 January 2021, as well as the possibility to opt for derogations applied by other Member States. In contrast, Article 105b creates a transitional regime for transactions relating to housing that are not part of a social policy, allowing Member States to maintain reduced rates lawfully applied on 1 January 2021, even where those rates are below 12%, subject to the requirement that from 1 January 2042 onwards the applicable rate must not fall below 12%.

In other words, EU law permits derogations only for Member States that had already introduced them before 1 January 2021, under the specific conditions laid down in Articles 105a and 105b. Slovenia has not notified any derogation falling under Article 105b. Its reduced VAT rate on housing-related transactions operates within the ordinary framework of Article 98 in conjunction with point 10 of Annex III, which covers not only housing provided as part of a social policy but also renovation and repair services carried out on private dwellings, subject to national conditions.

While Slovenian law thus applies reduced rates to both socially targeted housing measures and certain non-social renovation services,¹⁰ the present article focuses on the social-policy dimension. To understand Slovenia's implementation challenges in that respect, it is first necessary to situate its approach within the broader objectives of Directive (EU) 2022/542. This contextual bridge allows the analysis to move from EU-wide reforms to national application, ensuring that the specificities of Slovenian law are assessed within the wider legal and policy framework established at the EU level.

In Slovenia, the part of point 10 of Annex III relating to housing provided as part of a social policy is implemented primarily through technical eligibility thresholds based on dwelling size, namely a maximum floor area of 120 m² for apartments and 250 m² for single-family houses.¹¹ These criteria, embedded in the PZDDV, operate without reference to household income, social vulnerability, or formal certification mechanisms.¹² No cross-reference is made to the National Housing Programme 2015–2025 (ReNSP15-25) or to any administrative verification procedure.¹³ This approach has generated legal uncertainty, as taxpayers and administrators lack clear and predictable rules on the scope and purpose of

10 Law of the Republic of Slovenia no 1068-IV of 27 October 2006 'Value Added Tax Act (ZDDV-1)' [2006] Uradni list RS 117, Annex I pt 11, as amended [in Slovenian] <<https://pisrs.si/pregledPredpisa?id=ZAKO4701>> accessed 25 January 2026.

11 Rules on the Implementation of the Value Added Tax Act of 15 December 2006 (PZDDV) [2006] Uradni list RS 141, as amended [in Slovenian] <<https://pisrs.si/pregledPredpisa?id=PRAV7542>> accessed 25 January 2026.

12 Aleksandra Heinzer, 'Pregled DDV zakonodaje na področju uporabe znižane DDV stopnje za dobavo, gradnjo, obnovo in popravila stanovanj v Sloveniji' (*Davčno svetovalna zbornica Slovenije*, 1 March 2024) <https://www.dszs.si/mnenja_clanov> accessed 25 January 2026.

13 Resolution of the Ministry of the Environment and Spatial Planning no 0736-VII of 24 November 2015 'On the National Housing Programme 2015–2025 (ReNSP15-25)' [2015] Uradni list RS 92 [in Slovenian].

the reduced rate. As emphasised in the *OECD Economic Surveys: Slovenia 2024*, VAT design remains a central element in shaping housing affordability, yet poorly targeted reduced rates offer little distributive relief.¹⁴ In Slovenia, housing VAT relief is granted without any social criteria, leading to significant efficiency and equity concerns.

Comparative practice shows that several Member States, such as Spain, France, and Luxembourg, require certification, income-based eligibility or claw-back mechanisms to ensure that reduced rates apply only to social or affordable housing. By contrast, Slovenia's framework applies automatically to any dwelling within the prescribed size limits, regardless of social criteria. Against this background, this article addresses a single overarching research question:

How does Slovenia's reduced VAT rate on housing, adopted under Article 98 and Annex III (10) of the VAT Directive, compare with selected European jurisdictions in terms of legal certainty, proportionality and social-policy targeting?

This article contributes to the literature by providing a normative legal assessment of the compatibility of Slovenia's regime with EU law and by highlighting the implications of the absence of social criteria for legal certainty and fairness. The findings underline that Slovenia's current framework raises doubts about its compliance with EU principles and the social objectives underlying reduced VAT rates.

To answer this question, the article applies a doctrinal and comparative legal analysis of Slovenian and EU VAT rules, assessing how the Slovenian framework aligns with selected Member States and with the objectives of Article 98 and Annex III (10) to the VAT Directive.

2 EU AND NATIONAL FRAMEWORKS

2.1. Contextual Background and National Framework

This section examines the Slovenian legal framework governing the application of reduced VAT rates to housing. It outlines the relevant provisions of the Value Added Tax Act (ZDDV-1) and the Rules on its Implementation (PZDDV), together with the Construction Act (GZ-1), the Regulation on the Classification of Structures and the Technical Guideline TSG-V-006:2022, to identify how eligibility for the reduced rate is defined and whether these rules incorporate social-policy criteria or rely primarily on technical parameters.¹⁵

14 OECD, *OECD Economic Surveys: Slovenia 2024* (OECD Publishing 2024) 87, doi:10.1787/bc4a107b-en.

15 ZDDV-1 (n 10); PZDDV (n 11); Law of the Republic of Slovenia no 1961-VIII of 9 December 2021 'Construction Act (GZ-1)' [2021] Uradni list RS 199, as amended [in Slovenian] <<https://pisrs.si/pregledPredpisa?id=ZAKO8244>> accessed 25 January 2026; Technical guideline TSG-V-006: 2022: Classification of Objects [2021] Uradni list RS 199.

The analysis reveals several ambiguities: the undefined terms “permanent residence” and “investor”, the absence of income- or vulnerability-based eligibility criteria, and the lack of certification requirements.

Although Annex I, point 11 ZDDV-1 refers to housing “intended for permanent residence”, this phrase is not defined in Slovenian VAT law. The implementing regulation partially addresses this gap. Article 54(4) of the Rules on the Implementation of the VAT Act provides that the intended use of buildings must be determined by reference to the Regulation on the Classification of Structures adopted under construction law. This cross-reference to construction law suggests that classification as a residential building may be sufficient to qualify a dwelling as being “intended for permanent residence” for VAT purposes. However, this approach raises significant concerns from a social policy perspective. The Regulation on the Classification of Structures encompasses not only primary residences but also certain holiday homes that do not necessarily satisfy the “intended for permanent residence” criterion. As a result, eligibility for the reduced VAT rate may depend primarily on technical planning classifications rather than on substantive social-policy criteria such as household income, vulnerability, or effective long-term occupation.

This reliance on construction-law categories risks diluting the social-policy rationale underpinning point 10 of Annex III to the VAT Directive and may undermine the targeted character of the Slovenian regime.

Likewise, the requirement in Article 54(1) PZDDV that supplies be made “directly to the investor” draws on the definition of “investor” in the GZ-1, but this does not clarify how the concept applies when non-owners (such as tenants commissioning minor works) engage contractors.

A further ambiguity arises from Article 54(2) of the Rules on the Implementation of the VAT Act. That provision defines “appurtenant parts” of qualifying residential buildings as individual units and common areas, as well as structural elements, installations, equipment and fittings, if they are jointly used by residents for permanent living and owned by the apartment owners in the building.

In practice, however, this distinction is difficult to apply. The regulation does not specify how the boundary between residential appurtenances and “leisure” facilities is to be drawn, nor does it clarify the criteria for determining whether a given space is genuinely linked to permanent residence or primarily intended for recreation. Questions arise, for example, as to whether shared wellness areas, saunas, hobby rooms or multipurpose spaces within residential complexes fall inside or outside the scope of the reduced rate.

The absence of interpretative guidance on these notions further exacerbates legal uncertainty. It leaves both taxpayers and tax authorities with significant discretion, thereby undermining the predictability and targeted character of the Slovenian regime.

These gaps mirror concerns widely recognised in the literature on tax simplicity, clarity, and targeting. Poorly defined eligibility conditions increase the risk of misapplication, system abuse, and unintended beneficiaries. Engelschalk and Loeprick show that simplified or preferential regimes that rely on broad or vague criteria are prone to targeting failures and administrative inconsistency.¹⁶ The OECD likewise observes that Slovenia applies reduced VAT rates to housing without income thresholds, social-vulnerability criteria, or administrative certification, raising concerns about fairness and effective policy targeting.¹⁷ In the broader tax-equity literature, Cuyo and Morales argue that the design and application of VAT in Ecuador have regressive distributional effects, disproportionately burdening lower-income households and raising concerns about compliance with principles of equality and non-discrimination.¹⁸

Legal certainty is a fundamental principle of EU law that requires tax legislation to be clear, predictable, transparent, and non-retroactive, thereby protecting taxpayers from arbitrary or inconsistent fiscal measures. The CJEU has held that the principle of legal certainty aims to ensure the predictability of legal situations and requires that a taxable person's position regarding their rights and obligations vis-à-vis the tax authorities cannot be called into question indefinitely, thereby enabling taxpayers to foresee how the authorities may act.¹⁹ Recent scholarship highlights that legal certainty also depends on the predictability and internal coherence of judicial decision-making: Brzeziński and Franczak show that inconsistent interpretative shifts undermine transparency and weaken taxpayers' trust in the stability of tax law.²⁰

From a tax-policy perspective, legal certainty is closely linked to the principle of simplicity. Ryesky notes that excessive complexity, overlapping rules, and ambiguous statutory language increase compliance burdens, diminish comprehensibility for ordinary taxpayers, and heighten the risk of inconsistent administrative application.²¹ These theoretical insights underline that clarity, transparency, predictability, and simplicity jointly support the proper functioning of VAT and are essential to ensuring that reduced VAT rates achieve their intended social-policy objectives.

16 Michael Engelschalk and Jan Loeprick, *MSME Taxation in Transition Economies: Country Experience on the Costs and Benefits of Introducing Special Tax Regimes* (Policy Research Working Paper 7449, World Bank Group 2015) doi:10.1596/1813-9450-7449.

17 OECD (n 14).

18 Jomayra Nicol Cuyo Caisaguano y Martha Alejandra Morales Navarrete, 'Análisis sobre el principio de igualdad y no discriminación en la aplicación del Impuesto al Valor Agregado en el Ecuador' (2024) 17(27) *Misión Jurídica: Revista de Derecho y Ciencias Sociales* 139-43, doi:10.25058/1794600X.2463.

19 Case C-615/21 *Napfény-Toll Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (CJEU, 13 July 2023) ECLI:EU:C:2023:573, para 40.

20 Bogumił Brzeziński and Agnieszka Franczak, 'In Search of a Strategy for the Interpretation of Tax Law by Courts' (2024) 16(4) *Krytyka Prawa* 57-8, 74-5, doi:10.7206/kp.2080-1084.720.

21 Kenneth H Ryesky, 'Tax Simplification: So Necessary and So Elusive' (2004) 2(2) *Pierce Law Review* 93-6, 101-3.

Building on this literature, the following sections assess whether Slovenia's implementation of the reduced VAT rate for housing satisfies the requirements of legal certainty under EU law and how this framework compares with the approaches adopted in other Member States.

2.2. Legal and Theoretical Framework

This section sets out the EU law framework governing reduced VAT rates on housing, the theoretical concepts used in the analysis. Then it turns to the relevant CJEU case law and the broader economic and administrative law debates.

At the EU level, Member States' discretion to introduce reduced rates derives from Article 98 of the VAT Directive, but this discretion is legally constrained by the structural principles of the common VAT system and by the general principles of EU law. In interpreting VAT rules, the CJEU often faces the challenge of reconciling the principle of strict interpretation of exemptions with the need to preserve fiscal neutrality, creating a delicate balance between formal precision and economic fairness. As de la Feria et al. note (2015), this tension illustrates that legal certainty in taxation is not merely procedural but also substantive; it safeguards equality and prevents arbitrary administrative action.²²

The CJEU has consistently emphasised that derogations from the standard VAT rate must be interpreted strictly and apply only to clearly defined categories listed in Annex III to the VAT Directive. Compared with several other Member States, such as Spain, France, and Luxembourg, which operationalise reduced VAT rates for housing through certification, income thresholds, or clawback mechanisms, Slovenia relies almost exclusively on technical parameters.

Against that EU-law background, the limits of Member States' discretion are primarily shaped through judicial review, with proportionality emerging as the central doctrinal tool.

As Sauter notes, the proportionality principle in EU law serves as a key supervisory mechanism ensuring that the exercise of national discretion remains within the bounds of necessity and suitability for the stated objectives.²³ Similarly, Joosen interprets proportionality as an area of controlled national discretion, where Member States retain policy flexibility but within a framework that preserves coherence with EU law.²⁴

22 Rita de la Feria, *EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox* (Working Paper 16/03, Oxford University Centre for Business Taxation 2016) 1-2, 25-6.

23 Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15(1) *Cambridge Yearbook of European Legal Studies* 440-1, 448, doi:10.5235/152888713809813611.

24 Bart PM Joosen, *The Principle of Proportionality as an Area of National Discretion* (Working Paper Series 151, EBI 2023) 12-5.

These general principles operate across the VAT system and strictly limit the scope for divergent national implementation.

In VAT matters, this balance is particularly visible in optional regimes such as VAT grouping under Article 11 of the VAT Directive, which allows Member States to treat legally independent persons who are closely bound by financial, economic and organisational links as a single taxable person. When exercising that option, national discretion remains conditioned by the structural principles of the common VAT system.²⁵ The sources suggest that deviation from EU directives is highly constrained, as implementation must strictly adhere to the general principles of EU law. Member States, therefore, enjoy only limited room for manoeuvre when transposing or applying directives. As Hartkamp et al. emphasise, the general principles of EU law have a constitutional nature and form part of primary law, subjecting all national implementation to strict judicial scrutiny.²⁶

This general understanding is reflected in CJEU case law. The principle of proportionality serves as a fundamental constraint on the legislative and administrative discretion of Member States when implementing the VAT Directive. It requires that national measures pursuing legitimate fiscal or social policy objectives be suitable for achieving those aims and not go beyond what is necessary. The CJEU established this three-step proportionality test in *Fedesa* (C-331/88), holding that any restrictive measure must be appropriate, necessary, and not disproportionate to the objectives pursued.²⁷ In parallel, the Court has clarified that the general principles of legal certainty and the protection of legitimate expectations must be respected when Member States modify or withdraw fiscal advantages. In *Plantanol* (C-201/08), although it concerned excise duties on biofuels rather than VAT, the CJEU held that the early repeal of a tax exemption was not contrary to EU law per se if the changes were clear and foreseeable and afforded adequate time for adaptation. The ruling reaffirmed that legal certainty requires both clarity and predictability in legislative measures, especially where financial burdens are imposed, and that legitimate expectations must be assessed in concrete terms regarding whether a prudent economic operator could reasonably foresee the legislative change.²⁸

As Mudrecki explains, proportionality serves a dual role in tax law: it protects taxpayers from excessive public intervention while preserving the effectiveness of tax collection. He further notes that this judicial approach limits Member States' discretion by requiring that

25 B Gryziak, 'VAT Groups and the Right of Deduction across the European Union: Review and Analysis' (2021) 32(4) *International VAT Monitor*. doi:10.59403/3299jar.

26 Arthur S. Hartkamp, 'The General Principles of EU Law and Private Law' (2011) 75 *Rechtszeitschrift für ausländisches und internationales Privatrecht* 241-3.

27 Case C-331/88 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Fedesa and Others* (CJEU, 13 November 1990) EU:C:1990:391, para 13.

28 Case C-201/08 *Plantanol GmbH & Co. KG tegen Hauptzollamt Darmstadt* (CJEU, 10 September 2009) EU:C:2009:539, paras 43-46, 49-53, 57 and 68.

domestic VAT provisions respect both necessity and coherence with EU objectives.²⁹ In a broader review of tax jurisprudence, Beshi and Susuri confirm that proportionality now functions as a central benchmark in the CJEU's analysis of fiscal measures.³⁰

Recent legislative reforms have added a further layer to the EU framework governing reduced VAT rates. Directive (EU) 2022/542 introduced transitional arrangements allowing certain Member States to retain pre-existing reduced VAT rates that fall outside the ordinary system of Article 98 and Annex III of the VAT Directive. Such derogation-based regimes form a distinct category within EU VAT law, and the present analysis does not address them. Instead, it focuses on housing-related reduced VAT rates applied under the general system of Article 98 and Annex III (10) of the VAT Directive.

More generally, the taxation of housing under VAT has long generated extensive debate about the social role of housing, since taxing residential construction and sales without compensatory mechanisms may exacerbate inequality.³¹

From an economic perspective, Thomas concludes that reduced VAT rates are poorly targeted and administratively costly.³² Cnossen likewise criticises rate differentiation in the housing sector as distorting the neutrality of VAT and advocates a broader application of the standard rate within a reformed housing regime.³³ These perspectives form the theoretical basis for assessing whether technically defined housing regimes can fulfil the redistributive and legal-certainty objectives inherent in Article 98 and Annex III(10) of the VAT Directive.

Beyond VAT-specific doctrine, the limits of national discretion can also be illuminated by broader administrative law theory. As Ivanova notes, the balance between administrative discretion and judicial control constitutes a cornerstone of modern governance, ensuring that public decision-making remains aligned with legality, transparency and the rule of law.³⁴ Although developed primarily in the context of administrative courts, this conceptual framework provides a valuable analogy for interpreting national discretion under Article 98 of the VAT Directive. In both settings, discretion does not represent an autonomous sphere of freedom, but rather a delegated competence exercised within boundaries set by higher legal norms. Judicial review,

29 Artur Mudrecki, 'The Contemporary Significance of the Principle of Proportionality in Tax Law' (2021) 26(4) Białostockie Studia Prawnicze 37, 39-40, 44-5, doi:10.15290/bsp.2021.26.04.03.

30 Simeana Beshi and Driola Susuri, 'Proportionality Principle in the CJEU Judgments on Tax Cases' (2023) 9(4) Lex Portus 28, doi:10.26886/2524-101X.9.4.2023.3.

31 Satya N Poddar, 'Taxation of Housing Under a VAT' (2010) 63 Tax Law Review 901.

32 Alastair Thomas, *VAT Rate Structures in Theory and Practice* (Policy Research Working Paper 10677, World Bank Group 2024) 2-3, doi:10.1596/1813-9450-10677.

33 Sijbren Cnossen, 'A Proposal to Improve the VAT Treatment of Housing in the European Union' (2011) 32(4) Fiscal Studies 457.

34 Roksolana Ivanova, 'Growing Influence of Judicial Control of Administrative Courts on Public Administration Bodies' (2023) 9 Economics, Finances and Law 82, doi:10.37634/efp.2023.9.19.

therefore, functions as a corrective mechanism, ensuring that discretionary measures, whether administrative or fiscal, remain proportionate, transparent and consistent with the objectives of the governing legal framework. In the VAT context, this is reflected in the CJEU's role in delineating the limits of Member States' discretion to apply reduced rates, thereby safeguarding the coherence and uniformity of the common VAT system.

Building on this discussion of proportionality and the general principles of EU law, it is also necessary to distinguish between the formal and substantive dimensions of legal certainty, which play a central role in the interpretation and application of VAT provisions.

These two dimensions differ fundamentally in their approach to predictability and the acceptability of legal decision-making. Formal legal certainty concerns the predictability of legal norms, requiring VAT provisions to be clear, stable, and intelligible so that taxpayers can accurately anticipate the legal consequences of their actions. In contrast, substantive legal certainty extends beyond mere predictability, focusing on the rational acceptability of legal decisions within the tax community and their coherence with the underlying principles of justice.³⁵

In the VAT context, this distinction manifests as a tension between strict procedural compliance and the protection of substantive rights. As Barth et al. observe, the non-fulfilment of certain formal requirements does not necessarily invalidate a taxpayer's substantive entitlement, particularly where the underlying transaction remains genuine and properly documented. Substantive legal certainty, therefore, allows for a more purposive and economically realistic interpretation of VAT law, prioritising the true substance of the transaction over rigid procedural formalism.³⁶

Lifante-Vidal et al. further emphasise that legal certainty cannot be completely detached from substantive justice, as formal rules must always be interpreted within a broader normative and contextual framework. In VAT law, this interplay between formal and substantive dimensions underscores the need for balanced interpretation, one that preserves predictability for taxpayers while ensuring outcomes that remain fair, rational, and consistent with the objectives of the common VAT system.³⁷

Against this theoretical and doctrinal background, this article does not contend that Slovenia has failed formally to transpose the VAT Directive. The Slovenian reduced rate on housing is, in principle, anchored in Article 98 of the VAT Directive and point 10 of Annex

35 Elina Paunio, 'Beyond Predictability: Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10(11) German Law Journal 1469, doi:10.1017/S2071832200018332.

36 Fabian Barth, 'CJEU Case Law on Exercising Rights Under EU VAT: Is There a Golden Thread in the Distinction Between Substantive and Formal Conditions?' (2022) 31(6) EC Tax Review 341, doi:10.54648/ecta2022033.

37 Isabel Lifante-Vidal, 'Is Legal Certainty a Formal Value?' (2020) 11(3) Jurisprudence 456, doi:10.1080/20403313.2020.1778289.

III, and therefore falls within the discretion accorded to Member States. The core of the critique developed in this study concerns the way discretion has been exercised at the national level, in particular through reliance on purely technical eligibility criteria, the absence of income- or vulnerability-based conditions and certification mechanisms, and the resulting lack of legal certainty and social targeting.

The analysis further demonstrates that these weaknesses become especially visible when Slovenia's model is placed in a comparative perspective. Several Member States operating under the same legal framework have complemented reduced rates for housing with administrative controls or social-policy criteria designed to confine the benefit to genuinely social housing. The Slovenian framework does not appear to breach EU law per se, but rather illustrates a minimalist use of the discretion left by the VAT Directive, combined with drafting choices that generate uncertainty and weaken the social-policy rationale of the measure. It is this combination, rather than a simple failure of transposition, that forms the central focus of the present research.

3 METHODOLOGY

3.1. Analytical Approach

This study applies a doctrinal and comparative legal methodology to examine the coherence of Slovenia's reduced VAT rate on housing with the objectives and principles of EU law. The doctrinal component entails the systematic location, interpretation and synthesis of legal sources, including legislation, case law and scholarly writings, to clarify the content of the law, analyse the relationships between legal rules and principles, identify internal inconsistencies and develop normative arguments concerning the proper interpretation and application of the legal framework.³⁸ This understanding of doctrinal legal research also draws on accounts which describe doctrinal research as a process of identifying legal problems, analysing authoritative sources and producing reasoned conclusions and recommendations.³⁹

At the EU level, the research examines the legal basis and interpretation of reduced VAT rates, drawing on key CJEU judgments. In particular, the Court has stressed that reduced rates constitute an exception to the standard rate and may be applied only within the strict conditions laid down in Article 98 and Annex III.⁴⁰ More generally, CJEU case law also

38 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, doi:10.21153/dlr2012vol17no1art70.

39 Nasir Majeed, Amjad Hilal and Arshad Nawaz Khan, 'Doctrinal Research in Law: Meaning, Scope and Methodology' (2023) 12(4) *Bulletin of Business and Economics* 559, doi:10.61506/01.00167.

40 Case C-161/14 (n 5) paras 22–25.

highlights the need for uniform interpretation of EU VAT concepts and the principle that discretionary choices must remain bounded by higher-order legal norms.⁴¹

At the national level, the analysis focuses on the ZDDV-1, specifically Article 41 and Annex I, point 11, and the PZDDV, notably, Articles 54 and 54.a. These provisions are examined together with the GZ-1 and the Regulation on the Classification of Structures, to determine how eligibility for the reduced VAT rate is defined and whether it incorporates elements of social policy or only technical criteria.

This study relies on a doctrinal and comparative legal methodology. It does not attempt to measure the price effects of reduced VAT rates or their distributive impact across income groups. Nor does it systematically analyse administrative practice beyond published guidance and official reports. The qualitative and normative character of the analysis reflects the legal nature of the research question: rather than engaging in econometric modelling or statistical evaluation, the article assesses the design of VAT rules against EU-law standards such as legal certainty, proportionality and social-policy targeting through interpretative reasoning and doctrinal evaluation.⁴²

3.2. Comparative Scope and Criteria

The comparative component examines twelve EU jurisdictions: Spain, Portugal, France, Italy, Luxembourg, Romania, Austria, Croatia, Malta, the Netherlands, and Hungary, and the United Kingdom. This selection represents diverse legal traditions and policy approaches, ranging from socially targeted systems (Spain, France, Luxembourg, Portugal, and Italy) to formally neutral or technical models (Austria, Malta, the Netherlands, Hungary, and Slovenia). Romania was included to represent an additional Central and Eastern European jurisdiction, combining objective eligibility criteria with a limited form of targeting based on value and size thresholds. The comparison follows three analytical criteria:

- Existence of explicit social or administrative eligibility requirements (e.g. income thresholds, certification of social housing, claw-back provisions);
- Integration of technical or legal definitions within the VAT framework (e.g. references to construction standards, classification codes, or residence criteria); and
- Extent of alignment with CJEU principles on legal certainty and proportionality.

The study relies exclusively on legal and documentary sources, including EU and national VAT legislation, government regulations, and authoritative commentaries. It adopts a qualitative, normative approach rather than empirical or econometric analysis. Its objective

41 Case C-331/88 (n 27) paras 12–17 ; Case C-497/01 *Zita Modes Sàrl v Administration de l'enregistrement et des domaines* (CJEU, 27 November 2003) EU :C :2003:644, paras 31–32, 39–41.

42 Majeed, Hilal and Khan (n 39) 559–61.

is to provide a coherent legal assessment of the Slovenian model within the wider European framework, identifying how design differences affect compliance with EU principles and the effectiveness of social targeting.

Neighbouring jurisdictions are included on methodological grounds commonly recognised in comparative legal scholarship, according to which the choice of legal systems must be guided primarily by the research aims and questions, as well as by historically, institutionally and socio-economically relevant contexts. Comparative methodology emphasises that legal systems should not be selected arbitrarily but based on criteria that make functional and structural comparison meaningful, including shared legal traditions, similar institutional frameworks or historically contingent developments. In this sense, the comparison of geographically proximate systems may be particularly informative where proximity coincides with such contextual commonalities, while remaining attentive to the risk that apparently similar solutions may conceal deeper doctrinal or cultural divergences.⁴³

3.3. Selection of Jurisdictions

The selection of jurisdictions for this comparative analysis is guided by both geographic and methodological considerations. Neighbouring countries such as Austria, Croatia, Italy, and Hungary were included due to their geographic proximity and shared legal-historical context with Slovenia, enabling meaningful regional comparisons within Central and Southern Europe. Additional Member States, such as France, Spain, Portugal, Luxembourg, the Netherlands, and Malta, were chosen to represent a diversity of legal and administrative approaches to implementing reduced VAT rates on housing, ranging from socially targeted systems to formally neutral frameworks. The inclusion of the United Kingdom, although no longer an EU Member State, is justified by its long-standing participation in the EU VAT system and its significant influence on the evolution of EU case law, including several judgments discussed in this article. Collectively, this selection enables a balanced examination of both continental and common law perspectives, thereby enhancing the generalisability and doctrinal depth of the comparative findings.

4 ANALYSIS AND RESULTS

4.1. Legal Uncertainty in the Slovenian Framework

In Slovenia, the legal analysis identifies three principal sources of uncertainty in the application of the reduced VAT rate on housing. First, phrases such as “permanent residence” and “investor” are not legally defined for VAT purposes, leaving their interpretation to administrative discretion. Second, the framework references external

43 Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method 4-6, doi:10.5553/REM/.000010.

technical standards (e.g., building codes and the Slovenian Classification of Structures) without fully integrating them into the VAT law, which creates instability when those standards change. Third, proportionality mechanisms are absent: all dwellings within the size limits qualify, regardless of buyer status or property value.

CJEU case law requires a strict interpretation of derogations from the standard VAT rate. Applied to Slovenia, these rulings suggest that floor-area criteria, without social targeting, do not sufficiently reflect the rationale of Article 98 of the VAT Directive.

4.2. Comparative Analysis of Selected Member States

The comparative analysis of twelve jurisdictions shows that Slovenia's model is atypically narrow in its reliance on technical thresholds. Other Member States introduce explicit social or administrative conditions:

1. **Spain** applies a 4% reduced VAT rate to dwellings that are officially classified as “social housing” (Viviendas de Protección Oficial) under a special or public promotion regime. Eligibility requires prior administrative designation by the competent regional authority and applies only to first supplies made by the developer.⁴⁴
2. **Portugal** applies a 6% reduced rate only to specific construction and renovation works linked to social or controlled-cost housing and urban rehabilitation. This includes projects certified by the housing authority (IHRU), rehabilitation works in officially designated urban areas, and renovation of dwellings where incorporated materials do not exceed 20% of the contract value. The reduction thus targets affordable and socially oriented housing initiatives rather than the housing market in general.⁴⁵
3. **France** applies reduced VAT rates of 5.5% and 10% only to operations relating to social housing and certain social homeownership or urban renewal projects, subject to strict administrative certification. These rates cover the construction, acquisition, or improvement of dwellings financed through regulated social housing loans, as well as accession-to-ownership schemes and renovations in priority urban areas. The reduced rates thus target projects serving public housing and social cohesion objectives, while ordinary residential construction or market-rate housing remains subject to the standard 20% rate.⁴⁶

44 Law of the Kingdom of Spain no 37/1992 of 28 December 1992 ‘On Value Added Tax’ [1992] BOE 312, art 91, as amended [in Spanish] <<https://www.boe.es/buscar/act.php?id=BOE-A-1992-28740>> accessed 25 January 2026.

45 Decree-Law of the Portuguese Republic no 394-B/84 of 26 December 1984 ‘Value Added Tax Code’ [2008] Diário da República 102, Annex I, as amended [in Portuguese] <<https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/2008-34500675>> accessed 25 January 2026.

46 French General Tax Code, art 278 sexies A <<https://french-business-law.com/french-legislation-art/article-278-sexies-a-of-the-french-general-tax-code/>> accessed 25 January 2026.

4. **Italy** links reduced VAT rates to non-luxury and socially classified housing as defined by the Ministerial Decree of 22 April 2008. The decree defines *alloggio sociale* as housing provided for permanent rental to address social needs and ensure access for households unable to obtain accommodation on the free market. Reduced rates (typically 4% or 10%) apply to the supply and construction of such dwellings when they meet the criteria for social housing or non-luxury residential use, as certified under the relevant national and regional housing programmes.⁴⁷
5. **Luxembourg** applies a super-reduced VAT rate of 3% to the supply, construction, and renovation of dwellings intended as the purchaser's principal residence. The measure is subject to a maximum eligible amount per dwelling and to prior certification by the tax administration. If the property ceases to be used as the principal residence within a prescribed period, the benefit is partially clawed back.⁴⁸
6. **United Kingdom** structures housing related VAT relief through two regimes. The construction and first sale of new dwellings, as well as buildings intended for relevant residential or charitable purposes, are zero-rated (0%), provided that statutory planning consent exists and each dwelling constitutes a self-contained residential unit. A reduced rate of 5% applies to renovation or conversion works, notably the conversion of non-residential buildings into dwellings and the renovation of homes that have been vacant for at least two years.⁴⁹
7. **Austria** taxes the construction and sale of dwellings at the standard rate of 20%, as no reduced rate applies to housing construction.⁵⁰
8. **Croatia** does not apply a reduced rate, but instead regulates housing affordability through the POS scheme, which sets clear income, age, and residency conditions.⁵¹ Although the POS scheme significantly contributes to housing affordability in Croatia, it operates entirely outside the VAT system and, therefore, does not constitute a social-policy mechanism within the meaning of Article 98 and Annex III (10) of the VAT Directive; its relevance in this analysis lies in demonstrating that social targeting can be achieved through instruments other than reduced VAT rates.

47 Decree of the Ministry of Infrastructure of the Italian Republic of 22 April 2008 'Definition of social housing for the purposes of exemption from the obligation to notify State aid, pursuant to Articles 87 and 88 of the Treaty establishing the European Community' [2008] *Gazzetta Ufficiale* 146 [in Italian].

48 Law of the Grand Duchy of Luxembourg of 12 February 1979 'Concerning Value Added Tax' [1979] *Journal Officiel A* 23, art 40(2), as amended [in French].

49 UK Value Added Tax Act 1994, Sch 8, Sch 7A <<https://www.legislation.gov.uk/ukpga/1994/23/contents>> accessed 25 January 2026.

50 Federal Law of the Republic of Austria 'Value Added Tax Act 1994 (UStG 1994)' [1994] BGBl I 663, § 10(2), as amended [in German] <https://360.lexisnexis.at/d/rechtsnorm-ris/ustg_umsatzsteuergesetz_1994/L-10004873-P0> accessed 25 January 2026.

51 Law of the Republic of Croatia no 01-081-01-3773/2 of 6 December 2001 'On Socially Supported Housing Construction' [2001] NN 109, as amended [in Croatian] <<https://www.zakon.hr/z/371/zakon-o-drustveno-poticanoj-stanogradnji>> accessed 25 January 2026.

9. **Malta** exempts housing universally, without social targeting.⁵²
10. **Netherlands** applies a 9% rate to renovation labour for dwellings older than two years, without socio-economic criteria.⁵³
11. **Hungary** applies a 5% reduced VAT rate to the sale and construction of newly built dwellings. The measure covers apartments of up to 150 m² and single-family houses of up to 300 m². The reduction applies automatically if the property meets the technical definition of a residential dwelling and qualifies as newly built. There are no income limits, social criteria, or administrative certification procedures. The relief is therefore available to all buyers within the size limits, regardless of their economic situation.⁵⁴
12. **Romania** applies a reduced VAT rate of 11% to the supply of new dwellings meeting specific value and size thresholds. The reduced rate covers the delivery of dwellings with a usable area not exceeding 120 m², excluding annexes, and a total value (including land) not exceeding RON 600,000, excluding VAT. Eligibility is limited to natural persons, who may benefit from the reduced rate only once, whether individually or jointly with another individual. The dwelling must be fit for use as a residence at the time of delivery, as defined by Law No. 114/1996 on housing and Law No. 50/1991 on construction works. The reduced rate applies only to new constructions, not to renovation or alteration works. Romania's approach combines technical criteria (size, value limits) with a one-time personal eligibility condition, thereby ensuring a minimum level of targeting toward middle-income households. However, no income-based or social-vulnerability criteria are applied, and there is no administrative certification comparable to those in France or Spain. The measure thus reflects a semi-targeted model, more restrictive than the Slovenian and Hungarian systems, yet still primarily based on objective technical thresholds rather than explicit social-policy mechanisms.⁵⁵

In comparative perspective, Slovenia belongs to the group of Member States that rely exclusively on technical criteria, together with Hungary, while most other jurisdictions

52 Law of the Republic of Malta 'Value Added Tax Act', ch 406, art 5 <<https://legislation.mt/eli/cap/406/eng/pdf>> accessed 25 January 2026.

53 Law of Netherlands 'Turnover Tax Act 1968', art 9(2a), table I [in Dutch] <<https://wetten.overheid.nl/BWBR0002629/2026-01-01>> accessed 25 January 2026.

54 National Tax and Customs Administration of Hungary, 'Tax Rate on the Sale of New Dwellings, Residential Properties: Relevant Rules in force from 1 January 2021' (NTCA, 15 February 2021) <<https://nav.gov.hu/en/main-tiles/important-information/20211.-tax-issue---tax-rate-on-the-sale-of-new-dwellings-residential-properties>> accessed 25 January 2026.

55 Law of Romania no 227/2015 'On the Fiscal Code' [2015] Monitorul Oficial 688, title VII, arts 291(3)(c), 292(2)(f), as amended [in Romanian] <https://static.anaf.ro/static/10/Anaf/legislatie/Cod_fiscal_norme_2023.htm> accessed 25 January 2026; Law of Romania no 50/1991 'On Construction Works' [2004] Monitorul Oficial 933 [in Romanian]; Law of Romania no 114/1996 'On Housing' [1997] Monitorul Oficial 393 [in Romanian].

supplement technical thresholds with substantive social policy mechanisms. Countries such as France, Spain, Portugal, and Luxembourg require administrative certification, income-based eligibility, value caps or claw-back provisions, thereby ensuring that the reduced rate benefits households for whom housing affordability represents a genuine social concern. Italy and Romania represent intermediate approaches: although they preserve certain technical parameters, they introduce personal eligibility limits, statutory definitions of social housing, or value thresholds that provide a minimum level of targeting. Compared with these models, Slovenia's framework is formally clear but substantively untargeted, which raises concerns about proportionality and the social-policy rationale required under Article 98 and Annex III (10). The comparative evidence suggests that reforms aligned with certification-based or income-based models would provide greater legal certainty, transparency, and coherence with EU law. To structure these comparative findings more clearly, the examined jurisdictions can be grouped into three distinct regulatory models, each reflecting a different balance between technical criteria and social policy targeting. Within this typology, the approaches adopted in France, Spain, Luxembourg, and Portugal offer particularly instructive models for potential reform of the Slovenian framework, as they combine clear eligibility rules with verifiable social-policy safeguards.

Table 1. Typology of Reduced VAT Rate Models for Housing in Selected Jurisdictions

Model	Jurisdictions	Core features
A - Socially certified	France, Spain, Luxembourg, Portugal	Certification, income thresholds, claw-back, strong targeting
B - Hybrid	Italy, Romania	Size/value limits + social filters
C - Technical	Slovenia, Hungary	Purely technical criteria, no social-policy mechanism

As summarised in Table 1, three regulatory models can be identified. These comparative differences are not merely descriptive. Certification-based models provide transparent, predictable and verifiable eligibility conditions, thereby enhancing legal certainty and ensuring that the reduced VAT rate remains proportionate to its stated social-policy objective. In contrast, Slovenia's reliance solely on floor-area thresholds produces a formally clear but substantively untargeted framework, in which the absence of income-based or administrative criteria weakens the proportionality link required under Article 98 and Annex III (10) of the VAT Directive. The comparative evidence suggests that reforms aligned with certification-based or income-based models would provide greater legal certainty, transparency and coherence with EU law.

In contrast, systems based solely on technical or physical parameters, as in Slovenia and Hungary, lack a substantive social test. In these countries, eligibility for the reduced rate is automatically determined by floor area or construction characteristics, without verification

of social need or income-based targeting. This approach increases the risk of unequal or arbitrary application. It limits the redistributive potential of VAT relief, while ensuring a high level of legal certainty and administrative simplicity.

A comparable pattern can also be observed in Romania, where eligibility for the reduced 11% VAT rate likewise depends on objective parameters, specifically, a maximum usable area of 120 m² and a total property value not exceeding RON 600,000. However, Romania introduces a one-time eligibility condition for individual purchasers, which slightly narrows the scope of relief compared with Slovenia and Hungary. While this restriction does not amount to a genuine social-policy test, it nevertheless imposes a moderate targeting effect by excluding high-value transactions. Thus, within the group of technically defined regimes, Romania represents a semi-targeted model that enhances proportionality without introducing income-based or administrative certification mechanisms.

In addition to the standard reduced-rate frameworks analysed above, certain Member States continue to apply special derogations authorised under Articles 105a and 105b of the VAT Directive. These derogations were introduced by Directive (EU) 2022/542 of 5 April 2022, amending Directive 2006/112/EC as regards VAT rates and allow countries to retain pre-existing reduced rates outside Annex III, including, in the case of Article 105b, for “non-social housing”. According to the European Commission’s 2025 Report on VAT Rate Derogations⁵⁶, only a limited number of Member States currently rely on such derogations, with Italy being the only one maintaining a reduced rate for non-social housing. Slovenia has no such historical derogation and applies its reduced rate exclusively under Article 98 in conjunction with point 10 of Annex III.

Therefore, the presence of clear administrative and substantive criteria reinforces the principle of legal certainty by defining the eligible scope of social policy in a predictable, transparent, and uniform manner. The OECD’s comparative analysis reveals that several EU Member States, such as France, Portugal, and Luxembourg, condition reduced VAT rates on formal social housing certification, thereby aligning the legal framework with redistributive aims, whereas the technical eligibility models of Slovenia and Hungary lack these safeguards.

4.3. Discussion

The Hungarian experience illustrates that technically defined VAT reductions may stimulate construction activity and contribute to price stabilisation, without in themselves demonstrating that such measures effectively achieve social policy objectives under EU law. Koroseczné Pavlin and Koponicsné Györke show that the 5% VAT rate in Hungary increased building activity and stabilised housing prices, but their analysis

56 European Commission, *Report from the Commission to the Council in accordance with Article 105a(6) of Council Directive 2006/112/EC on VAT rate derogations* (COM(2025) 585 final, 2 October 2025) 12.

focuses on aggregate market effects rather than on the distribution of benefits across income groups. This highlights the need to distinguish between economic effectiveness and social policy targeting when assessing compliance with the concept of “housing as part of a social policy”.⁵⁷

Broader international research confirms that reduced VAT rates are a poorly targeted mechanism for achieving redistributive aims. Thomas finds that, both theoretically and empirically, reduced VAT rates fail to support low-income households effectively, and that targeted cash transfers provide superior redistributive outcomes. This reinforces the argument that VAT measures relying solely on technical parameters, such as those in Slovenia and Hungary, lack substantive alignment with the social-policy rationale required under EU law.⁵⁸

The conceptual debate on VAT neutrality, as emphasised by Cnossen, highlights that exemptions and reduced rates distort the functioning of VAT and are poorly targeted instruments for pursuing social objectives. Cnossen advocates extending the VAT base to increases in the value of exempt housing at the time of sale to enhance neutrality, rather than relying on transfer taxes.⁵⁹ Subsequent scholarship, such as Thomas, shifts the focus towards the distributive inadequacy of reduced rates, thereby illustrating the persistent tension between fiscal efficiency and social targeting in housing VAT policy.⁶⁰

The combined legal and comparative findings reveal a structural misalignment between the design of Slovenia's reduced VAT rate on housing and the objectives pursued under EU law and national housing policy. Although the Slovenian framework is formally predictable and administratively simple, its exclusive reliance on technical parameters fails to ensure that the measure is directed towards households facing genuine affordability constraints. Undefined concepts such as “permanent residence” and “investor”, the dependence on CC-SI classifications capable of encompassing holiday homes and secondary residences, and the ambiguous treatment of appurtenant parts of residential buildings, including the boundary between residential and leisure facilities, the reliance on external technical standards, and the absence of objective social-eligibility criteria weaken legal certainty and dilute the proportionality link required under Article 98 and Annex III (10) of the VAT Directive.

From a doctrinal and EU-law perspective, these features confirm a disconnect between formal clarity and substantive policy objectives, including those articulated in the National Housing Programme 2015–2025, which explicitly prioritises access to adequate and

57 Rita Koroseczné Pavlin and Diána Koponicsné Györke, ‘The Effect of VAT Reductions on Newly Built Properties and Constructions in Hungary’ (2024) 23(1) *Acta Scientiarum Polonorum Administratio Locorum* 91, doi:10.31648/aspal.9001.

58 Thomas (n 32) 2-3, 18-9.

59 Cnossen (n 33) 457-8, 471-4.

60 Thomas (n 32) 2-3, 18-9.

affordable housing for socially vulnerable groups. At the same time, the comparative analysis suggests that these shortcomings are not solely the result of national design choices but also reflect broader structural ambiguities within the EU VAT framework itself. The concept of “housing as part of a social policy” in Article 98 and Annex III (10) remains insufficiently defined at the EU level, leaving Member States with wide discretion and contributing to divergent national approaches. Clearer EU level guidance, whether through interpretative instruments, minimum eligibility standards or more precise definitional criteria, would enhance uniformity, strengthen proportionality and support a more consistent operationalisation of social-policy objectives in VAT systems.

4.4. Policy Implications

The findings support several policy reforms aimed at improving both the legal coherence and the social targeting of Slovenia’s reduced VAT rate on housing:

- Introduce more targeted relief, including income-based thresholds and, where administratively feasible, certification mechanisms, in line with the OECD’s 2024 recommendations.⁶¹
- Establish a formal certification process through housing authorities to ensure that the reduced rate applies only to projects serving clearly identified social objectives.
- Clarify key statutory definitions and align the VAT framework more explicitly with the National Housing Programme 2015–2025.
- Regularly assess distributive and economic impacts using empirical evaluation frameworks developed in OECD countries.
- Clarify the VAT relevance of construction law classifications and exclude holiday homes or secondary residences from social policy relief unless additional substantive criteria are satisfied.
- Issue binding guidance on the treatment of appurtenant parts of residential buildings and on the boundary between residential and leisure facilities, to enhance legal certainty and limit administrative discretion.
- Clarify the position of non-owners (such as tenants) commissioning works, so that the notion of “investor” better reflects contemporary housing arrangements.

61 OECD (n 14) 145-8.

5 CONCLUSIONS

This article assessed whether Slovenia's reduced VAT rate on housing meets the requirements of legal certainty, proportionality and social targeting under EU law. The findings show that although the Slovenian framework is formally clear and administratively simple, its exclusive reliance on technical floor-area thresholds does not ensure that the reduced rate is directed towards households with genuine housing needs. As a result, the measure satisfies the formal dimension of legal certainty but falls short of the substantive social-policy rationale underlying Article 98 and point 10 of Annex III of the VAT Directive.

The comparative analysis reinforces this conclusion. Certification-based systems in countries such as France, Spain, Luxembourg, and Portugal align most closely with EU law requirements by linking reduced VAT rates to administrative designation or income-based eligibility. Italy and Romania illustrate intermediate approaches that combine technical parameters with additional targeting mechanisms, while Slovenia and Hungary rely predominantly on technical criteria. These patterns indicate that models grounded in verifiable social-policy conditions provide the most coherent and proportionate implementation of Article 98 and Annex III (10) of the VAT Directive.

To strengthen legal certainty, proportionality and social effectiveness, several targeted legislative adjustments could be considered for the Slovenian framework. These include introducing income-based or vulnerability-based eligibility criteria, establishing an administrative certification mechanism for dwellings supplied as part of social or affordable housing programmes, and clarifying statutory definitions of key terms such as "investor" and "permanent residence". In addition, closer alignment of VAT provisions with the National Housing Programme and related housing policy instruments would improve coherence between fiscal measures and broader social objectives.

Finally, at the EU level, a more precise definition of "housing as part of a social policy", through interpretative guidance, Commission communications or minimum eligibility standards, could enhance the uniform application of the Directive and reduce divergences among Member States. Such clarification would support both legal certainty and the equitable distribution of fiscal benefits across the Union, while preserving the discretion conferred on Member States by Article 98.

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Corresponding author, solely responsible for preparation of the manuscript.

Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that their opinion and views expressed in this manuscript are free of any impact of any organisations.

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EDITORS

Managing editor – Mag. Yuliia Hartman. **English Editor** – Robert Reddin.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Heinzer A, 'Reduced VAT Rates on Housing within Social Policy and Legal Certainty: A Comparative Analysis of Slovenia and Selected European Jurisdictions' (2026) 9(2) Access to Justice in Eastern Europe 356-82 <<https://doi.org/10.33327/AJEE-18-9.2-a000186>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000186>

Summary: 1. Introduction. – 2. EU and National Frameworks. – 2.1. *Contextual Background and National Framework.* – 2.2. *Legal and Theoretical Framework.* – 3. Methodology. – 3.1. *Analytical Approach.* – 3.2. *Comparative Scope and Criteria.* – 3.3. *Selection of Jurisdictions.* – 4. Analysis and Results. – 4.1. *Legal Uncertainty in the Slovenian Framework.* – 4.2. *Comparative Analysis of Selected Member States.* – 4.3. *Discussion.* – 5. Conclusions.

Keywords: *EU tax harmonisation; social policy targeting; proportionality principle; VAT design; social housing policy.*

ACKNOWLEDGEMENT

The publication of this article was supported by the *Support for Early Career Researchers (ECR) Program* of the Access to Justice in Eastern Europe (AJEE) journal. Under this program, the article was published free of charge through a 100% publication fee waiver granted to eligible early career researchers.

ADDITIONAL INFORMATION

No external funding was received for this research.

DETAILS FOR PUBLICATION

Date of submission: 24 Nov 2025

Date of acceptance: 09 Feb 2026

Publication: 20 May 2026

Was the manuscript fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

<https://ajee-journal.com/responsible-use-of-ai-tools-in-publishing-with-ajee>

AI DISCLOSURE STATEMENT

The manuscript was prepared by the author. AI tools were employed exclusively for spelling, grammar, and stylistic refinement. No generative AI was used to produce original content, research ideas, or analysis.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗНИЖЕНІ СТАВКИ ПДВ НА ЖИТЛО В МЕЖАХ СОЦІАЛЬНОЇ ПОЛІТИКИ
ТА ПРАВОВОЇ ВИЗНАЧЕНОСТІ:

ПОРІВНЯЛЬНИЙ АНАЛІЗ СЛОВЕНІЇ ТА ОКРЕМИХ ЄВРОПЕЙСЬКИХ ЮРИСДИКЦІЙ

Александра Хайнцер

АНОТАЦІЯ

Вступ. Стаття 98 та Додаток III (10) Директиви ЄС 2006/112/ЄС дозволяють знижені ставки ПДВ на «постачання, будівництво, реконструкцію та переобладнання житла в межах соціальної політики». Хоча це положення надає державам-членам дискреційні повноваження, Суд Європейського Союзу (Суд ЄС) вимагає суворого тлумачення та

дотримання принципів правової визначеності та пропорційності. Словенія застосовує знижену ставку ПДВ, яка базується виключно на технічних параметрах, таких як максимальна площа, без порогів на дохід, офіційної сертифікації або зв'язків з національною житловою політикою. Це піднімає питання щодо відповідності словенської системи вимогам ЄС та порівняльній практиці.

Методи. У цій статті застосовується доктринальна та порівняльно-правова методологія. На рівні ЄС досліджується Стаття 98 та Додаток III (10) Директиви про ПДВ, а також відповідна судова практика Суду ЄС, щоб визначити вимоги щодо правової визначеності, пропорційності та цілеспрямованої реалізації соціальної політики. На національному рівні аналізується Закон Словенії про податок на додану вартість та Правила імплементації Закону про ПДВ. Порівняльний компонент охоплює дванадцять держав-членів та Велику Британію, зосереджуючись на критеріях прийнятності, механізмах соціального цільового спрямування та адміністративній сертифікації.

Результати та висновки. Аналіз показує, що технічно досконала система зниження ПДВ у Словенії не має чіткої соціальної спрямованості. Невизначені правові концепції, опора на класифікації будівельного права, неоднозначне трактування належних частин та об'єктів для відпочинку, а також відсутність механізмів, що ґрунтуються на доході, або механізмів сертифікації, підривають правову визначеність та цільове спрямування. Натомість, такі держави-члени, як Франція, Іспанія, Італія, Люксембург, Португалія та Румунія, використовують пороги на дохід, адміністративну сертифікацію, обмеження вартості або механізми повернення коштів, тоді як Словенія та Угорщина покладаються виключно на технічні параметри. Таким чином, Словенія задовольняє формальну правову визначеність, але не відповідає суттєвим вимогам пропорційності та соціальному цільовому спрямуванню згідно з Директивою про ПДВ. У цій статті рекомендуються критерії відповідності на основі доходу та адміністративної сертифікації, чіткіші законодавчі визначення та більша відповідність цілям національної житлової політики.

Ключові слова. Гармонізація податків ЄС; цільове спрямування соціальної політики; принцип пропорційності; структура ПДВ; політика соціального житла.

Research Article

COPYRIGHT PROTECTION IN THE AGE OF GENERATIVE AI: A COMPARATIVE STUDY OF GLOBAL REGULATORY TRENDS AND JUDICIAL DIVERGENCE

Dang Bui Thi Hai

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a0001970>

Date of submission: 5 Jan 2026

Date of acceptance: 2 Mar 2026

Publication: 20 May 2026

Disclaimer:

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ABSTRACT

Background: The emergence of literary, scientific, and artistic works generated by artificial intelligence (AI) in recent years has become a common legal challenge worldwide. The main legal difficulties relate to determining whether AI-generated works qualify for copyright protection under national laws and international treaties. Judicial practice of the Chinese Internet Courts in copyright disputes concerning AI-generated works has, in recent years, given rise to divergent opinions among legal scholars both within and outside China. Examining judicial approaches to the recognition of copyright in AI-generated works constitutes a valuable source of information for research on international copyright law and for the future improvement of domestic legal systems addressing AI.

Methods: The paper identifies and addresses legal challenges to the protection of copyright in AI-generated works, emphasising that, where the law contains significant gaps, the role of the

judiciary must be clearly articulated to overcome these challenges. To achieve this objective, analytical and comparative methods are employed to examine differences in the legal regulation of traditional works and AI-generated works. The study primarily focuses on the current legal framework of the World Intellectual Property Organization (WIPO), in conjunction with the laws of the European Union, the United States, and the United Kingdom, with particular emphasis on Chinese judicial practice concerning whether copyright in AI-generated works is recognised and the impact of such case law in a context where the law still contains numerous legal gaps.

Results and conclusions: The study highlights the diversity of approaches to copyright protection for AI-generated works and the need to reconsider the understanding of authors' creativity in the AI era. Based on the experience of the Chinese Internet Courts, the study concludes that the judiciary plays a particularly important role in filling legislative gaps by assessing the level of human creative intervention in the use of AI to generate works and by ensuring flexibility in the protection of copyright in AI-generated works.

1 INTRODUCTION

Artificial intelligence (AI) is no longer an unfamiliar concept in contemporary scientific and technological development. The term "AI" (Artificial Intelligence) was first introduced by John McCarthy in 1956 at a conference held at Dartmouth College (New Hampshire, United States).¹ Over nearly seventy years, AI has evolved to produce outputs of a high level of complexity that can be compared to human creative capacity. In *Artificial Intelligence: A Modern Approach*, the authors identify four core characteristics of modern AI: (i) thinking humanly, (ii) thinking rationally, (iii) acting humanly, and (iv) acting rationally.² Some scholars have even suggested that AI in the future may become more intelligent and powerful than the most intelligent human beings.³

At the end of 2024, the artwork *AI God: Portrait of Alan Turing*, painted by an AI robot, was sold at auction for over one million USD, setting a world record⁴ and leading experts to recognise that AI-generated works may possess significant substantive and artistic value. Since 2021, the emergence of creative tools such as Stable Diffusion, Midjourney,

1 Dartmouth College, 'Artificial Intelligence Coined at Dartmouth' (*Dartmouth College*, 2017) <<https://home.dartmouth.edu/about/artificial-intelligence-ai-coined-dartmouth>> accessed 17 December 2025.

2 Stuart Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach* (3rd edn, Pearson Education 2010) 1-5.

3 Tim Mucci, 'The Future of AI: Trends Shaping the Next 10 Years' (*IBM*, 11 October 2024) <<https://www.ibm.com/think/insights/artificial-intelligence-future>> accessed 17 December 2025.

4 Karen K Ho, 'Artwork Made by Humanoid Robot Ai-Da Using AI Algorithms Sells for \$1 M. at Sotheby's' (*ArtNews*, 8 November 2024) <<https://www.artnews.com/art-news/news/artwork-humanoid-robot-ai-da-artificial-intelligence-algorithms-sothebys-alan-turing-1234723391/>> accessed 17 December 2025.

DALL-E, and Dreamwriter has enabled users to generate images, music, and videos simply by entering natural-language prompts. This development has generated divergent views in legal scholarship as to whether AI-generated works should be recognised and protected by copyright in the same manner as works created by humans, and whether AI itself should be regarded as an author.

To address these legal issues, it is necessary to re-examine the understanding of works and copyright as regulated by national laws and relevant international treaties. In principle, copyright protection arises automatically without the need for any administrative formalities.⁵ A work is eligible for copyright protection when it satisfies the following conditions. First, the work must be expressed in a particular form. The categories of protected works include all works in the fields of literature, science, and art, as provided for in Article 2 of the Berne Convention. Second, the work must be original. Originality is understood as independent creation, reflecting the author's intellectual labour, and not copied from another work. Originality or creativity relates to the form of expression rather than merely the underlying idea of the work. Creativity does not require a work to be unique or to possess high artistic or academic value, but rather that it bears the personal imprint of the author, reflecting individuality, thought, emotion, and creative style.⁶ Third, the work must not fall within the category of subject matter excluded from copyright protection. Each country has the authority to determine, under its domestic law, which subject matter is excluded from copyright protection, such as legal normative documents or news of a purely factual nature.⁷

The author who creates a work must be a natural person. This principle has been affirmed in international treaties, as well as in the WIPO's guidance,⁸ and in the practice of certain member states when encouraging copyright registration. For example, in notices concerning copyright ownership, the United States Copyright Office (USCO) emphasises that only a human being may be recognised as an author, and that copyright owners may be natural persons, legal persons, or unincorporated organisations,⁹ without listing AI as a

5 The World Intellectual Property Organization, 'How to Obtain Copyright Protection?' (WIPO, 03 April 2019) <<https://www.wipo.int/en/web/copyright/protection>> accessed 18 December 2025.

6 CJS Azoro and Queen O Agulefo, "'Original' under the Law of Copyright is Distinct from the Ordinary Meaning of 'Original': A Discourse" (2021) 7(6) International Journal of Law 33.

7 Article 5 of China's Copyright Law stipulates that the following objects are not copyrighted works: laws, regulations, resolutions, decisions, orders and other documents of the nature of legislation, administration and justice of state organs, and their official translations; simple factual information; calendars, general numerical tables, general forms and formulas. See, Copyright Law of the People's Republic of China (amendment 2020) <<https://www.lawinfochina.com/display.aspx?lib=law&id=34232>> accessed 23 December 2025.

8 The World Intellectual Property Organization, 'Frequently Asked Questions: Copyright Basics' (WIPO, 18 March 2023) <<https://www.wipo.int/en/web/copyright/faq-copyright>> accessed 22 December 2025.

9 US Copyright Office, *Copyright Basics* (Library of Congress 2021) 2-4.

recognised author.¹⁰ This approach is consistent with the understanding of authorship under the Chinese Copyright Law and reflects the general trend among states not to recognise AI as a subject of copyright.

However, the refusal to recognise AI as an author does not necessarily imply the denial of protection for AI-generated works. Whether copyright protection should be granted to works generated by AI remains an unresolved issue and continues to provoke considerable debate in legal scholarship. In this context, judicial interpretation and adjudicative practice may address legal gaps in the protection of copyright in AI-generated works.

2 METHODOLOGY

The study adopts a doctrinal legal research method to examine existing legal provisions and relevant legal practice concerning the protection of copyright in AI-generated works. It analyses international treaties and WIPO guidance, as well as the laws of selected jurisdictions, including the United States, the European Union, the United Kingdom, and China, to identify similarities and differences in national approaches to AI-generated works and the potential development of relevant legal frameworks. The United States, the European Union, and the United Kingdom are selected for in-depth analysis due to their leading roles in global investment in and application of artificial intelligence. The legislative positions and regulatory approaches adopted in these jurisdictions are likely to shape future trends in the development of AI-related legal frameworks.

In addition, the study conducts an in-depth analysis of notable judgments issued by the Chinese Internet Courts. These courts are specialised judicial bodies designed to adjudicate disputes arising in the digital environment through fully online proceedings. Notably, since 2023, cases involving copyright disputes over AI-generated works adjudicated by Chinese Internet Courts have attracted significant controversy both domestically and internationally. This development has opened up a novel analytical perspective in the study of legal protection for AI-generated works. In light of the existing legal gaps in copyright protection relating to AI, these courts have played a pioneering role in interpreting and applying the law to resolve disputes involving AI-generated works. By emphasising the role and perspectives of the Chinese judiciary, the article examines individual cases to evaluate judicial reasoning and to derive lessons for improving copyright law in the AI era.

The study is structured around the fundamental question of whether AI-generated works should be recognised as copyrightable. To address this issue, the article sequentially analyses and evaluates the legal positions adopted by selected jurisdictions in order to clarify prevailing approaches. Where legal gaps persist, judicial practice in China demonstrates

10 US Copyright Office, 'Standard Application Help: Author' (*US Copyright Office: Registration Portal*, 12 May 2021) <<https://www.copyright.gov/eco/help-author.html>> accessed 22 December 2025.

how courts may contribute to the development of rules governing the protection of AI-generated works. Finally, based on the challenges identified and lessons drawn from judicial practice, the article proposes recommendations for establishing a comprehensive legal framework to protect copyright in AI-generated works, ensuring a balance between technological development and copyright protection.

3 LEGAL GAPS IN THE COPYRIGHT PROTECTION OF AI-GENERATED WORKS

3.1. The Distinction Between AI-Generated Works and AI-Assisted Works

Works created with AI involvement may be broadly divided into AI-generated and AI-assisted works. AI-assisted works refer to works in which natural persons use AI merely as a supporting tool in the creative process, such as refining images, suggesting language, editing texts, or assisting with music arrangement. This model typically follows the “prompt – input – output” workflow. In such cases, the core creative contribution and responsibility for the content remain with humans; therefore, these works may still qualify for copyright protection.¹¹ The principal legal issue lies in determining the scope of human creativity relative to the extent of AI assistance, and whether the human contribution is sufficient to meet the originality requirement under copyright law. This issue poses significant challenges for legal systems when deciding whether AI-assisted works should be recognised as copyrightable works.

In contrast, AI-generated works are works produced entirely by AI systems without direct human intervention during the creative process. For example, an image generated by an AI model based solely on input commands such as “paint a row of cherry blossom trees in the spring breeze, with lightly drifting petals, soft colours, and a classical style,” without any subsequent human modification. In such cases, although AI technically synthesises data and generates a complete artistic work, it lacks legal authorship status under the copyright laws of most countries.¹²

However, where AI-generated works result from long-term human training of AI systems, through continuous data input and deliberate shaping of the information processed by AI to achieve a desired creative outcome, the question arises as to whether the trainer may be regarded as the author, and whether the AI-generated output may qualify as a “work” in the legal sense. In jurisdictions that do not recognise copyright protection for AI-generated works, it may be argued that “training AI” constitutes a technical or organisational activity

11 Hafiz Gaffar and Saleh Albarashdi, ‘Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape’ (2025) 15(1) Asian Journal of International Law 34, doi:10.1017/S2044251323000735.

12 Andres Guadamuz, ‘Artificial intelligence and copyright’ (*WIPO Magazine*, 01 October 2017) <<https://www.wipo.int/web/wipo-magazine/articles/artificial-intelligence-and-copyright-40141>> accessed 14 November 2025.

rather than a direct creative act.¹³ Consequently, the AI trainer would not be recognised as the author, and the AI-generated work would not be protected by copyright. Conversely, more open approaches argue that long-term AI training involves substantial creative investment, including data selection, parameter configuration, input adjustment, and training algorithm design, thereby reflecting personal intellectual input and creativity. Under this view, it may be appropriate to consider recognising the AI trainer as the author and granting copyright protection to the AI-generated work.

While the widespread use of AI offers undeniable benefits, it also poses significant legal challenges for copyright protection, particularly for AI-generated works. In practice, countries adopt divergent approaches. Under the expansive approach, in which a human selects data, designs algorithms, configures parameters, and intervenes to guide AI outputs toward a specific goal, such involvement may constitute creative activity bearing personal characteristics and thus warrant copyright protection. China, the United Kingdom, Singapore, and Japan are prominent examples of jurisdictions adopting this approach.¹⁴ Under the traditional approach, a work must result from human intellectual creative labour; works generated entirely by AI do not satisfy copyright requirements unless humans input their own copyrighted works and can demonstrate effective control over the output.¹⁵ The United States, the European Union, and Vietnam currently follow this approach.

No country currently prohibits AI from generating works; however, granting copyright protection AI-generated works remains a complex legal issue faced worldwide. For example, the USCO has stated that copyrightable works must be created by a human being, protecting only intellectual labour founded in the creative powers of the human mind.¹⁶ In Australia, the case *Acohs Pty Ltd v Ucorp Pty Ltd* held that works created with computer intervention are not protected by copyright because AI is not a human author.¹⁷

In terms of form, early AI development focused on robots and tangible machines designed to perform repetitive mechanical tasks.¹⁸ In recent years, AI has been embedded in software

13 Edward Lee, 'Fair Use and the Origin of AI Training' (2025) 63(1) *Houston Law Review* 168.

14 Yelena Ambartsumian and Maria T Cannon, 'Why the Obsession with Human Creativity? A Comparative Analysis on Copyright Registration of AI-Generated Works' [2025] *The Harvard International Law Journal* <<https://journals.law.harvard.edu/ilj/2025/02/why-the-obsession-with-human-creativity-a-comparative-analysis-on-copyright-registration-of-ai-generated-works/>> accessed 15 December 2025.

15 Arian F Jabbary and others, 'Clarifying the Copyrightability of AI-Assisted Works' (*Foley & Lardner LLP*, 20 February 2025) <<https://www.foley.com/insights/publications/2025/02/clarifying-copyrightability-ai-assisted-works/>> accessed 15 December 2025.

16 US Copyright Office, 'Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence' (10 March 2023) [2023] CFR 88(51)/16191-2.

17 Nirogini Thambaiya, Kanchana Kariyawasam and Chamila Talagala, 'Copyright Law in the Age of AI: Analysing the AI-Generated Works and Copyright Challenges in Australia' (2025) 39(3) *International Review of Law, Computers & Technology* 452, doi:10.1080/13600869.2025.2486893.

18 Josip Tomo Licardo, Mihael Domjan and Tihomir Orehovački, 'Intelligent Robotics: A Systematic Review of Emerging Technologies and Trends' (2024) 13(3) *Electronics* 542, doi:10.3390/electronics13030542.

systems with increasingly sophisticated functions, such as facial recognition, data analysis, and predictive analytics with remarkable accuracy. Regarding diversity, AI has penetrated literature, arts, and other creative fields traditionally regarded as uniquely human domains. Even in complex areas such as legal research, AI can synthesise information, eliminate redundant data, improve legal file management, and effectively support legal consulting and litigation.¹⁹ Based on machine learning technologies, AI processes input knowledge,²⁰ often existing works, information, and knowledge available online, and applies complex algorithms to generate new outputs. AI-generated works may include texts, images, or musical compositions, some of which possess significant cultural and commercial value.

3.2. Legal and Regulatory Gaps in the Copyright Protection of AI-Generated Works in Selected Jurisdictions

3.2.1. Legal and Judicial Practice in the United States

The USCO has repeatedly held that images generated by AI are not eligible for copyright protection because they are not created by humans. Notable cases include:

Monkey selfie case (*Naruto v. Slater*, 2016): The copyrighted photograph at issue in this dispute was not created by AI but was taken by a monkey.²¹ Nevertheless, both the court and the USCO affirmed that the photograph was not protected by copyright because a monkey cannot be an author and only human beings may qualify as authors of a work.²² This case has been regarded as an important precedent in subsequent debates on AI, as the USCO rejects the recognition of any non-human entity as an author.

Stephen Thaler and “a recent entrance to paradise” (*Thaler v. Perlmutter*, 2019): Thaler used an AI system known as the “Creativity Machine” to generate an artwork. The USCO denied copyright protection due to the absence of human authorship. This decision was upheld after Thaler initiated legal proceedings seeking to overturn the refusal between 2020 and 2025.²³ In this case, Thaler’s involvement was limited to providing prompts and specific instructions expressing his intent for the AI to produce the final work based on given inputs. The degree of human intervention and labour was therefore considered minimal, while the AI carried out almost the entire process of producing the final output.

19 Mojtaba Rezaei, ‘Artificial Intelligence in Knowledge Management: Identifying and Addressing the Key Implementation Challenges’ (2025) 217 *Technological Forecasting & Social Change* 124183.

20 Dave Bergmann, ‘What is Machine Learning?’ (*IBM*, 2025) <<https://www.ibm.com/think/topics/machine-learning>> accessed 15 December 2025.

21 *Naruto v Slater*, no 16-15469 (ND Cal, 9th Cir, 23 April 2018).

22 Andrés Guadamuz, ‘The Monkey Selfie: Copyright Lessons for Originality in Photographs and Internet Jurisdiction’ (2016) 5(1) *Internet Policy Review*, doi:10.14763/2016.1.398.

23 *Thaler v Perlmutter*, no 23-5233 (DC Cir, 18 March 2025) 6-7.

Zarya of the Dawn (2022): This case involved a graphic novel whose images were generated using Midjourney.²⁴ The USCO granted copyright protection to the script, layout, and creative choices made by the human author, Kristina Kashtanova, but refused protection for the AI-generated images produced on the basis of the author's script.²⁵ This decision reaffirmed the USCO's position that only human authors are recognised and that copyright protection extends solely to works directly created by humans.

U.S. courts have consistently upheld the USCO's refusals, concluding that works generated by AI under human guidance or training, where human creativity is not concretely identifiable, are not eligible for copyright protection. U.S. courts maintain that the recognition of AI authorship or copyrightability of AI outputs is a matter for Congress. Consequently, U.S. administrative and judicial decisions adopt a narrow view,²⁶ whereby, AI trainers or prompt providers are not considered authors unless they can demonstrate precise and predictable control over all aspects of the final output.

The United States has not enacted specific legislation addressing copyright protection for AI-generated works, aside from policy reports issued by the USCO. The U.S. Copyright Act protects original works of authorship fixed in a tangible medium and created by humans, while the Digital Millennium Copyright Act (DMCA 1998) does not address AI-generated works.²⁷ According to USCO guidance, copyright protection applies only if it is the result of intellectual labour, which can be achieved solely through the creative capacity of the human mind.²⁸ As a result, applications for works not created by humans are uniformly rejected.

Overall, the United States continues to adhere to a traditional approach that requires clear, and direct human creativity. Even extensive AI training is regarded as a technical activity rather than creative labour, resulting in persistent legal gaps as AI increasingly produces works comparable in value to human-created literary, scientific, and artistic works.

24 Tony Analla, 'Zarya of the Dawn: How AI is Changing the Landscape of Copyright Protection' (*JOLT Digest*, 06 March 2023) <<https://jolt.law.harvard.edu/digest/zarya-of-the-dawn-how-ai-is-changing-the-landscape-of-copyright-protection>> accessed 19 November 2025.

25 *Zarya of the Dawn*, no VAu001480196 (US Copyright Office, 21 February 2023) <<https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>> accessed 19 November 2025.

26 Jackeline Zelaya, 'Summary of the USCO Copyright and AI Report, pt 2: Copyrightability' (*Copyright Alliance*, 06 February 2025) <<https://copyrightalliance.org/ai-report-part-2-copyrightability/>> accessed 20 November 2025.

27 Digital Millennium Copyright Act (DMCA) [1998] Pub L 105-304; Scott M Douglass and Dominic Rota, 'The Fast-Moving Race Between Gen-AI and Copyright Law' (*Baker Donelson*, 10 July 2024) <<https://www.bakerdonelson.com/the-fast-moving-race-between-gen-ai-and-copyright-law>> accessed 26 November 2025.

28 Miriam Lord, 'US Copyright Office on AI: Human Creativity Still Matters, Legally' (*WIPO Magazine*, 24 April 2025) <<https://www.wipo.int/web/wipo-magazine/articles/us-copyright-office-on-ai-human-creativity-still-matters-legally-73696>> accessed 26 November 2025.

3.2.2. Legal and Judicial Practice in the European Union

The European Union has demonstrated rapid adaptability to technological development through the adoption of the AI Act,²⁹ approved by the European Parliament in June 2024. The AI Act aims to establish a regulatory framework for AI governance and mitigate risks arising from AI misuse by classifying AI systems according to their risk levels to human health and fundamental rights.³⁰

However, the AI Act primarily proposes that individuals or entities making significant contributions to AI-generated works may be entitled to copyright protection, without specifying concrete criteria or thresholds for significant contribution. Its primary role lies in ethical boundaries, risk awareness³¹ and responsible AI development. Similar to the United States, the EU continues to uphold the principle of human intellectual creativity and lacks a clear legal mechanism to recognise AI trainers as authors. Nevertheless, the AI Act reflects the EU's proactive legislative stance and opens for the door to future copyright protection for AI-generated works.

In judicial practice, EU courts do not recognise non-human authorship and remain reluctant to protect works created entirely by AI.³² In *Infopaq International A/S v. Danske Dagblades Forening* (2009), the Court of Justice of the European Union (CJEU) held that copyright applies only to original works reflecting the author's own intellectual creation, a standard that AI-generated works cannot satisfy.³³ CJEU case law has played a crucial role in harmonising the interpretation of intellectual property across EU member states,³⁴

29 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) <<http://data.europa.eu/eli/reg/2024/1689/oj>> accessed 27 November 2025; 'The EU Artificial Intelligence Act: Up-to-date developments and analyses of the EU AI Act' (*EU Artificial Intelligence Act*, 2025) <<https://artificialintelligenceact.eu/>> accessed 27 November 2025.

30 European Parliament, 'EU AI Act: First Regulation on Artificial Intelligence' (*European Parliament*, 19 February 2025) <<https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence#ai-act-different-rules-for-different-risk-levels-6>> accessed 27 November 2025.

31 OECD, *Governing with Artificial Intelligence: The State of Play and Way Forward in Core Government Functions* (OECD Publishing 2025) doi:10.1787/795de142-en.

32 Sergiy Barbashyn, 'Approaches to IP Protection for Works Generated by Artificial Intelligence European Standards' (*International Association for the Protection of Intellectual Property*, 25 April 2025) <<https://www.aippi.org/news/approaches-to-ip-protection-for-works-generated-by-artificial-intelligence-european-standards/>> accessed 27 November 2025.

33 C-5/08 *Infopaq International A/S v Danske Dagblades Forening* (CJEU, 16 July 2009) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62008CJ0005>> accessed 29 November 2025.

34 Sofia Karttunen, 'Copyright of AI-Generated Works: Approaches in the EU and Beyond' (*European Parliamentary Research Service*, December 2025) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/782585/EPRS_BRI\(2025\)782585_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/782585/EPRS_BRI(2025)782585_EN.pdf)> accessed 29 November 2025.

thereby contributing to a coherent copyright framework in the context of rapid technological advancement.

EU intellectual property offices have rejected applications listing AI as the author³⁵ while leaving open the possibility of protection where a human author is identified and the AI-generated work demonstrates originality. Although AI authorship is not recognised, the EU does not entirely preclude future copyright protection for AI-generated works.

3.2.3. Legal and Judicial Practice in the United Kingdom

The United Kingdom adopted an early approach to AI-related intellectual property issues. Section 9(3) of the Copyright, Designs and Patents Act 1988 provides that³⁶ for computer-generated literary, dramatic, musical, or artistic works, the author is the person by whom the arrangements necessary for the creation of the work are undertaken. Traditionally, this has led to identifying programmers or engineers as authors. In the contemporary AI context, this may extend to AI trainers,³⁷ provided they demonstrate creative control.

In *Nova Productions Ltd v Mazooma Games Ltd*, the court held that images generated during gameplay constituted computer-generated works and that the software programmer was the author, as the programmer predetermined the rules and commands governing the creation of those images.³⁸ Although players could trigger the appearance of images, their actions remained subject to the constraints embedded in the software.³⁹ Similarly, in *THJ Systems Ltd v Sheridan*, where the court recognised copyright protection for images generated by software and identified the programmer as the author based on creative input and personal intellectual contribution, while the software developer was considered the copyright owner.⁴⁰ However, judicial interpretation of Section 9(3) remains limited, and uncertainty persists. In 2024, the UK Intellectual Property Office indicated the possibility of repealing Section 9(3),⁴¹ though no definitive decision has been made due to the absence of a comprehensive legal framework governing AI-generated works.

35 Nicola Lucchi, *Generative AI and Copyright: Training, Creation, Regulation* (Policy Department for Justice, Civil Liberties and Institutional Affairs 2025) 95-6, doi:10.2861/0365517.

36 UK Public General Acts, 'Copyright, Designs and Patents Act 1988' <<https://www.legislation.gov.uk/ukpga/1988/48/section/9>> accessed 02 December 2025.

37 Ambartsumian and Cannon (n 14).

38 *Nova Productions Ltd v Mazooma Games Ltd & Ors* (CA) (England and Wales Court of Appeal (Civil Division), 14 March 2007) [2007] EWCA Civ 219.

39 Syn Ong, 'The UK's Curious Case of Copyright for AI-Generated Works: What Section 9(3) Means Today' (*Authors Alliance*, 19 May 2025) <<https://www.authorsalliance.org/2025/05/19/the-uks-curious-case-of-copyright-for-ai-generated-works-what-section-93-means-today/>> accessed 02 December 2025.

40 *THJ Systems Ltd & Anor v Sheridan & Anor* (England and Wales Court of Appeal (Civil Division), 20 November 2023) [2023] EWCA Civ 1354.

41 Crown Copyright, *Copyright and AI: Consultation* (The Intellectual Property Office December 2024) 25-6.

Section 178 of the same Act defines computer-generated works as works with no human author, suggesting possible copyright protection.⁴² Nonetheless, concerns arise over AI's reliance on existing copyrighted works as training data, risking infringement and undermining originality.⁴³ Expanding copyright protection may conflict with the fundamental principles of intellectual property, as protected works risk being exploited as mere inputs for further AI-generated outputs. Consequently, ethical and legal challenges surrounding the recognition of copyright in AI-generated works remain unresolved, raising unresolved ethical and legal risks in the UK.

4 JUDICIAL PRACTICE OF CHINA'S INTERNET COURTS IN COPYRIGHT DISPUTES INVOLVING AI-GENERATED WORKS

Chinese law does not recognise AI or non-human entities as authors. Whether AI-generated works qualify for copyright protection remains unclear under the law. Nevertheless, China has adopted an open yet cautious approach through the judicial practice of its Internet Courts. The first Chinese Internet Court was established in Hangzhou in 2017, and similar courts were established in Beijing and Guangzhou in 2018.⁴⁴ The jurisdiction of Chinese Internet Courts is to resolve disputes related to data ownership, privacy protection, violations of virtual property rights, and unfair competition in cyberspace.⁴⁵ Cases resolved by China's internet courts may offer an initial glimpse into legal thinking regarding artificial intelligence⁴⁶ and represent a pioneering step by China toward creating a judicial system capable of handling issues arising from the digital economy.

42 Emma Chew, 'Algorithmic Creativity: How Should the UK Copyright Regime Accommodate Autonomous AI-generated Works?' (*London School of Economics Law Review Blog*, 24 March 2023) <<https://blog.lselawreview.com/2023/03/24/algorithmic-creativity-how-should-the-uk-copyright-regime-accommodate-autonomous-ai-generated-works/>> accessed 03 December 2025.

43 Gaffar and Albarashdi (n 11).

44 Meirong Guo, 'Internet Court's Challenges and Future in China' (2021) 40 *Computer Law & Security Review* 105522, doi:10.1016/j.clsr.2020.105522.

45 Supreme People's Court of the People's Republic of China, 'New Regulation Adjusts Jurisdiction of Internet Courts' (*China Daily*, 13 October 2025) <https://english.court.gov.cn/2025-10/13/c_1131380.htm> accessed 18 January 2026.

46 Aaron Wininger, 'Schwegman, Lundberg & Woessner, 'Early Jurisprudence from Beijing on the Intersection of Artificial Intelligence, Copyright and Personality Rights' [2025] *The National Law Review* <<https://natlawreview.com/article/early-jurisprudence-beijing-intersection-artificial-intelligence-copyright-and>> accessed 12 December 2025.

4.1. “Spring Breeze Brings Tenderness” Case (Li v. Liu, 2023)

In February 2023, the claimant used Stable Diffusion to generate a portrait titled *Spring Breeze Brings Tenderness*⁴⁷ and posted it on Xiaohongshu (Rednote).⁴⁸ The defendant reproduced the image on a Baidu-affiliated platform without authorisation, removed the watermark and used it without permission. The claimant brought an action before the Beijing Internet Court, alleging copyright infringement.

The court addressed two key issues: (i) whether the AI-generated image constituted a work under copyright law, and if so, what type of work; and (ii) whether the claimant held copyright and whether the defendant’s conduct amounted to infringement.

On the first issue, the court held that the claimant had engaged in intellectual activity throughout the creative process, including conceptualisation, selection of training inputs, repeated adjustment of prompts and parameters, and final selection of the image.⁴⁹ Accordingly, the court classified the image as an artistic work. On the second issue, the court ruled that the AI model developer merely provided a creative tool and could not be regarded as the author. Given that the claimant independently used Stable Diffusion and selected the final image, the court recognised the claimant as the author and copyright holder. In its judgment on 27 November 2023, the Beijing Internet Court found that the defendant had infringed the claimant’s copyright, ordered a public apology, and awarded economic compensation.

This case marked the first judicial decision in China to affirm copyright protection for an AI-generated image and was listed among the top ten nominated cases of 2024.⁵⁰ It reflects a creativity-oriented approach consistent with China’s copyright law, which aims to encourage creation and dissemination of works.⁵¹ Although the statute does not explicitly address AI-generated works, the court interpreted its underlying principles in light of technological development.

However, the decision attracted substantial domestically and international criticism. Opponents argued that, despite human involvement in controlling inputs, the final output

47 Jing 0491 Min Chu no 11279 (*Beijing Internet Court*, 28 December 2023) <https://english.bjinternetcourt.gov.cn/2023-12/28/c_688.htm> accessed 08 November 2025.

48 One of the most popular social media platforms in China, where users share photos and videos, similar to Instagram.

49 Copyright Law of the People’s Republic of China (n 7) art 3.

50 Liang Qiang and Zhang Meijian, ‘Recognising Copyright of AI-Generated Works’ (*Law Asia*, 08 April 2025) <<https://law.asia/copyright-ai-generated-works-china-judicial-ruling/>> accessed 11 November 2025.

51 Seagull Song, ‘China’s First Case on Copyrightability of AI-Generated Picture’ (*King & Wood Mallesons*, 07 December 2023) <<https://www.kwm.com/cn/en/insights/latest-thinking/china-s-first-case-on-copyrightability-of-ai-generated-picture.html>> accessed 09 November 2025.

was autonomously generated by AI through processes beyond ordinary human control.⁵² Equating AI image generation with human creativity was therefore considered conceptually flawed,⁵³ and AI outputs were viewed as technical products rather than copyrightable works.

4.2. "Cat Crystal Diamond Pendant" Case (2025)

The "Cat Crystal Diamond Pendant" case concerns a copyright infringement dispute before the Beijing Internet Court. The claimant, Zhou, a content creator, alleged that he independently created an AI-generated image titled "Cat Crystal Diamond Pendant" using image-generation software (presumably Midjourney). He claimed that, during a business collaboration, the defendant, a Beijing technology company, disseminated the image in a WeChat group without authorisation.

On 16 September 2025, the Beijing Internet Court issued its decision in this case. According to this decision, the court rejected the claimant's claim, holding that the image did not qualify as a copyright-protected work.⁵⁴

The court acknowledged that AI-generated images may, in principle, be protected, but only where the claimant can demonstrate substantial creative input and personal expression. Claimants must explain their creative intent, the prompts used, the selection and adjustment of inputs, and provide supporting evidence. In this case, the court found that the claimant's contribution was limited to providing general ideas and prompts, while the remaining process was completed by AI with minimal intellectual effort.⁵⁵ Compared to traditional manual creation, the level of human creativity was insufficient, and copyright protection was denied.

Taken together, these two cases illustrate the cautious stance of Chinese internet courts. Rather than granting blanket protection to AI-generated outputs, courts assess the

52 Yuqian Wang and Jessie Zhang, 'Beijing Internet Court Grants Copyright to AI-Generated Image for the First Time' (*Kluwer Copyright Blog*, 02 February 2024) <<https://legalblogs.wolterskluwer.com/copyright-blog/beijing-internet-court-grants-copyright-to-ai-generated-image-for-the-first-time/>> accessed 09 November 2025.

53 Yuanxiao Xu, 'China's Controversial Court Rulings on AI Output—and How It May Affect People in the US' (*Authors Alliance*, 03 April 2025) <<https://www.authorsalliance.org/2025/04/03/chinas-controversial-court-rulings-on-ai-output-and-how-it-may-affect-people-in-the-us/>> accessed 11 November 2025.

54 'E-case E-trial: Claimed the copyright of AI Wenshengtu but could not provide records of the generation process to prove intellectual input Court: Insufficient evidence to dismiss it' (*Beijing Internet Court*, 16 September 2025) <<https://peking.bjd.com.cn/content/s68c9443ce4b0221b9becf3fe.html>> accessed 17 November 2025.

55 Aaron Wininger, 'Beijing Internet Court Requires Evidence of Creative Effort to Claim Copyright Protection in AI-Generated Images' (*China IP Law Update*, 16 September 2025) <<https://www.chinaiplawupdate.com/2025/09/beijing-internet-court-requires-evidence-of-creative-effort-to-claim-copyright-protection-in-ai-generated-images/>> accessed 17 November 2025.

degree of human creative involvement,⁵⁶ thereby preserving the core objective of copyright law: promoting genuine creativity and the dissemination of works beneficial to social development.

5 SHIFTS IN THE PERCEPTION OF COPYRIGHT IN AI-GENERATED WORKS

5.1. Originality and ethical concerns in art

The primary reason many jurisdictions refuse to recognise copyright in AI-generated works lies in disputes over originality. Authors are generally required to demonstrate intellectual labour, creative judgment, and personal imprint. In the case of AI-generated works, it is difficult to clearly distinguish between pre-existing scientific knowledge, protected works used as training data,⁵⁷ and individual creativity. As a result, AI outputs are often perceived as copies or compilations rather than original works bearing distinct personal expression. Moreover, AI technologies frequently exploit existing creative works as training data without authorisation,⁵⁸ raising ethical and legal concerns. The large-scale aggregation and replication of content by AI models also increases the risk of replacing human artists in creative industries.⁵⁹

At the same time, the rapid development of AI suggests that such limitations may be partially overcome. AI systems may incorporate original ideas introduced by developers or trainers. Based on its ability to self-learn and research, AI may generate novel algorithms and outputs not previously known to humans.⁶⁰ In addition, human intervention at the refinement and publication stages may embed sufficient personal input to satisfy copyright requirements. Given the significant commercial value generated by AI-assisted works,⁶¹ recognising their economic contribution could facilitate reinvestment and expand creative opportunities.

56 'AI-Related Court Cases Surge in Beijing' (*China Intellectual Property Rights Protection*, 11 September 2025) <<https://chinaipr.mofcom.gov.cn/article/copyright/202509/1993131.html>> accessed 16 November 2025.

57 European Parliament (n 30).

58 Vilhelm Schröder and Max Visser, 'AI and Copyright, Pt 2: The European and US Approach' (*Hannes Snellman Attorneys Ltd*, 20 November 2025) <<https://www.hannessnellman.com/news-and-views/blog/ai-and-copyright-part-ii-the-european-and-us-approach/>> accessed 20 November 2025.

59 Sachin Waikar, 'When AI-Generated Art Enters the Market, Consumers Win and Artists Lose' (*Stanford Business*, 20 May 2025) <<https://www.gsb.stanford.edu/insights/when-ai-generated-art-enters-market-consumers-win-artists-lose>> accessed 24 November 2025.

60 Matthew Sag, 'Fairness and Fair Use in Generative AI' (2024) 92 *Fordham Law Review* 1887.

61 'Governing AI Misuse Requires Both Exposing Falsity and Distinguishing Authenticity' (*Beijing Internet Court*, 22 August 2025) <https://english.bjinternetcourt.gov.cn/2025-08/22/c_810.htm> accessed 20 November 2025.

At present, WIPO has not adopted binding rules on copyright protection for AI-generated works, but it has actively facilitated international dialogue on this issue.⁶² Discussions focus on whether AI outputs meet copyright standards, who should be recognised as author or rights holder, and how AI-driven creativity may affect traditional artistic norms. Although no consensus has emerged, WIPO continues to gather views from member states and experts before proposing any regulatory framework. Furthermore, WIPO could take the lead in proposing amendments to the Bern Convention, reconsidering the approach and interpretation of the concept of an original work in the age of technology, thereby moving towards accepting AI-generated works within the Bern Convention's scope.

5.2. The Subject of Copyright

The global legal framework governing AI and AI-related intellectual property remains at an early stage. Most jurisdictions neither recognise copyright in AI-generated works nor accept AI as an author or rights holder. This position reflects uneven technological development and divergent national approaches to AI governance. Fundamentally, AI is regarded as technology rather than a natural person,⁶³ and therefore lacks the capacity to bear legal rights and obligations.

Although AI systems may operate autonomously, they remain dependent on human-created algorithms and knowledge. Consequently, AI is generally treated as a tool rather than an independent subject of law, and does not satisfy the requirement of direct creative authorship.⁶⁴ The prevailing international trend is therefore to allocate copyright in AI-generated works to human or legal persons involved in developing, owning, or operating AI systems.⁶⁵ This approach aligns with existing legal structures and the objective of protecting human intellectual achievements, while also incentivising investment and innovation.

Nevertheless, assigning copyright to human or corporate actors may create risks of abuse, such as excessive licensing fees or overreliance on advanced technology, potentially undermining the public interest. Balancing economic incentives and access remains a key reason why neither states nor WIPO have reached a definitive position on copyright protection for AI-generated works.

62 WIPO Secretariat, *WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI) Second Session* (Revised issues paper on Intellectual Property policy and Artificial Intelligence, WIPO 2020) 8-11.

63 Adil S Al-Busaidi and others, 'Redefining Boundaries in Innovation and Knowledge Domains: Investigating the Impact of Generative Artificial Intelligence on Copyright and Intellectual Property Rights' (2024) 9(4) *Journal of Innovation & Knowledge* 100630, doi:10.1016/j.jik.2024.100630.

64 Cristian Colther and Jean Pierre Doussoulin, 'Artificial Intelligence: Driving Force in the Evolution of Human Knowledge' (2024) 9(4) *Journal of Innovation & Knowledge* 100630, doi:10.1016/j.jik.2024.100625.

65 Maria Kalyvaki, Kyle Nash and Heather McIntosh, 'AI, Copyright, and Business: Navigating Global Legal Challenges in the Era of Generative Content and Digital Replicas' (*International Review of Law, Computers & Technology*, 24 November 2025) doi:10.1080/13600869.2025.2590795.

5.3. Policy Recommendations

The AI era presents unprecedented legal challenges, requiring a departure from traditional doctrines. China's evolving judicial practice reflects both caution and openness in addressing issues not yet clearly regulated by law. Although current court decisions function as precedents rather than statutory rules, they demonstrate flexibility in interpreting creativity and recognising human intellectual contribution through AI.

Drawing on the judicial practice analysed above, China's approach clearly encourages technological innovation. Rather than rigidly applying existing copyright rules to AI-generated works, Chinese courts have gradually expanded the concept of creativity by recognising human intellectual contribution through the training, supervision, and control of AI systems capable of producing copyrightable works. Assessments of creative judgment, intellectual labour, originality, and personal imprint remain highly dependent on judicial discretion in individual cases.⁶⁶ While this flexibility allows courts to respond to technological realities, it also risks inconsistency in the absence of a comprehensive statutory framework. However, case-by-case assessment of originality and creative input, largely dependent on judicial discretion, risks inconsistency in the absence of clear legislation. To address these challenges, coordinated action at national and international levels is necessary.

First, legislation should clarify the legal status of AI. As a scientific and technological phenomenon, AI must be legally characterised as a specific entity, whether tangible or intangible. At present, AI may be conceptualised either as: (i) a subject of law, with limited recognition of rights in rare cases,⁶⁷ such as Saudi Arabia's approach to humanoid robots;⁶⁸ or (ii) a distinct legal object subject to special regulatory control. Under the latter approach, AI is not recognised as a rights-bearing entity but rather as a controlled asset or technological tool,⁶⁹ as reflected in Article 3(1) of the EU AI Act. The EU regulations approach AI as a distinct legal object, controlled by subjects of law and subject to separate

66 Edward Chatterton, Joanne Zhang and Liam Blackford, 'Another Chinese Court Finds that AI-Generated Images can be Protected by Copyright: The Changshu People's Court and the Half Heart Case' (*Technology's Legal Edge*, 21 March 2025) <<https://www.technologysleage.com/2025/03/another-chinese-court-finds-that-ai-generated-images-can-be-protected-by-copyright-the-changshu-peoples-court-and-the-half-heart-case/>> accessed 05 December 2025.

67 Volker Türk, 'Artificial Intelligence Must be Grounded in Human Rights, Says High Commissioner' (*The Office of the High Commissioner for Human Rights of the United Nations*, 12 July 2023) <<https://www.ohchr.org/en/statements-and-speeches/2023/07/artificial-intelligence-must-be-grounded-human-rights-says-high>> accessed 16 December 2025.

68 Vidhurinda Samaraweera, Major WDS Rodrigo and Amandi Rathnayak, 'Futurama: Robot Rights and the Law' (*15th International Research Conference of KDU*, October 2022) <https://www.researchgate.net/publication/364070246_Futurama_Robot_Rights_and_the_Law> accessed 15 December 2025.

69 Rafael Dean Brown, 'Property Ownership and the Legal Personhood of Artificial Intelligence' (2021) 30(2) *Information & Communications Technology Law*, doi:10.1080/13600834.2020.1861714.

control, to limit risks to AI users. Clearly defining the legal nature of AI is crucial for assessing originality and creativity in AI-generated works, and directly affects decisions on copyright eligibility.

Second, international treaties and national laws could reconsider the concept of authorship by shifting from a narrow definition, in which the author is the person who directly creates the work, to a broader understanding of authorship as a creative contribution. This would enable recognition of copyright for individuals who develop, train, or meaningfully use AI systems, provided they can demonstrate substantial intellectual investment and personal creative input. At the same time, ownership rules may be expanded to include investors such as AI system owners, data holders, or publishers who finance AI-assisted production. This approach would enhance economic incentives, stimulate innovation,⁷⁰ and support the sustainable development of the AI industry.

Third, specific criteria should be established to assess the copyright protection of AI-generated works. Unlike traditional works, AI-generated outputs require tailored standards. Originality should remain central, requiring evidence of intellectual effort and personal imprint.⁷¹ AI-generated works should not merely reorganise existing data but must demonstrate novelty supported by identifiable creative processes. Rights holders should be able to document initial intellectual investment, creative planning, and the continuous involvement of human actors. Currently, there are no specific standards for quantifying the author's contribution in proving the above points; it depends on each case handled by the court. As reflected in Chinese internet court decisions, such criteria should be codified in legislation rather than applied only in isolated cases, ensuring consistency and objectivity in future disputes. Therefore, in line with judicial practice, courts may submit opinions to the legislature to develop a set of evaluation standards or a classification system for determining the originality of AI-generated works.

Fourth, AI training relies heavily on large volumes of copyrighted works owned by third parties. Unlike traditional quotation practices, AI developers may extensively reuse protected content without permission or remuneration.⁷² Domestic intellectual property laws should, therefore, require AI enterprises to provide fair compensation to copyright holders for the use of training data. This mechanism would safeguard existing rights while enabling AI development within a transparent and lawful framework. One feasible approach would be to operationalise compensation through a collective

70 Bijal Lalitkumar Dave, 'Future-Proof Living Leading a Better Life with Artificial Intelligence' (2024) 2(2) International Journal of Artificial Intelligence Research and Development 217, doi:10.34218/IJAIRD_02_02_019.

71 Gaffar and Albarashdi (n 11).

72 Bertin Martens, 'The European Union is Still Caught in an AI Copyright Bind' (*Bruegel's Weekly Newsletter*, 10 September 2025) <<https://www.bruegel.org/analysis/european-union-still-caught-ai-copyright-bind>> accessed 21 December 2025.

licensing model administered by Collective Management Organisations (CMOs). Although CMOs have expressed concerns that AI enterprises are currently evading payment obligations to copyright holders,⁷³ increasing cooperation among CMOs across jurisdictions indicates emerging prospects for the development and institutionalisation of such licensing models in the AI era.

6 CONCLUSIONS

AI and the legal challenges it raises for AI-generated works have become a major concern worldwide. As such, works that continue to improve in both substance and form significantly reshape perceptions of science and technology. While embracing the benefits of AI development, states must also confront its negative implications. In the field of copyright, AI enables the rapid creation of high-quality works, yet raises a fundamental question: should AI-generated works be treated on par with human-created works in literature, science, and the arts? Even technologically advanced jurisdictions such as the EU and the United States remain cautious in defining AI's legal status and the originality of AI-generated works. As a result, copyright applications for AI-generated works are often rejected, and domestic laws have yet to fully recognise them as equivalent to works created by humans.

Judicial practice of the Chinese Internet Courts demonstrates that copyright protection for AI-generated works largely depends on whether the claimant can prove meaningful creative effort and a discernible personal imprint in the work. Given AI's capacity for self-learning and algorithmic optimisation, its outputs may be substantially shaped, refined, and developed through human intervention prior to publication. Such an intervention can embed sufficient human creativity to satisfy the requirements of copyright protection.

Ultimately, copyright protection for AI-generated works in the technological era is not merely a legal issue but also a strategic policy choice. States must strike a balance between protecting intellectual property rights, encouraging innovation, and managing technological risks to prevent the misuse of AI. In the future, addressing legal uncertainties and establishing a coherent framework for protecting AI-generated works will be essential to safeguarding the interests of creators and technology investors while promoting sustainable economic development in the digital age.

73 Annica Ryng, 'CMOs Challenges in the AI Era, pt 1' (*Society of Audiovisual Authors*, 11 August 2025) <<https://www.saa-authors.eu/articles/cmcs-challenges-in-the-ai-era>> accessed 02 March 2026.

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Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organisations.

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EDITORS

Managing Editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Dang BTH, 'Copyright Protection in the Age of Generative AI: A Comparative Study of Global Regulatory Trends and Judicial Divergence' (2026) 9(2) Access to Justice in Eastern Europe 383-409 <<https://doi.org/10.33327/AJEE-18-9.2-a0001970>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a0001970>

Summary: 1. Introduction. – 2. Methodology. – 3. Legal Gaps in the Copyright Protection of AI-Generated Works. – 3.1. *The Distinction Between AI-Generated Works and AI-Assisted Works.* – 3.2. *Legal and Regulatory Gaps in the Copyright Protection of AI-Generated Works in Selected Jurisdictions.* – 3.2.1. *Legal and Judicial Practice in the United States.* – 3.2.2. *Legal*

and Judicial Practice in the European Union. – 3.2.3. *Legal and Judicial Practice in the United Kingdom.* – 4. *Judicial Practice of China's Internet Courts in Copyright Disputes Involving AI-Generated Works.* – 4.1. *“Spring Breeze Brings Tenderness” Case (Li v. Liu, 2023).* – 4.2. *“Cat Crystal Diamond Pendant” Case (2025).* – 5. *Shifts in the Perception of Copyright in AI-Generated Works.* – 5.1. *Originality and Ethical Concerns in Art.* – 5.2. *The Subject of Copyright.* – 5.3. *Policy Recommendations.* – 6. *Conclusions.*

Keywords: *AI-generated and AI-assisted works; AI and authorship; AI and legal gap; internet court, copyright protection.*

DETAILS FOR PUBLICATION

Date of submission: 5 Jan 2026

Date of acceptance: 2 Mar 2026

Publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in the first round: 2 reports

Number of revision rounds: 2 rounds with major and minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

This article was prepared with the assistance of AI tools. Specifically, Grammarly was employed for proofreading during the drafting process (version reviewed: December 2025). The authors confirm that all content, arguments, and conclusions were generated independently and remain their sole responsibility. No AI tool was used for generating original research findings or analysis.

ACKNOWLEDGEMENT

The publication of this article was supported by the Support for Early Career Researchers (ECR) Program of the Access to Justice in Eastern Europe (AJEE) journal. Under this program, the article was published free of charge through a 100% publication fee waiver granted to eligible early career researchers.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАХИСТ АВТОРСЬКИХ ПРАВ В ЕПОХУ ГЕНЕРАТИВНОГО ШТУЧНОГО ІНТЕЛЕКТУ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ ГЛОБАЛЬНИХ РЕГУЛЯТОРНИХ ТЕНДЕНЦІЙ ТА СУДОВИХ РОЗБІЖНОСТЕЙ

Данг Буй Тхі Хай

АНОТАЦІЯ

Вступ. Поява літературних, наукових та художніх творів, створених штучним інтелектом (ШІ), в останні роки стала поширеною юридичною проблемою в усьому світі. Основні правові труднощі пов'язані з визначенням того, чи відповідають твори, створені ШІ, вимогам авторського права відповідно до національного законодавства та міжнародних договорів. Судова практика китайських інтернет-судів у спорах щодо авторського права, пов'язаних з творами, створеними ШІ, останніми роками призвела до розбіжних думок серед юристів як у Китаї, так і за його межами. Вивчення судових підходів до визнання авторського права на твори, створені ШІ, є цінним джерелом інформації для дослідження міжнародного авторського права та для майбутнього вдосконалення національних правових систем, що стосуються ШІ.

Методи У статті визначено та розглянуто правові проблеми у захисті авторських прав на твори, створені штучним інтелектом, підкреслюючи, що у випадках, коли законодавство містить суттєві прогалини, роль судової влади має бути чітко сформульована для подолання таких проблем. Для досягнення цієї мети використовуються аналітичні та порівняльні методи для вивчення відмінностей між правовим регулюванням традиційних творів та творів, створених штучним інтелектом. Дослідження в першу чергу зосереджено на чинній правовій базі Всесвітньої організації інтелектуальної власності (ВОІВ) у поєднанні із законодавством Європейського Союзу, Сполучених Штатів та Сполученого Королівства, з особливим акцентом на китайській судовій практиці щодо визнання авторського права на твори, створені штучним інтелектом, та впливу такої судової практики в контексті, коли законодавство все ще містить численні правові прогалини.

Результати та висновки. У дослідженні підкреслюється різноманітність підходів до захисту авторських прав на твори, створені штучним інтелектом, та необхідність перегляду розуміння творчості авторів у процесі створення творів в епоху штучного інтелекту. Грунтуючись на досвіді китайських інтернет-судів, дослідження робить висновок, що судова влада відіграє особливо важливу роль у заповненні законодавчих прогалин, оцінюючи рівень творчого втручання людини у використання штучного

інтелекту для створення творів та забезпечуючи гнучкість у захисті авторських прав на твори, створені штучним інтелектом.

Ключові слова. твори, створені за допомогою штучного інтелекту та за допомогою штучного інтелекту; штучний інтелект та авторство; штучний інтелект та правова прогалина; інтернет-суд, захист авторських прав.

中文注释*

研究文章

人工智能生成作品著作权保护： 基于中国互联网法院司法实践的比较研究

灯裴氏海

背景：近年来，人工智能（AI）生成文学、科学及艺术作品的现象日益普遍，已成为全球范围内共同面临的法律挑战。其核心法律难题在于：AI生成作品是否符合各国国内法及国际条约项下著作权保护的条件。中国互联网法院在处理涉及AI生成作品的著作权纠纷中所形成的司法实践，近年来在国内外学界引发了较大分歧。对AI生成作品著作权认定的司法路径进行研究，不仅为国际著作权法研究提供了重要参考，也为未来完善各国应对人工智能问题的国内法律体系提供了有益借鉴。

方法：本文识别并分析了AI生成作品著作权保护面临的法律挑战，强调在法律规范存在明显空白的情况下，应当明确司法机关的作用以应对相关问题。为实现上述研究目标，本文采用分析与比较研究方法，对传统作品与AI生成作品在法律规制方面的差异进行考察。研究主要基于世界知识产权组织（WIPO）的现行法律框架，并

* The publication metadata in Vietnamese is presented as submitted by the authors.

结合欧盟、美国及英国的相关法律制度，重点分析中国互联网法院在AI生成作品著作权认定问题上的司法实践及其在法律尚存诸多空白背景下的影响。

结果与结论：研究表明，各国在AI生成作品著作权保护方面呈现出多样化路径，同时有必要在AI时代重新审视作者创造性的内涵。基于中国互联网法院的司法经验，本文认为，司法机关在弥补立法空白方面发挥着尤为重要的作用，具体而言，司法机关通过评估自然人在利用AI生成作品过程中的创造性投入程度，并在此基础上灵活适用AI生成作品的著作权保护。

关键词：人工智能生成和人工智能辅助作品；人工智能与作者身份；人工智能与法律空白；互联网法庭，版权保护。

Research Article

LEGAL CONSTRAINTS AND PROCEDURAL SAFEGUARDS OF UNDERCOVER OPERATIONS IN ANTI-MONEY LAUNDERING INVESTIGATIONS: A UAE PERSPECTIVE

**Ayman Nawwaf Alhawawsheh*, Yaser Mohamad Al Sawy,
Luma Ali Al Dhaheri, Qusay Salman Alfalahi,
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DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a000196>

Date of submission: 20 Dec 2025

Date of acceptance: 01 Apr 2026

Publication: 20 May 2026

Disclaimer:

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ABSTRACT

Background: Covert operations have become indispensable in the fight against financial and cybercrimes, specifically money laundering and the exploitation of digital financial platforms. In the United Arab Emirates (UAE), judicial police officers are legally empowered to utilize undercover techniques, including disguise, impersonation, confidential informants, and transaction surveillance, to detect illicit activities while ostensibly respecting the autonomy of suspects. Despite these provisions, significant ambiguities persist in distinguishing lawful detection from unlawful instigation, posing a risk to due process and the admissibility of evidence. Comparative jurisprudence, particularly from the European Court of Human Rights (ECtHR), emphasizes the necessity of judicial oversight, proportionality, and robust anti-entrapment mechanisms, offering a vital framework for modernizing UAE legal practices.

Method: The study employed a descriptive-analytical research design, integrating quantitative and qualitative methodologies. A structured questionnaire was distributed to a sample of 321 specialists spanning the legal, financial, and cyber sectors in the UAE to evaluate expert perceptions regarding the operational effectiveness and ethical implications of undercover agents. Concurrently, a doctrinal analysis of the UAE Federal Decree-Law on Anti-Money Laundering was conducted. This included a rigorous examination of statutory provisions and judicial precedents, and a comparative evaluation against ECtHR standards and European Union (EU) directives, to identify operational, ethical, and legal gaps within the current UAE framework.

Results and Conclusions: The study demonstrates that the strategic use of undercover agents significantly enhances the detection and prevention of money laundering within the UAE. Quantitative results confirm strong expert consensus: 76.5% of specialists identify confidential agents as vital for reducing financial crime, and 81% associate their deployment with increased anti-money laundering (AML) effectiveness. However, the research also exposes critical legal and ethical vulnerabilities, particularly when investigative tactics risk overriding a suspect's free will or manufacturing criminal opportunities. Comparative analysis reveals that ECtHR jurisprudence provides a more robust framework for safeguarding due process, emphasizing mandatory judicial pre-authorization, proportionality, and the categorical exclusion of evidence obtained through entrapment. Although 73.2% of respondents indicated that increasing the effectiveness of local legislation is currently unnecessary, the doctrinal analysis suggests a normative gap that must be addressed to ensure procedural fairness. Consequently, the study recommends revising UAE legislation to clearly define the permissible scope of undercover activity, mandate prosecutorial or judicial oversight, and codify the exclusionary rule. Furthermore, implementing comprehensive training programs focused on legal ethics and human rights is essential to maintain public confidence in the justice system while preserving operational efficacy.

1 INTRODUCTION

In contemporary criminal justice systems, undercover operations have emerged as one of the most sophisticated and indispensable investigative tools, particularly in the escalating realm of cybercrime.¹ This form of criminality is defined by its transnational reach, reliance on advanced technologies, and the pervasive anonymity it affords perpetrators. Within this landscape, electronic communication serves as the primary medium for organizing and executing illicit activities. To counter these challenges, undercover agents are deployed to engage suspects via encrypted emails, text messages, and specialized online platforms. These

1 See more in Almudena Valiño Ces, 'The Importance of the Computer Undercover Agent as an Investigative Measure Against Cybercrime: A Special Reference to Child Pornography Crimes' in Francisco António Carneiro Pacheco de Andrade, Pedro Miguel Fernandes Freitas and Joana Rita de Sousa Covelo de Abreu (eds), *Legal Developments on Cybersecurity and Related Fields* (Springer 2024) 145.

agents frequently adopt fictitious identities, ranging from minors in exploitation cases to cybercriminals infiltrating hacker syndicates, to penetrate criminal networks from within. While operations often begin in the virtual sphere, they frequently transition into physical encounters, significantly increasing the complexity of the investigative process.

A landmark illustration of an effective undercover cyber investigation occurred in 1999, involving the Seattle-based Internet Service Provider, Speakeasy Network.² Targeted by hackers using Russian IP addresses, the company faced extortion after perpetrators threatened to expose thousands of stolen customer credit card details and passwords. In response, the Federal Bureau of Investigation (FBI) launched a multifaceted operation utilizing audio and video surveillance, keystroke monitoring, sniffing devices, and the creation of "front" companies and fake networks. This strategy led to the successful conviction of the suspects on federal charges of computer fraud, mail fraud, and conspiracy, demonstrating the power of covert tactics in dismantling sophisticated criminal schemes.

Yet, despite these successes, undercover operations precipitate profound legal and ethical dilemmas. The core challenge lies in balancing legitimate law enforcement objectives, namely, the detection and prevention of crime, with the preservation of fundamental human rights. Central to this tension are the right to due process and protection against entrapment. A critical question persists: do covert tactics risk crossing the boundary into unlawful inducement or the fabrication of criminal conduct? Such practices threaten to compromise judicial fairness, undermine constitutional guarantees, and erode the integrity of the justice system. These concerns are amplified in cyber and financial crime investigations, where the intangible nature of digital evidence increases the risk of procedural irregularities and abuses of power.³

The significance of this research lies in the urgent need to clarify the legal and procedural limits of undercover operations, with a specific focus on agents' liability and the safeguards needed to regulate their conduct. Because these operations are inherently shrouded in secrecy, they risk unintentionally compromising individual security and the broader public interest.⁴

Consequently, a precise delineation of permissible conduct, paired with robust judicial oversight, is essential to prevent abuses such as fabricated evidence or malicious accusations. By addressing these complexities, this study aims to analyze the legal standards that define the legitimacy of undercover practices while ensuring that public trust in judicial and law enforcement institutions is maintained.

2 *United States v Gorshkov* No CR00-550C (WD Wash, 23 May 2001) [2001] WL 1024026; Dorothy E Denning, 'Obstacles and Options for Cyber Arms Controls' (Arms Control in Cyberspace Conference, Heinrich Böll Foundation, Berlin, 29–30 June 2001) <<https://faculty.nps.edu/dedennin/publications/Berlin.pdf>> accessed 10 December 2025.

3 David S Wall, *Cybercrime: The Transformation of Crime in the Information Age* (2nd ed, Polity 2024).

4 Ishan Atrey, 'Cybercrime and its Legal Implications: Analysing the Challenges and Legal Frameworks Surrounding Cybercrime, Including Issues Related to Jurisdiction, Privacy, and Digital Evidence' (2023) 10(1) *International Journal of Research and Analytical Reviews* 183.

2 RESEARCH METHODOLOGY

The questionnaire was distributed to 321 specialists in the United Arab Emirates across the legal, financial, and cyber sectors. The sample consisted of 176 males (55 percent) and 145 females (45 percent), with a significant majority being non-Emirati professionals (71 percent).

The instrument's validity was confirmed by a panel of six experts in law, finance, and information technology, achieving an inter-rater agreement rate of 92 percent via the Cooper formula. Internal consistency was verified using a pilot sample forty-one of fifty-nine individuals, with correlation coefficients ranging from 0.647 to 0.773 with a significance level of $p < 0.01$.

Reliability was further established using the split-half method, Pearson's correlation, and the Spearman-Brown formula, yielding coefficients between 0.791 and 0.832. Data was analyzed using chi-squared tests to determine the statistical significance of expert responses.

3 THE DIFFERENCE BETWEEN AN UNDERCOVER AGENT AND AN INSTIGATOR

In legal literature and across national legislations, various terms are used to refer to individuals involved in covert law enforcement operations, including 'covert investigator', 'undercover agent', 'secret police', and 'undercover officer'.⁵ This terminological diversity reflects differing legal frameworks across jurisdictions, each prescribing unique conditions for the deployment and conduct of such individuals. As a result, practices in combating organized crime vary significantly, influencing both policing strategies and judicial approaches.⁶

From a criminal law standpoint, there is a crucial distinction between an undercover agent and an instigator (also known as an agent provocateur), primarily concerning their role in the commission of an offense.⁷

An undercover agent is a person authorized by law enforcement or judicial authorities to engage in secret surveillance or interaction with suspects, to detect crimes and collect evidence. These agents may utilize techniques such as impersonation or simulated transactions (for example, controlled delivery). However, their role is limited to observation; they must not incite, provoke, or cause criminal behavior. If the undercover agent does not

5 Štefan Kočan, 'The Agent in the Slovak Criminal Law' (2012) 12(12) *Kultura Bezpieczeństwa* 16.

6 Clive Harfield and Simon Bronitt, 'Undercover Investigation', *Elgar Encyclopedia of Crime and Criminal Justice* (2024) 714, doi:10.4337/9781789902990.

7 Joseph Jaconelli, 'Incitement: A Study in Language Crime' (2018) 12 *Criminal Law and Philosophy* 245, doi:10.1007/s11572-017-9427-8.

interfere with the suspect's free will, they bear no criminal responsibility for the offense that is eventually committed.⁸

In contrast, an instigator or agent provocateur takes an active role in inducing, encouraging, or facilitating the commission of a crime. This form of participation transforms the instigator into a criminal accomplice, as they contribute directly to the formation of criminal intent or provide the means for executing the offense.⁹

This distinction becomes even more important in the context of incitement, a legally recognized inchoate offense. Incitement involves a person persuading or encouraging another person to commit a crime, regardless of whether the crime is ultimately committed. The essential element that differentiates incitement from mere preparation is a communicative act directed at provoking unlawful conduct.¹⁰ In many jurisdictions, such behavior is criminalized to prevent the creation of criminality through external provocation.

According to the majority of criminal law scholars, inciting an individual to commit a crime violates fundamental principles of justice and the ethical conduct expected of law enforcement officers. The state's role is to prevent crime and prosecute offenders, not to provoke criminal behavior. Consequently, when entrapment methods are used, they risk nullifying criminal proceedings for infringing on individual liberties protected by law and the Constitution.¹¹

Punishable entrapment occurs when an undercover officer originates the idea of the offense and deliberately implements it in the suspect's mind solely to catch them committing, or attempting to commit, the crime. Suppose the officer, through deception, offers to trade illicit goods (for example, narcotics or laundered money),¹² which directly leads to the commission of the crime. In that case, the officer may be deemed a participant if a causal link exists between their conduct and the offense.¹³

This legal principle extends to undercover agents, whose actions are legally attributed to law enforcement and may thus trigger the same consequences as entrapment conducted by officers.¹⁴ While these theoretical distinctions between detection and instigation are foundational to criminal law, their application is particularly challenging in the context of

8 David Ormerod, Karl Laird and Matthew Gibson, *Criminal Law* (17th edn, OUP 2024).

9 Jeremy Horder, *Ashworth's Principles of Criminal Law* (10th edn, OUP 2022).

10 Ormerod, Laird and Gibson (n 8).

11 Bruce Hay, 'Sting Operations, Undercover Agents, and Entrapment' (2005) 70(2) *Missouri Law Review* 22, doi:10.2139/ssrn.469960.

12 Eldad Bar Lev, 'Money Laundering — White Collar Crimes in Israel' (2022) 5(2) *Israel Journal of Financial and Monetary Economics* 125, doi:10.33545/26175754.2022.v5.i2b.158. Recent case-focused empirical research relevant for comparative analysis.

13 Elizabeth Boison and Peter D Hardy (eds), *Anti-Money Laundering 2024: Risks, Due Diligence, and Compliance in an Evolving Legal World* (Practising Law Institute 2024). Current practice guide on compliance and AML risk management.

14 RE Bell, 'Undercover Sting Operations in Money Laundering Cases' (2001) 4(4) *Journal of Money Laundering Control* 333, doi:10.1108/eb027283.

money laundering, where the inherent secrecy and structural complexity of financial transactions often necessitate a more proactive investigative approach.

Consequently, the use of undercover agents in money laundering investigations raises key legal and doctrinal concerns:¹⁵

To what extent does the undercover agent influence the actual commission of the crime?

Can the agent be legally considered a participant and, thus, held liable alongside the principal perpetrators?

Proponents of undercover operations argue that economic crimes, such as money laundering, warrant the same investigative rigor as violent or political offenses. Modern money laundering schemes are extremely secretive; conventional methods often fall short in penetrating these networks. Undercover agents, by posing as investment facilitators or brokers of illicit funds, can gain the suspect's trust and execute arrests in flagrante delicto, thereby preserving the integrity of the evidence and preventing harm.¹⁶

Advocates assert that individual liberties must be balanced against society's right to security, especially in the financial domain. Undercover work remains indispensable to uncovering hidden illicit activity and building legally sound prosecutions.¹⁷

Critics argue that such undercover methods are inherently problematic: they may unduly influence the suspect's free will, manufacturing criminal intent that would not otherwise exist. This diminishes the credibility of evidence, especially if the agent is motivated by ulterior motives, such as financial gain or personal vendetta.¹⁸

Furthermore, this practice may distort the principle of flagrante delicto, particularly if the arrest is deliberately orchestrated, thus questioning legal and procedural legitimacy. Opponents contend that the agent becomes an active accomplice and, under certain statutes, is criminally liable. There is also an elevated risk of entrapping innocent individuals, undermining due process, and fostering distrust in the system.¹⁹

Given that that such practices may prioritize individual interests at the expense of personal freedoms, the supportive view remains, in our opinion, the more convincing. However, this approach must be refined by implementing strict legal safeguards to ensure that fundamental rights and individual liberties are not infringed.

15 Hay (n 11).

16 Bell (n 14).

17 B Grant Stitt and Gene G James, 'Entrapment and the Entrapment Defense: Dilemmas for a Democratic Society' (1984) 3(1) Law and Philosophy 111, doi:10.1007/bf00211226.

18 Doron Goldbarsht, Louis de Koker and Jamie Ferrill (eds), *The Financial War on Crime and Terrorism: Opportunities and Challenges* (Springer Cham 2025) doi:10.1007/978-3-032-06360-1. Latest interdisciplinary examination of global financial crimes, AML policy, and enforcement challenges.

19 Daniel J Hill, Stephen K McLeod and Attila Tanyi, 'The Concept of Entrapment' (2018) 12(4) Criminal Law and Philosophy 539, doi:10.1007/s11572-017-9436-7.

4 LEGAL FRAMEWORK IN THE EUROPEAN UNION AND THE UAE

The United Arab Emirates legislator provides foundational definitions for covert operations in Article 1 of the Federal Decree-Law on Anti-Money Laundering, establishing a clear distinction between the movement of illicit assets and the role of the investigator:

Controlled Delivery - a way in which the competent authority allows under its control the entrance of illegal or suspicious funds or proceeds of crimes to the lands of the State, their passage, transit, or exiting the State to investigate a crime and determine the identity of the perpetrators.²⁰

Secret Operation - a way of investigation and examination by which a judicial officer assumes an identity other than his real one or performs a hidden or false role to obtain evidence or information relevant to the crime.

European legislation does not provide a single unified definition of the undercover agent, but through various directives and jurisprudence, particularly under the European Convention on Human Rights and Directive 2014/41/EU on the European Investigation Order (EIO), a clear legal understanding has developed.²¹ An undercover agent in the European legal context is generally defined as:²²

An individual acting on behalf of law enforcement authorities, who assumes a false identity or performs a concealed or fictitious role to obtain evidence or information relevant to a suspected crime, without disclosing their real identity.²³

The UAE judiciary distinguishes between the creation of criminal intent in the accused's mind (i.e., entrapment), and merely detecting or observing a crime already intended or committed by the suspect.

In one landmark judgment, the Court held:

According to Article 30 of the UAE Code of Criminal Procedure, the mission of a judicial police officer is to uncover crimes and ensure the punishment of their

20 Federal Decree by Law No (10) of 2025 'Regarding Anti-Money Laundering, and Combating the Financing of Terrorism and Proliferation Financing' [2025] Official Gazette 808.

21 Council of the EU, 'Evaluation Report on the 10th Round of Mutual Evaluations on the Implementation of the European Investigation Order (EIO): Report on the Netherlands' (15 February 2024) <<https://www.parlament.gv.at/gegenstand/XXVII/EU/171172>> accessed 10 December 2025.

22 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 Regarding the European Investigation Order in Criminal Matters [2014] OJ L 130/1.

23 "Journal of Money Laundering Control" issue 5 for 2024 includes multiple research articles on money laundering patterns and AML, including UAE-related analysis. See, for example: Sadia Nazar, Abdul Raheman and Muhammad Anwar ul Haq, 'The Magnitude and Consequences of Money Laundering' (2024) 27(5) Journal of Money Laundering Control 808, doi:10.1108/JMLC-09-2022-0139; Mariam Aljassmi and others, 'An Analysis of the Determinants of Money Laundering in the United Arab Emirates (UAE)' (2024) 27(5) Journal of Money Laundering Control 858, doi:10.1108/JMLC-09-2023-0150.

perpetrators. Therefore, any act carried out in pursuit of this objective is deemed valid and legally effective, provided that the officer does not play a role in creating the crime or inciting its commission, and as long as the suspect's will remains free and uncoerced. There is no fault in the judicial officer resorting, within these bounds, to sophisticated methods that facilitate the detection of crime, so long as they do not conflict with public morals.²⁴

In another notable ruling, the Court clarified:

"It is well-established that judicial police officers and their assistants cannot be faulted for the investigative tactics they employ, including the use of deception or impersonation, if such methods are necessary to earn the trust of suspects and expose ongoing criminal conduct. The officers' passive acquiescence or cooperation with criminals, gathering evidence, or making arrests, is not considered entrapment as long as the suspect's will remains free and manipulated, and no active incitement occurred."²⁵

In contrast, if the police actively instigate or fabricate a criminal scenario, as occurred in the case where the Dubai International Narcotics Control Department induced the accused to commit a crime in Pakistan by promising him a monetary reward to be collected from an anonymous person in Abu Dhabi, then such actions fall outside the scope of legitimate investigation. In this case, the accused was merely a tool in an operation orchestrated entirely by law enforcement.

Furthermore, the arrest and search procedures carried out based on a circular issued by the Dubai International Narcotics Control Department were declared invalid. Neither the Dubai nor Abu Dhabi Anti-Narcotics Departments had obtained judicial authorization, and the arrest was triggered solely by a customs officer's suspicion. This procedural breach rendered the search and arrest unlawful.

The challenges observed in these domestic cases resonate in sophisticated ways with international standards. Undercover operations within the European Union are primarily governed by national laws but must comply with overarching directives and obligations under the European Convention on Human Rights. The European Investigation Order provides that covert investigations may be authorized by a competent authority, provided they are permitted under the executing state's national law.

Undercover operations within the European Union are primarily governed by national laws but must comply with overarching directives and obligations under the European Convention on Human Rights. Article 29 of Directive 2014/41/EU provides: 'An EIO may be issued to carry out covert investigations, including surveillance and undercover

24 Case 562/2019 (Abu Dhabi Court of Cassation (Criminal Chamber), 30 June 2019).

25 Case 343/2013 (Abu Dhabi Court of Cassation (Criminal Chamber), 28 May 2013).

activities, provided such activities are permitted under the national law of the executing State and authorized by a competent authority'.²⁶

The European Court of Human Rights has consistently held that the use of undercover agents must not cross the line from legitimate investigation into impermissible entrapment. While landmark cases such as *Teixeira de Castro v. Portugal*, *Ramanauskas v. Lithuania*, and *Khudobin v. Russia* are frequently cited, their true significance lies not merely in their outcomes but in the standard they establish for assessing state responsibility under Article 6 of the European Convention on Human Rights.²⁷

The Court has developed a two-tiered analytical framework to determine whether entrapment has occurred: a substantive test and a procedural test.

Under the substantive approach, the Court examines whether the criminal activity was predominantly the result of state intervention. In *Teixeira de Castro v. Portugal*,²⁸ the absence of prior suspicion or criminal record was decisive; the undercover officers did not uncover an existing criminal enterprise but instead created the offense themselves. The Court emphasized that law enforcement must limit its role to detecting ongoing criminal conduct rather than generating criminal intent.

In *Ramanauskas v. Lithuania*,²⁹ the Court refined this standard by stressing that, even where a public official occupies a position vulnerable to corruption, the initiative must originate with the suspect. The mere offer of an opportunity by an undercover agent, particularly where no prior intent is demonstrated, was deemed sufficient to undermine the fairness of the proceedings.

Applied to money laundering³⁰ investigations, this principle has profound implications. Because money laundering frequently operates through lawful financial transactions, an undercover agent who proposes laundering mechanisms, structures transactions, or introduces illicit funds may effectively implant the criminal intent, rather than reveal it. In such cases, the agent ceases to be an investigative tool and becomes a catalyst for criminality.

Beyond the suspect's intent, the ECtHR places equal weight on procedural safeguards. In *Khudobin v. Russia*,³¹ the Court reaffirmed that where authorities initiate or

26 Directive 2014/41/EU (n 22).

27 Council of Europe, *European Convention on Human Rights: as amended by Protocols Nos 11, 14 and 15; supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 10 December 2025.

28 *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998) <<https://hudoc.echr.coe.int/?i=001-58193>> accessed 10 December 2025.

29 *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008) <<https://hudoc.echr.coe.int/?i=001-84935>> accessed 10 December 2025.

30 Anna Popik-Mazur, 'A Systematic Literature Review of Illicit Financial Flows and Money Laundering: Current State of Research and Estimation Methods' (2025) 47(1) *Journal of Economics and Management* 257, doi:10.22367/jem.2025.47.11.

31 *Khudobin v Russia* App no 59696/00 (ECtHR, 26 October 2006) <<https://hudoc.echr.coe.int/?i=001-77692>> accessed 10 December 2025.

manipulate criminal conduct, the absence of effective judicial supervision renders the trial fundamentally unfair.

Article 6 is violated not simply because entrapment occurs, but because domestic courts fail to scrutinize the legality and necessity of undercover operations. The Court requires:

- 1) Prior judicial authorization,
- 2) Clear operational limits on agents' conduct,
- 3) Effective judicial review of allegations of entrapment,
- 4) The possibility of excluding tainted evidence.

Without these safeguards, the imbalance between the prosecution and the defense becomes structural, undermining the equality of arms and the integrity of the trial process.

The distinction between lawful infiltration and unlawful instigation constitutes the core analytical challenge in undercover operations.

Legitimate infiltration involves passive participation in an existing criminal scheme, allowing authorities to observe and document illicit conduct. Instigation, by contrast, entails influencing the suspect's free will, escalating criminal behavior, or fabricating opportunities that would not otherwise exist.³²

In money laundering cases, this line is particularly fragile. Financial expertise, regulatory complexity, and asymmetrical knowledge enable undercover agents to shape transactions in ways the suspect may not have independently conceived. ECtHR jurisprudence makes clear that when the state engineers such conduct, it cannot subsequently rely on it to secure a conviction without violating Article 6.³³

The ECtHR's approach frames entrapment not merely as a matter of investigative misconduct but as a structural violation of the right to a fair trial. The state cannot simultaneously act as the architect of the offense and the arbiter of guilt. Evidence obtained through entrapment is incompatible with the principles of adversarial proceedings and procedural fairness.

Accordingly, the liability of undercover agents is not confined to disciplinary or internal accountability; it extends to the admissibility of evidence and the legitimacy of the prosecution as a whole.

In contrast to the European model, UAE legislation and jurisprudence have yet to develop a comprehensive doctrinal framework distinguishing infiltration from entrapment. While undercover techniques are implicitly tolerated in financial crime investigations, the absence

32 Wall (n 3). Comprehensive criminology text on cybercrime and emerging digital financial offenses.

33 *Lukanov v Bulgaria* App no 21915/93 (ECtHR, 20 March 1997) <<https://hudoc.echr.coe.int/eng?i=001-58022>> accessed 10 December 2025.

of explicit standards concerning prior suspicion, proportionality, and judicial oversight raises concerns regarding procedural fairness.

Unlike ECtHR jurisprudence, UAE courts do not systematically examine whether the criminal intent originated with the suspect or was induced by state agents. This divergence underscores a normative gap between European human rights standards and the current Emirati approach, particularly in complex financial crimes such as money laundering.

The jurisprudence of the European Court of Human Rights, particularly in the case of *Teixeira de Castro v. Portugal*,³⁴ provides practical standards for addressing key legal gaps in the UAE's law on covert operations. It requires prior, objective suspicion, thus limiting the arbitrary use of covert methods in the UAE. It also explicitly prohibits the entrapment of suspects, helping to define the line between legitimate investigation and unlawful incitement.

Furthermore, the European Court of Human Rights emphasizes judicial oversight, places the burden of proof on the public prosecutor, and underscores the need for a clear and preventable legal framework.³⁵ These principles can strengthen UAE law by clarifying licensing criteria, limiting discretionary power, and improving procedural fairness in anti-money laundering investigations.

5 RESEARCH RESULTS AND DISCUSSION

The study employed a comprehensive survey design to collect data from a diverse professional landscape in the United Arab Emirates.

The research sample comprised 321 individuals from the local community, specifically targeting professionals in the legal, financial, and information technology sectors. The demographic and professional distribution is detailed in the table below.

Table 1. Distribution of Study Sample Characteristics

Study Sample	Number	Percentage
Male	176	55%
Female	145	45%
Emirati	93	29%
Non-Emirati	228	71%

34 *Teixeira de Castro v Portugal* (n 28).

35 ECtHR, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)* (Council of Europe 2022).

Study Sample	Number	Percentage
Legal Sector	176	55%
Financial Sector	132	45%
Information Sector	13	4%
Total	321	100%

The results indicate a balanced gender distribution, while participation by non-Emirati professionals is notably higher, reflecting the international nature of the state's financial and legal workforce.

To ensure high academic standards, the questionnaire underwent rigorous validation:

- 1) *Content Validity*: The criteria list was developed based on existing literature and approved by six reviewers specializing in law, finance, and information. Feedback regarding wording and dialogue formats was integrated into the final version.
- 2) *Inter-rater Agreement*: Using the Cooper formula, the instrument achieved an agreement rate of 92 percent among experts and arbitrators.
- 3) *Internal Consistency*: A pilot study of 59 individuals was conducted. As shown in Table 2, correlation coefficients ranged from 0.647 to 0.763, all significant at the 0.01 level, confirming strong internal consistency.
- 4) *Reliability*: Reliability was established using the split-half method, Pearson's correlation, and the Spearman-Brown formula. Reliability coefficients for the three main topics ranged from 0.791 to 0.832, indicating high stability.

To achieve the study's objectives, the researchers relied on numerous relevant studies and prior research and consulted a diverse group of specialists and reviewers to develop the criteria list. The criteria list was approved by six reviewers specializing in law, finance, and information. The reviewers suggested several necessary modifications, including rewording, adding, and modifying dialogue formats, and revising other criteria. The researchers carefully incorporated all feedback to arrive at the final version of the study's criteria.

The researchers carefully prepared the questionnaire according to several stages, as follows:

- 1) Defining the questionnaire's objective
- 2) Calculating the questionnaire's validity: The following procedures were considered:
- 3) The suitability of the instrument's (questionnaire's) measurement criteria.
- 4) The feasibility of preparing and publishing the questionnaire electronically via Google Drive and analyzing it statistically.

- 5) Assessing the validity of the questionnaire: To ensure the validity of the measurement instrument (questionnaire), the researchers administered the questionnaire to six experts and arbitrators specializing in law, finance, and information technology. Cooper's formula was applied to calculate the inter-rater agreement rate, which reached 92 %, a high percentage indicating the suitability of the measurement instrument (questionnaire).

The researchers verified the instrument's (questionnaire) internal consistency using a preliminary pilot sample of fifty-nine individuals outside the main study sample. This was done by calculating the overall correlation coefficients between each questionnaire item and the overall score for its associated dimension, as illustrated in Table 2 below.

Table 2. Correlation Coefficients Between Questionnaire Criteria

Statement	
Correlation Coefficient Between Statements and Axis	
1	.685**
2	.647**
3	.763**

(**) Significant at the (0.01) level

Table 2 shows that the correlation coefficients between all questionnaire statements and the total score for each domain, which ranged from 0.647 to 0.773 and were all statistically significant at the 0.01 level. Therefore, it is clear that the correlation coefficients between the questionnaire statements and the total score are significant at the 0.01 level. This confirms the strong correlation between all questionnaire statements and criteria, and that they possess a high degree of internal consistency.

Reliability of the measurement instrument (questionnaire) is one of the most important factors contributing to dependability and trust. The reliability of the measurement instrument (questionnaire) was calculated using the split-half method, in addition to determining the simple correlation coefficient using Pearson's correlation coefficient. This correlation was consistently corrected using the Spearman-Brown formula, and then further corrected using the Guttman formula, as shown in Table 3.

Table 3. Values of the Questionnaire Reliability Coefficient Using the Split-Half Method

Questionnaire Topic	
Number	Pearson's Reliability Coefficient
1	0.791
2	0.817
3	0.832

The values shown in Table 3 indicate that the measurement instrument (questionnaire) demonstrates statistically significant reliability. High stability among the study sample, which means that all values are appropriate, and therefore reliable and indicative of the validity of the measurement tool (questionnaire) for application.

Table 4. The Importance of Using a Secret Agent Leads to a Reduction in Financial Crimes in the UAE

The Importance of Using a Secret Agent Leads to a Reduction in Financial Crimes in the UAE: Frequency Percentage

Degree	Number	Percent
Very Widely	97	30,2%
Very Widely	149	46.4%
Somewhat	51	15.9%
Lowly	18	5,6%
Very Low	6	1,9%
Total	321	100%

The responses of the study sample regarding the importance of using a secret agent to reduce in financial crimes in the UAE indicate a high level of importance, approximately 76.5%. A chi-squared test on the study sample yielded a p-value of 0.043, which is less than the 0.05 threshold. This indicates that the differences in percentages are statistically significant, suggesting that the study sample variable affects the importance of using a secret agent to reduce financial crimes in the UAE.

Table 5. The Importance of Using a Secret Agent Leads to a Higher Level of Anti-Money Laundering in the UAE

The Importance of Using a Secret Agent Leads to a Higher Level of Anti-Money Laundering in the UAE: Frequency Percentage

Degree	Number	Percent
Very Widely	107	33.3%
Very Widely	153	47.6%
Somewhat	47	14.6%
Lowly	11	3.4%
Very Low	3	.93 %
Total	321	100%

The responses of the study sample regarding the importance of using a secret agent to achieve a higher level of anti-money laundering in the UAE indicate that its use is highly important, at approximately 81%. A chi-squared test on the study sample yielded a p-value of 0.047, which is less than the 0.05 threshold. This indicates that the differences in percentages are statistically significant, suggesting that the study sample variable affects the importance of using a secret agent, leading to a higher level of anti-money laundering in the UAE.

Table 6. Is there a need to increase the effectiveness of local legislation in the UAE to combat financial and cybercrimes?

Is there a need to increase the effectiveness of local legislation in the UAE to combat financial and cybercrimes? Frequency Percentage

Degree	Number	Percent
Very Widely	27	8,4%
Very Widely	43	13.4%
Somewhat	16	4,9%
Lowly	175	54.5%
Very Low	60	18.7%
Total	321	100%

The responses of the study sample regarding the need to increase the effectiveness of local legislation to combat financial and cybercrimes in the UAE indicate that this is unnecessary

for approximately 73.2% due to insufficient development. A chi-squared test on the study sample yielded a p-value of 0.39, which is less than the 0.05 threshold. This indicates that the differences in percentages are statistically significant, suggesting that the study sample variable affects the perceived need to increase the effectiveness of local legislation to combat financial and cybercrimes in the UAE.

The study results can be divided into three levels:

1. The responses of the study sample regarding the importance of using confidential agents in reducing the rate of financial crimes within the UAE show a high level of importance, approximately 76.5%.
2. The responses of the study sample regarding the importance of using confidential agents in increasing the effectiveness of anti-money laundering efforts within the UAE show a high level of importance, approximately 81%.
3. The responses of the study sample regarding the need to increase the effectiveness of local legislation to combat financial and information crimes within the UAE show that increasing effectiveness is unnecessary, approximately 73.2%, due to a lack of development.

The study reveals a significant professional consensus regarding the operational utility of undercover tactics, with 81 percent of specialists affirming their importance for anti-money laundering effectiveness. However, the finding that 73.2 percent of respondents view the expansion of local legislation as unnecessary suggests a complex professional stance. This skepticism likely stems from a perceived "lack of development" or a preference for the stability of current legal structures over the introduction of new, potentially complex regulations. While the chi-squared test for this legislative variable yielded a p-value of 0.39, indicating that these specific percentages are not as statistically significant as the operational findings, the high frequency of "low" responses highlights a cautious attitude among practitioners toward rapid legislative evolution.

This tension underscores the research's central theme: while undercover agents are indispensable for combating sophisticated financial crimes, their "responsibility" must be managed within a framework that practitioners can trust and understand. The challenge for the United Arab Emirates is to bridge this gap by refining existing laws, rather than merely expanding them, to incorporate the robust oversight and human rights protections found in international standards.

6 CONCLUSIONS

The analysis of the legal framework surrounding the role of undercover agents in the UAE Federal Decree-Law on Anti-Money Laundering reveals that undercover operations are legally permissible provided the suspect's free will is preserved and the agent does not induce, provoke, or fabricate criminal behavior. Judicial precedents confirm that

investigative techniques such as controlled deliveries, impersonation, and covert surveillance are lawful when employed to uncover pre-existing criminal intent. Nevertheless, ambiguities remain in distinguishing legitimate detection from unlawful instigation, and case law reveals inconsistencies in its application, creating potential legal uncertainty, particularly when an agent's conduct appears to contribute directly to the commission of the offense.

Despite adherence to the principle that investigative methods should not compromise a suspect's autonomy, in practice, the threshold of "free will" is often breached. Even in the absence of explicit threats or coercion, an undercover agent who actively proposes, facilitates, or simulates a criminal act risks becoming an instigator rather than a passive observer, with ethical and legal implications. This doctrinal inconsistency is compounded by the lack of comprehensive legislative or procedural safeguards comparable to European standards. The European Court of Human Rights, through cases such as *Teixeira de Castro v. Portugal* and *Ramanauskas v. Lithuania*, emphasizes judicial oversight, proportionality, and the exclusion of evidence obtained through entrapment, offering a more robust framework than currently available under UAE law.

To address these challenges, it is recommended that UAE legislation be revised to clearly define the permissible scope of undercover operations and to distinguish lawful investigative activity from unlawful instigation. Judicial or prosecutorial pre-authorization should be made mandatory before initiating any covert operation. An independent oversight mechanism should be established to monitor undercover agents' conduct and ensure compliance with principles of legality, proportionality, and due process. The exclusionary rule should also be codified to prevent the use of evidence obtained through entrapment or undue influence over a suspect's autonomy.

Furthermore, law enforcement agencies should implement comprehensive training programs for officers authorized to conduct undercover investigations, with a strong focus on legal ethics, human rights, and operational restraint. Encouraging the Emirati judiciary to incorporate comparative international jurisprudence, particularly regarding human rights standards, can enhance the protection of individual liberties and strengthen public confidence in the criminal justice system.

By implementing these measures, the UAE can ensure that undercover operations remain effective in combating money laundering while upholding legal, ethical, and constitutional standards, balancing operational effectiveness with the protection of fundamental rights.

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Writing, reviewing and editing: All authors

Competing interests: The authors declare that their opinions and views expressed in this manuscript are free of any impact from any organizations.

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EDITORS

Managing editor – Valentina Krivolapova. **English Editor** – Robert Reddin.
Ukrainian language Editor – Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Alhawawsheh AN, Al Sawy YM, Al Dhaheri LA, Alfalahi QS, Taher AQM and Soltan KRA, 'Legal Constraints and Procedural Safeguards of Undercover Operations in Anti-Money Laundering Investigations: A UAE Perspective' (2026) 9(2) Access to Justice in Eastern Europe 410-34 <<https://doi.org/10.33327/AJEE-18-9.2-a000196>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a000196>

Summary: 1. Introduction. – 2. Research Methodology. – 3. The Difference Between an Undercover Agent and an Instigator. – 4. Legal Framework in the European Union and the UAE. – 5. Research Results and Discussion. – 6. Conclusions.

Keywords: *Anti-Money Laundering; Undercover Agents; Entrapment; United Arab Emirates Law; Agent Provocateur; Due Process; Cybercrime Investigations; Judicial Oversight; Criminal Liability*

DETAILS FOR PUBLICATION

Date of submission: 20 Dec 2025

Date of acceptance: 01 Apr 2026

Publication: 20 May 2026

Was the manuscript fast tracked? - No

Number of reviewer reports submitted in first round: 2 reports

Number of revision rounds: 3 rounds with major revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

AI Disclosure Statement: This article was prepared without AI-generated content. AI tools were used solely for formatting and language editing. The authors take full responsibility for the content.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВІ ОБМЕЖЕННЯ ТА ПРОЦЕДУРНІ ГАРАНТІЇ ТАЄМНИХ ОПЕРАЦІЙ У РОЗСЛІДУВАННЯХ ЩОДО БОРОТЬБИ З ВІДМИВАННЯМ КОШТІВ: ПЕРСПЕКТИВА ОАЕ

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АНОТАЦІЯ

Вступ. Таємні операції стали незамінними в боротьбі з фінансовими та кіберзлочинами, зокрема відмиванням грошей та експлуатацією цифрових фінансових платформ. В Об'єднаних Арабських Еміратах (ОАЕ) співробітники судової поліції уповноважені законом використовувати методи роботи під прикриттям, зокрема маскування, видавання себе за іншу особу, конфіденційних інформаторів та спостереження за транзакціями, для виявлення незаконної діяльності, нібито поважаючи автономію підозрюваних. Незважаючи на ці положення, зберігаються суттєві неточності у розмежуванні законного виявлення від незаконного підбурювання, що створює ризик для належної правової процедури та допустимості доказів. Порівняльна судова практика, зокрема Європейського суду з прав людини (ЄСПЛ), підкреслює необхідність судового нагляду, пропорційності та надійних механізмів боротьби з провокацією, що пропонує життєво важливу основу для модернізації правової практики ОАЕ.

Методи. У дослідженні було використано описово-аналітичний дизайн дослідження, що поєднує кількісні та якісні методології. Структурована анкета була розповсюджена серед 321 спеціаліста, що охоплюють юридичний, фінансовий та кіберсектори ОАЕ, щоб оцінити сприйняття експертів щодо операційної ефективності та етичних наслідків діяльності таємних агентів. Одночасно було проведено доктринальний аналіз Федерального декрету-закону ОАЕ про боротьбу з відмиванням грошей. Він містив ретельне вивчення законодавчих положень, судових прецедентів та порівняльну оцінку зі стандартами Європейського суду з прав людини та директивами ЄС для виявлення операційних, етичних та правових прогалин у чинній системі ОАЕ.

Результати та висновки. Дослідження демонструє, що стратегічне використання агентів під прикриттям значно покращує виявлення та запобігання відмиванню грошей в ОАЕ. Кількісні результати підтверджують високий консенсус експертів: 76,5% фахівців вважають конфіденційних агентів життєво важливими для зменшення фінансових злочинів, а 81% пов'язують їхнє залучення з підвищенням ефективності боротьби з відмиванням грошей (AML). Однак у дослідженні також було виявлено критичні правові та етичні проблеми, особливо коли слідча тактика ризикує скасовувати вільну волю підозрюваного або створювати можливості для злочину. Порівняльний аналіз показує, що судова практика Європейського суду з прав людини забезпечує більш надійну основу для забезпечення належної правової процедури, наголошуючи на обов'язковому попередньому судовому дозволі, пропорційності та категоричній недопустимості доказів, отриманих за допомогою провокації. Хоча 73,2% респондентів вказали, що підвищення ефективності місцевого законодавства наразі не є необхідним, доктринальний аналіз свідчить про нормативну прогалину, яку необхідно усунути для забезпечення процесуальної справедливості. Отже, автори дослідження рекомендують переглянути законодавство ОАЕ, щоб чітко визначити допустимий обсяг діяльності під прикриттям, забезпечити прокурорський або судовий нагляд та кодифікувати правило недопустимості доказів. Крім того, впровадження комплексних навчальних програм, зосереджених на юридичній етиці та правах людини, є важливим для підтримки довіри громадськості до системи правосуддя, одночасно зберігаючи операційну ефективність.

Ключові слова. Боротьба з відмиванням грошей; агенти під прикриттям; провокація; законодавство Об'єднаних Арабських Еміратів; агент-провокатор; належна правова процедура; розслідування кіберзлочинів; судовий нагляд; кримінальна відповідальність.

ABSTRACT IN ARABIC*

مقال بحثي

القيود القانونية والضمانات الإجرائية للعمليات السرية في تحقيقات مكافحة غسل الأموال: منظور دولة الإمارات العربية المتحدة

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الملخص:

أصبحت العمليات السرية ضرورية في مكافحة الجرائم المالية والإلكترونية، وتحديدًا غسل الأموال واستغلال المنصات المالية الرقمية. في دولة الإمارات العربية المتحدة، يتمتع ضباط الضبط القضائي بصلاحيات قانونية لاستخدام أساليب العمل السري — بما في ذلك التنكر، وانتحال الشخصية والاستعانة بمصادر سرية، ومراقبة المعاملات — لكشف الأنشطة غير المشروعة مع الاحترام الظاهري لاستقلالية المشتبه بهم. على الرغم من هذه الأحكام، لا تزال هناك ضبابية في التمييز بين الكشف القانوني والتحريض غير القانوني، مما يشكل خطراً على الإجراءات القانونية الواجبة ومقبولية الأدلة. يؤكد الفقه المقارن، ولا سيما أحكام المحكمة الأوروبية لحقوق الإنسان، على ضرورة الرقابة القضائية، والتناسب، وآليات مكافحة الإيقاع، مما يوفر إطاراً حيويًا لتحديث الممارسات القانونية في دولة الإمارات.

المنهجية:

استخدمت الدراسة تصميمًا بحثيًا وصفيًا تحليليًا، يدمج المنهجيات الكمية والنوعية. وُزّع استبيان مُنظَّم على عينة من 321 متخصصاً من القطاعات القانونية والمالية والإلكترونية في دولة الإمارات لتقييم آراء الخبراء بشأن الفعالية التشغيلية والآثار الأخلاقية للعلاء السريين. بالتزامن مع ذلك، أُجري تحليل فقهيٍّ للمرسوم بقانون اتحادي بشأن مكافحة غسل الأموال في دولة الإمارات. وشمل ذلك فحصاً دقيقاً للأحكام القانونية، والسوابق القضائية، وتقييماً مقارناً بمعايير المحكمة الأوروبية لحقوق الإنسان وتوجيهات الاتحاد الأوروبي لتحديد الثغرات التشغيلية والأخلاقية والقانونية في الإطار الحالي.

*. The publication metadata in Arabic is presented as submitted by the authors.

النتائج والاستنتاجات:

تُظهر الدراسة أن الاستخدام الاستراتيجي للعملاء السريين يُعزز بشكلٍ كبير كشف ومنع غسل الأموال حيث اعتبر 76.5% من المتخصصين أنهم عنصرٌ حيويٌّ للحد من الجرائم المالية. ومع ذلك، يكشف البحث عن ثغراتٍ قانونية وأخلاقية عندما تتجاوز أساليب التحقيق إرادة المشتبه به الحرة. ويُظهر التحليل المقارن أن اجتهادات المحكمة الأوروبية لحقوق الإنسان تُوفر إطاراً أكثر متانة لحماية العدالة الإجرائية. وبناءً على ذلك، توصي الدراسة بمراجعة التشريعات الإماراتية لتحديد نطاق العمل السري بوضوح، وإلزام النيابة العامة أو القضاء بالإشراف المباشر، وتقنين قاعدة استبعاد الأدلة غير القانونية كما يُعدّ تنفيذ برامج تدريبية متخصصة في أخلاقيات المهنة وحقوق الإنسان أمراً بالغ الأهمية لضمان فعالية العمليات دون المساس بنزاهة النظام القضائي.

الكلمات المفتاحية:

مكافحة غسل الأموال؛ العملاء السريون؛ التحريض؛ تشريعات دولة الإمارات العربية المتحدة؛ العميل المحرض؛ الإجراءات القانونية الواجبة؛ تحقيق الجرائم الإلكترونية؛ الرقابة القضائية؛ المسؤولية الجنائية.

Research Article

DESIGNING AN INTERNATIONAL MEDIATION HUB FOR NUCLEAR-RELATED DISPUTES: PROCEDURAL GUARANTEES AND ACCESS TO JUSTICE

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DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a0001967>

Date of submission: 9 Jan 2026

Date of acceptance: 30 Mar 2026

Publication: 20 May 2026

Disclaimer:

The authors declare that their opinions and views expressed in this manuscript are free of any impact from any organizations.

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Alimzhan Irzhanov and Bakhtygul
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ABSTRACT

Background: Nuclear-related disputes, covering safeguards compliance, safety and security incidents, nuclear liability, and transboundary environmental harm, highlight a persistent deficit in international dispute resolution. Persons affected by nuclear risk frequently lack meaningful access to remedies, whereas states and operators often avoid litigation because of sovereignty sensitivities, fragmented jurisdiction, and the need to protect classified or commercially sensitive information. Existing fora and administrative processes provide only partial coverage and seldom integrate confidentiality with minimum procedural guarantees. This article, therefore, asks how an international mediation hub for nuclear-related disputes can be designed to deliver credible access to justice while safeguarding security-relevant information and maintaining trust among states, operators, and affected communities.

Method: The study uses doctrinal and comparative legal analyses. It examines treaty regimes and general principles relevant to nuclear governance and dispute processing, including due process and participation standards, standing and admissibility, transparency and confidentiality, state responsibility, and pathways for the recognition of mediated settlements. It then compares procedural models from established international mediation and arbitration frameworks to identify design features that can be adapted to nuclear sensitivities. Sources include treaties, institutional rules, jurisprudence, state practice, and peer-reviewed scholarship.

Results and Conclusions: The article proposes a blueprint for a specialized international mediation hub for nuclear-related disputes: a consent-based, non-adjudicative mechanism administered by an independent international secretariat and supported by a multidisciplinary roster of mediators and vetted technical experts. Rather than functioning as a court-adjacent extension of domestic adjudication, the hub is conceived as a complementary international interface that can process safeguards-related coordination disputes, nuclear safety and security coordination disputes, mixed public-private operational disputes, and participation-sensitive disputes under differentiated admissibility rules. The article's original contribution lies in four design outputs: a typology of disputes linked to mediation-suitability criteria; a three-track intake model; a tiered confidentiality or public-interest protocol; and a differentiated enforceability model. Where settlement agreements are international and commercial in nature, the framework contemplates structured use of the Singapore Convention; where disputes are state-centered or public-law in character, implementation would rely on recorded settlements, monitoring clauses, and agreed conversion pathways into other procedures.

1 INTRODUCTION

Nuclear technologies sit at the intersection of international peace and security, energy policy, public health, and environmental protection. When disagreements arise over safeguards compliance, safety obligations, emergency notification, or compensation for transboundary harm, the legal and political stakes are unusually high, and so are the practical barriers to dispute resolution. International law presumes that such disputes should be addressed through peaceful means chosen by the parties, yet the available pathways often fragment across institutions, regimes, and domestic courts in ways that are difficult to navigate for non-specialists and frequently inaccessible for affected individuals and communities.¹

For all interested parties, the proposed mediation hub is particularly relevant for Eastern Europe and Central Asia, where a shared post-Soviet legal legacy, transboundary

1 Charter of the United Nations (UN Charter) (signed 26 June 1945) XV UNCIO 335, Ch VI art 33 <<https://www.un.org/en/about-us/un-charter/full-text>> accessed 8 January 2025.

environmental risks, and renewed security concerns keep nuclear risk high on the procedural agenda. The region combines a history of transboundary nuclear harm and complex liability issues with contemporary debates about confidentiality, public accountability, and effective legal remedies. A mediation center built on procedural safeguards offers a structured way to manage confidential information while preserving access to justice, which is often inadequately provided in fragmented multi-forum systems.

In the nuclear field, the core regulatory architecture was not primarily built as a dispute-resolution system. Non-proliferation relies on the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and on verification arrangements implemented through IAEA safeguards agreements, which are technocratic in operation and state-centered in standing.² Nuclear safety cooperation is organized through dedicated conventions that prioritize prevention, peer review, and inter-state coordination, such as the Convention on Nuclear Safety, and the conventions on early notification and on assistance in the event of accidents or radiological emergencies.³ Where civil redress is concerned, the international liability regime is convention-based and plural (Vienna, Paris and related instruments), and it presupposes domestic adjudication under harmonized rules rather than a direct international forum for victims.⁴ This combination has created a recurrent design tension: nuclear governance is legally dense and technically sophisticated, but dispute settlement—especially where claims implicate public interests, cross-border harms, or sensitive information—remains procedurally uneven and institutionally dispersed.⁵

- 2 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) (adopted 12 June 1968) [1974] 729 UNTS 161 <<https://www.iaea.org/publications/documents/treaties/npt>> accessed 8 January 2025; International Atomic Energy Agency, *The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons* (INFCIRC/153 (Corrected), IAEA 1972) <<https://inis.iaea.org/records/rpr4y-sd344>> accessed 8 January 2025.
- 3 Convention on Nuclear Safety (CNS) (adopted 17 June 1994) 1963 UNTS 293 <<https://www.iaea.org/topics/nuclear-safety-conventions/convention-nuclear-safety>> accessed 8 January 2025; Convention on Early Notification of a Nuclear Accident (adopted 26 September 1986) [1997] 1439 UNTS 275 <<https://www.iaea.org/topics/nuclear-safety-conventions/convention-early-notification-nuclear-accident>> accessed 8 January 2025; Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (adopted 26 September 1986) [1997] 1457 UNTS 133 <<https://www.iaea.org/topics/nuclear-safety-conventions/convention-assistance-case-nuclear-accident-or-radiological-emergency>> accessed 8 January 2025.
- 4 Vienna Convention on Civil Liability for Nuclear Damage (adopted 21 May 1963) [1985] 1063 UNTS 265 <<https://www.iaea.org/topics/nuclear-liability-conventions/vienna-convention-on-civil-liability-for-nuclear-damage>> accessed 8 January 2025; OECD, *Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention)* (OECD/LEGAL/0038, OECD Publishing 2025); Convention on Supplementary Compensation for Nuclear Damage (adopted 12 September 1997, amended 13 January 2026) <<https://www.iaea.org/topics/nuclear-liability-conventions/convention-supplementary-compensation-nuclear-damage>> accessed 8 January 2025.
- 5 Kimberly Sexton Nick and Stephen G Burns (eds), *Principles and Practice of International Nuclear Law* (OECD Publishing 2022) doi:10.1787/58b25dca-en; Carlton Stoiber and others, *Handbook on Nuclear Law: Implementing Legislation* (IAEA 2010).

A further institutional implication is that 'nuclear dispute resolution' is not a blank slate. The Statute of the International Atomic Energy Agency contains its own dispute-settlement clause, and safeguards agreements include consultation and arbitration mechanisms. Yet authoritative analyses of international nuclear law emphasize that there is no standing judicial tribunal competent to resolve disputes between the IAEA and a State concerning the interpretation or application of safeguards agreements, and that arbitral recourse has not been used in safeguards practice. This reinforces the case for a procedurally structured, non-adjudicative hub that can operate upstream of escalation, while remaining compatible with existing treaty-based mechanisms.⁶

The access-to-justice dimension complicates this picture. Access to justice is commonly understood not merely as access to a courtroom, but as effective access to procedures and remedies capable of making rights meaningful.⁷ In human-rights terms, procedural guarantees such as equality before tribunals, independence and impartiality, and reasoned decision-making function as enabling conditions for substantive rights.⁸ Environmental governance has gone further in articulating participatory entitlements (information, participation, and review), crystallized most clearly in the Aarhus Convention⁹. Nuclear-related risks and harms have repeatedly tested these principles, including in litigation concerning access to information and the practical ability of individuals to pursue remedies where official secrecy and evidentiary asymmetries are significant.¹⁰ The result is a persistent gap between the state-centric structure of many nuclear regimes and the justice claims that arise when nuclear activities affect persons beyond national borders or outside conventional political accountability channels.

Against this background, the broader field of dispute resolution has undergone a parallel evolution toward mediation, institutionalized standards, and enforceability.¹¹ The UN has

- 6 OECD, *International Nuclear Law: History, Evolution and Outlook* (OECD Publishing 2010) doi:10.1787/9789264106888-en.
- 7 Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181.
- 8 International Covenant on Civil and Political Rights (adopted 16 December 1966) [1983] 999 UNTS 171, art 14 <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> accessed 8 January 2025; UN Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial* (CCPR/C/GC/32, 23 August 2007) <<https://www.refworld.org/legal/general/hrc/2007/en/52583>> accessed 8 January 2025; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights ECHR) (signed 4 November 1950) 5 ETS, art 6 <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 8 January 2025.
- 9 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998) [2003] 2161 UNTS 447 <<https://unece.org/environment-policy/public-participation/aarhus-convention/text>> accessed 8 January 2025.
- 10 *McGinley and Egan v United Kingdom* Apps 21825/93, 23414/94 (ECtHR, 9 June 1998) <<https://hudoc.echr.coe.int/eng?i=001-58175>> accessed 8 January 2025.
- 11 Elisabetta Silvestri, 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation?' (2019) 2(3) *Access to Justice in Eastern Europe* 5, doi:10.33327/ajee-18-2.4-a000016.

developed policy-level guidance on mediation design and legitimacy, emphasizing consent, impartiality, inclusivity, and coherence with applicable legal frameworks.¹² At the level of transnational commercial practice, UNCITRAL has provided a model procedural framework for international mediation, and the Singapore Convention supplies enforcement architecture for qualifying mediated settlement agreements.¹³ These instruments are not nuclear-specific, but they demonstrate that mediation can be 'procedurally thick', that is, supported by formal guarantees and predictable consequences, without collapsing into adjudication.¹⁴

The scholarship relevant to this article, therefore, spans three adjacent literatures. First, international nuclear law scholarship has richly documented the substantive regimes of safety, security, safeguards, and liability, and has mapped their institutional techniques (reporting, peer review, and harmonized domestic implementation).¹⁵ Second, access-to-justice literature has clarified why procedural structures, participation, and remedy design are decisive for making legal protections effective, particularly in complex and transboundary contexts.¹⁶ Third, mediation and ADR scholarship (and associated practice guidance) has focused on legitimacy conditions, appropriate participation, and institutional safeguards that preserve fairness while retaining flexibility.¹⁷ What remains comparatively underdeveloped is an integrated institutional design proposal for nuclear-related disputes that treats *procedural guarantees* and *access to justice* as first-order design variables rather than as external constraints.

This gap is sharpened by two recurring controversies. One concerns confidentiality: nuclear disputes frequently involve national security, safeguards-sensitive information, or proprietary technical data, leading some to argue that meaningful transparency is structurally incompatible with effective nuclear dispute settlement. Another concern is legitimacy: critics of confidential settlement processes contend that disputes touching public safety and environmental risk require stronger transparency and participation to secure public trust and accountability, and that «private justice» can erode norm development. Comparable debates in other mixed public-private regimes have generated

12 UN, *Guidance for Effective Mediation* (UN Secretary-General 2012) <<https://peacemaker.un.org/en/documents/united-nations-guidance-effective-mediation>> accessed 8 January 2025.

13 UNCITRAL, *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use* (2018) (UN Publishing 2022); United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) (adopted 20 December 2018 UNGA Res 73/198) <<https://digitallibrary.un.org/record/1660341>> accessed 8 January 2025.

14 Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) Pepperdine Dispute Resolution Law Journal 1.

15 Nick and Burns (n 5); Stoiber and others (n 5).

16 Cappelletti and Garth (n 7) 191.

17 UN, *Guidance for Effective Mediation* (n 12).

procedural responses, including codified transparency rules and structured third-party participation.¹⁸ The central question, therefore, is not whether confidentiality or transparency should prevail categorically, but how an institution can calibrate both while still delivering credible fairness and workable outcomes.

At the same time, the existing literature on nuclear-related disputes has only weakly engaged with the broader mediation, ADR, and access-to-justice scholarship. This matters because the normative plausibility of a specialized mediation mechanism depends not only on the existence of disputes, but also on whether mediation can deliver procedural fairness, meaningful participation, and institutionally credible outcomes in technically complex and public-interest-sensitive cases. Scholarship on mediation and access to justice has emphasized that dispute system design must be evaluated not only by settlement efficiency, but also by voice, procedural justice, inclusivity, and the ability of affected parties to participate on an informed basis. Bringing this body of literature into conversation with nuclear governance helps clarify both the promise and the limits of a specialized international mediation hub.¹⁹

This article responds by developing a blueprint for an international mediation hub for nuclear-related disputes designed around procedural guarantees, access to justice, and calibrated confidentiality. The article's original contribution is fivefold: first, it classifies nuclear-related disputes by both subject matter and mediation suitability; second, it proposes a three-track intake architecture; third, it specifies a feasible institutional model for an internationally administered hub; fourth, it develops a confidentiality or public-interest protocol that protects sensitive information without nullifying community rights; and fifth, it differentiates enforcement pathways between commercial and public-law settlements. The hub is not presented as a substitute for adjudication or for existing IAEA and treaty-based procedures, but as a complementary international mechanism for de-escalation, structured technical exchange, and settlement facilitation in disputes where authoritative adjudication is either unavailable, over-brittle, or poorly matched to the problem.²⁰

18 UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration* (CL-53, UN Publishing 2014).

19 Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice in Mediation within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528.

20 UN Charter (n 1) art 33; UN, *Guidance for Effective Mediation* (n 12); UNCITRAL, *Model Law on International Commercial Mediation* (n 13) art 7; Singapore Convention on Mediation (n 13) art 5(1).

2 METHODOLOGY

This article applies a doctrinal-comparative legal methodology combined with design-oriented institutional analysis to develop a procedural blueprint for an international mediation hub for nuclear-related disputes. The overall aim is to specify how such a hub can operationalize procedural guarantees and access to justice while managing confidentiality and transparency in a domain shaped by national security sensitivities and technical asymmetries. The research is structured around four research questions: 1) What procedural guarantees are minimally required for a mediation process to be credible as an access-to-justice mechanism in nuclear-related disputes? 2) Which guarantees are already embedded in relevant international legal regimes and dispute-resolution instruments, and where are the gaps? 3) How can confidentiality be tiered to protect sensitive information without undermining fairness, participation, and public-interest accountability? 4) What institutional features (standing, rosters, expert support, and recording or enforcement pathways) are necessary for a mediation hub to function as a complementary, 'court-adjacent' mechanism rather than a substitute for adjudication?

Source selection and corpus construction. The analysis relies exclusively on publicly accessible legal materials and secondary literature. The primary corpus comprises: a) general international law on peaceful settlement and procedural fairness; b) nuclear governance instruments addressing safeguards, safety, emergency notification or assistance, and civil liability; c) human-rights and environmental law materials relevant to participation rights and effective remedies; and d) mediation or ADR instruments relevant to procedural design and enforceability. These materials were selected because they 1) structure the legal environment in which nuclear disputes arise, 2) contain transferable procedural standards, or 3) shape the feasibility constraints for transparency and participation.

Secondary sources were collected through targeted searches in major legal databases and indexing services, using combinations of keywords aligned with the article's conceptual pillars (e.g., 'nuclear dispute' and 'mediation'; 'IAEA safeguards' and 'dispute settlement'; 'nuclear liability' and 'access to justice'; 'confidentiality' and 'public interest' and 'mediation'; 'procedural fairness' and 'ADR'). Inclusion criteria were: 1) direct relevance to nuclear dispute processing, access to justice, procedural guarantees, confidentiality or transparency, or mediation institutional design; 2) clear methodological quality (peer-reviewed scholarship, authoritative institutional reports, or widely cited doctrinal works); and 3) legal-analytical usefulness for deriving design requirements. Exclusion criteria were: purely technical or engineering publications without legal-procedural implications, and policy commentary lacking traceable legal grounding.

The literature base was not limited to nuclear law and international institutional materials, but also included selected scholarship on mediation, ADR, and access to justice in order to

evaluate the procedural legitimacy, participation standards, and design feasibility of a specialized dispute-resolution mechanism.

To avoid a purely instrument-driven account, the study prioritized peer-reviewed scholarship in three streams: 1) international nuclear law and institutional design, 2) dispute system design and mediation theory in public or technically complex disputes, and 3) access-to-justice and procedural guarantees in international and transboundary settings. Inclusion criteria were a) direct relevance to dispute settlement or procedure (standing, confidentiality, compliance, enforceability), and b) analytical rather than purely descriptive treatment. Sources focused exclusively on domestic ADR practice without cross-border or institutional implications were excluded.

The research proceeds in three replicable stages. First, the study constructs a typology of disputes to prevent overgeneralization. Nuclear-related disputes are grouped into 1) state-to-state compliance or cooperation disagreements (e.g., safeguards and reporting controversies), 2) mixed public-private disputes implicating operators and regulators (e.g., security measures and incident response), and 3) disputes involving affected persons or communities (e.g., information access, participation, and compensation following transboundary harm). Each category is mapped against likely confidentiality constraints, evidentiary asymmetries, and plausible remedy expectations. Second, the study performs comparative procedural mapping. A coding matrix is used to extract and compare procedural safeguards across the selected instruments and practice models. The coding categories are defined *ex ante* and include: standing channels; independence and impartiality; conflict-of-interest controls; equality of arms (including access to expertise); participation modalities for affected persons; transparency, confidentiality rules, and exceptions; protection of sensitive information (security); reasoned procedural determinations; timeliness; language, and legal-aid support; and outcome formalization (settlement recording, enforcement pathways). The matrix is populated by close reading of the primary materials and then iteratively refined to ensure that each safeguard is formulated as an operational rule (i.e., capable of being implemented in institutional procedures) rather than an abstract principle. Third, the study undertakes normative synthesis and design testing. The extracted safeguards are translated into a proposed hub architecture: entry points and admissibility filters; an independent mediator roster supported by vetted technical experts; tiered confidentiality and narrowly tailored public-interest disclosure mechanisms; and standardized settlement recording. The design is then tested against the dispute typology through scenario-based stress testing (e.g., safeguards-sensitive disputes requiring strict confidentiality; accident-related disputes requiring participation and remedial pathways; mixed disputes requiring expert equality and enforceable outcomes). In each scenario, the hub's rules are evaluated for 1) fairness and access-to-justice adequacy, 2) feasibility under confidentiality constraints, and 3) institutional complementarity with existing regimes.

3 STATE OF PLAY: EXISTING PROCEDURES AND THEIR LIMITATIONS

Safeguards and compliance-related disagreements (IAEA-centered processes). In the safeguard's domain, dispute processing is formally available but institutionally underused. The IAEA Statute contains a settlement-of-disputes clause, providing that unresolved disputes on interpretation or application may be referred to the International Court of Justice unless the parties agree on another mode of settlement.²¹ Comprehensive safeguards agreements concluded on the basis of INFCIRC 153 also foresee consultation pathways and, in principle, arbitration for certain disputes; however, safeguards practice has largely relied on political-institutional management through reporting, consultations, and Board processes rather than formal adjudicatory escalation. Procedurally, this creates a «thin» pathway for states: disagreements can persist as compliance controversies without a predictable, fair-process forum that can handle sensitive technical evidence while offering parties confidence in impartial facilitation.²²

Nuclear safety, notification or assistance, and incident-response disputes (coordination without remedies). Safety and emergency conventions are primarily prevention and coordination-oriented. Their procedures are well-suited to information exchange, peer review, and assistance, but they are not designed as remedy-providing dispute systems for affected persons or for mixed disputes involving regulators, operators, and transboundary communities. In practice, post-incident conflicts often fragment into administrative review, domestic litigation, or diplomatic exchanges, each constrained by evidentiary asymmetry and confidentiality claims.

Civil nuclear liability and compensation disputes (domestic channeling; cross-border barriers). The nuclear liability regime is convention-based and generally channels jurisdiction to domestic courts under harmonized rules.²³ This delivers legal certainty for operators and insurers, but for cross-border victims it can generate access-to-justice barriers: forum concentration, language hurdles, evidentiary asymmetries, and difficulties in meaningfully participating where key data are classified or commercially sensitive.²⁴ As a result, 'rights on paper' may not translate into practical remedies for affected persons in transboundary settings.

21 Stephen Gorove, 'Sanctions and the Settlement of Disputes: Focus on the IAEA' (1970) 16(2) *The Catholic Lawyer* 163.

22 Marianne Nari Fisher and North Carolina Mayhew, 'Safeguards Non-Compliance and the Utility of Arbitration under Safeguards Agreements: A Review of Arbitral Mechanisms and Reflections for Today' (*Vienna Center for Disarmament and Non-Proliferation*, May 2023) <<https://vcdnp.org/wp-content/uploads/2023/05/ID-09-%E2%80%93-Fisher.pdf>> accessed 29 January 2026.

23 Jakub Handrlica, 'A New Transnational Regime for Nuclear Liability and Compensation in Europe' (2022) 13 *Czech Yearbook of Public and Private International Law* 225.

24 Nathan Swartz, 'The Impact of the Convention on Supplementary Compensation for Nuclear Damage' (2016) 12(2) *University of Pennsylvania Asian Law Review* 312.

Access-to-information and participation disputes (Aarhus interface; nuclear sensitivity). Nuclear activities frequently trigger contestation under environmental participation regimes²⁵. Aarhus Convention practice demonstrates that nuclear-related decisions (including license changes and lifetime extensions) can raise compliance disputes about timely public participation and access to review.²⁶ Yet even when review mechanisms exist, nuclear-specific secrecy claims and technical complexity often reduce the practical equality of arms between authorities and the public.

Cross-cutting procedural shortcomings (why the 'hub' problem is real). Synthesizing across the above procedures, four deficits recur. First, fragmentation: different regimes address different slices of the same dispute, forcing parties to navigate multiple forums. Second, standing asymmetry: many nuclear processes remain state-centered, while affected persons face indirect, domestic, or prohibitively costly routes. Third, confidentiality dominance: safeguards-sensitive, security-classified, or proprietary data are often protected through blanket non-disclosure rather than calibrated, reviewable protocols, undermining perceived fairness and legitimacy.²⁷ Fourth, no structured 'upstream' de-escalation layer: many disputes escalate politically because available forums are either too technocratic (verification), too diplomatic (consultations), or too adversarial (litigation), with little space for procedurally guaranteed problem-solving.

The problem is not merely hypothetical. In the MOX Plant dispute, Ireland and the United Kingdom pursued a controversy over radioactive discharges and the Sellafield MOX facility through overlapping UNCLOS, ITLOS, or PCA, and EU-law pathways, demonstrating how nuclear-environmental disputes can become procedurally fragmented and jurisdictionally contested.²⁸ In safeguards practice, the picture is different but equally revealing: safeguards agreements contain arbitration clauses, yet the IAEA's own Legal Framework for Safeguards notes that no recourse to arbitration has been made to date in safeguards implementation, leaving politically sensitive disputes largely within diplomatic and Board-managed processes.²⁹ Participation disputes are also concrete rather than speculative: the CJEU's judgment in *Inter-Environnement Wallonie* (C-411/17) concerned the Belgian extension of reactor operation without a prior

25 Leslie-Anne Duvic-Paoli and Priska Lueger, 'A Democratic Nuclear Energy Transition? Public Participation in Nuclear Activities' (2022) 31(1) *RECIEL* 199, doi:10.1111/reel.12433.

26 ÖKOBÜRO, *International Case-Law in Nuclear Matters* (ÖKOBÜRO - Alliance of the Environmental Movement, January 2022) <https://www.oekobuero.at/files/416/international_nuclear_case-law_2022.pdf> accessed 12 March 2026.

27 Michael G Faure and Kévine Kindji, *Cross-Border Nuclear Safety, Liability and Cooperation in the European Union: Study for the PETI committee* (European Parliament 2019).

28 Case No 2002-01 *MOX Plant Case (Ireland v United Kingdom)* (PCA, 6 June 2008) <<https://pca-cpa.org/es/cases/100/>> accessed 12 March 2026.

29 Laura Rockwood, *Legal Framework for IAEA Safeguards* (IAEA 2013).

environmental impact assessment,³⁰ while UNECE Espoo/Aarhus practice on the Belarusian NPP in Ostrovets and on Dukovany shows recurring transboundary and participation conflicts around nuclear siting, life-extension, and public review.³¹

A useful real-world comparator in the liability field is the post-Fukushima compensation architecture in Japan, which created a Dispute Reconciliation Committee and a dedicated ADR center for nuclear-damage claims. Their experience shows both the value of specialized dispute-processing and its limits: the mechanism was domestically anchored, accident-specific, and not designed to solve transboundary claims or mixed public-private disputes beyond the Japanese setting.³²

Implication for the present study's research task. Against this state of affairs, the research task is not merely to propose an institution in the abstract, but to derive a design that 1) fits existing treaty constraints, 2) remains confidentiality-capable, and 3) supplies minimum procedural guarantees that make mediation credible as an access-to-justice-relevant pathway in nuclear governance.

4 SCOPE, JURISDICTION, AND PROCEDURE OF THE PROPOSED HUB

Material scope (what counts as a 'nuclear-related dispute' for the hub). For the purposes of this article, a 'nuclear-related dispute' means a disagreement with a substantial nexus to: a) safeguards implementation and compliance cooperation; b) nuclear safety and security obligations, including incident-response coordination; c) nuclear civil liability and compensation arrangements; or d) nuclear-adjacent environmental and human-rights procedure claims (information, participation, access to review) where the underlying decision concerns nuclear activities. The hub is not designed for criminal accountability, sanctions determinations, or coercive enforcement actions; nor does it adjudicate treaty breaches. Its function is structured dispute processing and settlement facilitation under agreed procedural guarantees.

Not every nuclear-related dispute should be admitted to the hub. In addition to a substantial nuclear nexus, the hub should require five cumulative suitability criteria: 1) a residual zone of negotiability remains despite disagreement on law or facts; 2) mediation would not prejudice non-derogable obligations, criminal accountability, or coercive enforcement processes; 3) the immediate problem is operational, interpretive,

30 Case C-411/17 *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres* (CJEU, 29 July 2019) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A62017CJ0411>> accessed 12 March 2026.

31 EIA/IC/S/4 Belarus (UNECE, 2011-2025) <<https://unece.org/environmental-policy/environmental-assessment/eiaics4-belarus>> accessed 12 March 2026.

32 Daniel H Foote, 'Japan's ADR System for Resolving Nuclear Power-Related Damage Disputes' (2017) 12 *The University of Tokyo Law Review* 102.

compensatory, participatory, or coordinative rather than the need for an authoritative public determination of illegality; 4) the dispute can benefit from structured exchange of technical information under confidentiality controls; and 5) where affected communities are implicated, participation can be organized without defeating safety or security requirements. The hub is therefore unsuitable for atrocity accountability, sanctions design, or disputes in which no implementable settlement space remains.

Jurisdiction by dispute type (linking the typology to the hub's 'tracks'). The typology developed in the methodology is operationalized through a three-track intake model: Track A (State-State or State-Institution): disputes over interpretation of safeguards, notification duties, cooperation obligations, and related compliance coordination (high confidentiality; technical-expert support mandatory). Track B (Mixed public-private): regulator-operator or state-operator disputes about safety measures, incident response, cost allocation, and operational compliance where a negotiated outcome is feasible (managed confidentiality; expert equality of arms essential). Track C (Participation-sensitive disputes): disputes implicating affected persons (access to information pathways) where legal appropriateness and admissibility criteria are met (higher legitimacy needs; structured participation modalities; tailored confidentiality). This mapping clarifies which classes of the proposed dispute classification fall within the hub's jurisdiction and prevents an overly broad «all nuclear disputes» claim.

Consent-based referral (voluntariness) and entry pathways. Mediation rests on voluntariness; accordingly, the hub's jurisdiction is triggered only by consent. To make consent realistic rather than merely theoretical, the hub can operate through five entry pathways: 1) Post-dispute submission agreement (ad hoc consent once a dispute arises); 2) Standing consent declarations (opt-in instrument by which a state pre-accepts hub mediation for defined categories of disputes, with reservations); 3) Treaty or protocol clauses (future instruments or optional protocols can incorporate a «consultation - hub mediation» step before ICJ); 4) Contractual model clauses (operators, suppliers, insurers, and host states can incorporate hub mediation clauses in nuclear-adjacent commercial arrangements); 5) Domestic referral gateways (where permitted, domestic courts or regulators may stay proceedings to allow parties to attempt hub mediation, without prejudice to later adjudication). These pathways preserve voluntariness while making the hub practically reachable through institutionalized consent architectures rather than relying on rare ad hoc agreements.

Initiation, admissibility, and case management (what happens once a request is filed). A request must identify the parties, the dispute category (A, B, C), the requested confidentiality tier, and the desired outcome form (non-binding settlement, recorded settlement, or «mediation-plus» with agreed escalation). An intake panel issues a reasoned procedural determination on: 1) jurisdictional consent; 2) admissibility (nuclear nexus; no parallel coercive enforcement determination being sought; good-faith participation); 3) confidentiality tiering; and 4) participation modalities (Track C).

This intake design clarifies initiation and case-management steps by requiring a structured request, reasoned admissibility determinations, and an explicit confidentiality configuration from the outset.

The mediator roster should be multidisciplinary rather than purely generalist. Eligibility should normally require demonstrable competence in at least one core domain – public international law and nuclear law; safeguards and verification practice; nuclear safety, security, and radiation protection; nuclear liability and insurance; environmental participation and human-rights procedure; or complex public-private mediation, combined with completed mediation training and experience in high-complexity disputes.³³ Appointment should be made through an independent appointments committee using publicly available criteria, written disclosure of interests, cooling-off periods for recent employment by a party, challenge and removal procedures, regular ethics review, and a binding code of conduct. For cases involving affected communities or cross-border impacts, language capability, regional familiarity, and diversity considerations should also be taken into account.³⁴

This ethical architecture is not merely aspirational: under the Singapore Convention, relief may be refused where there has been a serious breach of standards applicable to the mediator or a failure to disclose circumstances raising justifiable doubts as to impartiality or independence.³⁵

Confidentiality tiering and equality of arms (minimum procedural guarantees). The hub should use a tiered confidentiality protocol, but confidentiality must not function as a blanket veto over participation or accountability. Tier 1 should cover safeguards-sensitive, national-security, and facility-vulnerability information subject to strict access controls. Tier 2 should cover proprietary technical or commercial information subject to redaction, secure data rooms, and expert-only review where justified. Tier 3 should cover public-interest information concerning health, environmental risk, emergency measures, participation rights, or settlement implementation. Where Tier 1 or Tier 2 restrictions materially affect affected communities or non-state participants, the hub should issue a reasoned confidentiality determination, provide the maximum feasible redacted summary, and, where necessary, appoint a community representative, public-interest advocate, or amicus-type expert with security-cleared access. Equality of arms is operationalized through vetted neutral technical experts, party-appointed experts with challenge rights, and an internal review channel for core decisions on disclosure and participation.³⁶

33 International Mediation Institute, *Code of Professional Conduct* (IMI 2017) <<https://imimediation.org/practitioners/code-professional-conduct/>> accessed 12 March 2026.

34 UN, *Guidance for Effective Mediation* (n 12).

35 Singapore Convention on Mediation (n 13).

36 Nancy A Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice' (2002) 1 Journal of Dispute Resolution 179.

Outcomes, non-settlement value, and «what if mediation does not decide». Mediation does not produce a binding «decision» unless parties so provide. Where no settlement is reached, expediency is ensured through three deliverables: 1) Issue-narrowing record (agreed statement of resolved and unresolved issues); 2) Procedural closure report (non-substantive summary of steps taken and confidentiality designations, enabling later forums to proceed efficiently); 3) Agreed escalation ladder (where parties consent at intake): mediation - neutral evaluation - ICJ or domestic litigation, with preserved confidentiality controls. Thus, even in non-settlement scenarios, the hub reduces escalation risk, structures evidence handling, and lowers transaction costs for subsequent procedures.

Fit with existing treaty mechanisms (complementarity). The hub is designed to remain compatible with treaty-based dispute settlement clauses rather than displacing them. Where instruments foresee negotiation, arbitration, or ICJ referral (as in the IAEA Statute and safeguards-related arrangements), the hub serves as a structured upstream step that the parties may choose as an 'other mode of settlement'.

Institutional anchoring of the hub. The proposed hub should not operate under the jurisdiction of a domestic court or as an internal organ of any single regulator. The most workable model is an independent international facility established by a multilateral memorandum or optional instrument and operating under the IAEA's auspices solely for technical liaison, not under the Agency's adjudicatory control. Case administration would be performed by a separate secretariat; roster governance, appointments, budget, and ethics would be supervised by a small governing board composed of participating States, an independent chair, and non-voting liaison points from relevant organizations, including the IAEA and, where appropriate, UNECE 'Aarhus' or 'Espoo' bodies. This design preserves technical compatibility with existing nuclear institutions while avoiding the impression that the hub is either a domestic court annex or an internal compliance arm of the IAEA.

5 DESIGN OUTPUTS

The analysis yields a central design finding: nuclear-related disputes require a mediation architecture that is procedurally 'thick' (guarantee-driven) yet confidentiality-capable, because the disputes are simultaneously high-stakes (peace and security, public safety, transboundary impacts) and information-constrained (safeguards-sensitive, security-classified, or proprietary technical data).

What is original in this article is not the abstract proposition that mediation can sometimes be useful, but the conversion of that proposition into a concrete institutional design for the nuclear field. The article contributes: 1) a dispute typology linked to admissibility and mediation-suitability standards; 2) a three-track intake architecture; 3) a hybrid hosting model combining international administration with technical liaison; 4) a mediator-and-expert selection framework built around ethics and conflict controls; 5) a reviewable

confidentiality or public-interest protocol; and 6) a differentiated enforceability model separating commercial from public-law settlements. These elements are offered as an integrated package because, in nuclear governance, mediation becomes normatively persuasive only when procedural legitimacy is engineered in advance rather than assumed.

The proposed hub, therefore, treats procedural guarantees and tiered confidentiality as coequal design variables, rather than assuming that confidentiality must dominate and access-to-justice concerns can be handled externally. This conclusion is consistent with the UN Charter's recognition of mediation among peaceful means of dispute settlement and with the UN's institutional guidance that legitimacy in mediation depends on impartiality, inclusivity, and coherence with applicable legal frameworks.³⁷

A second finding is that existing nuclear governance instruments are predominantly state-centered and cooperation-oriented, which is effective for prevention and coordination but leaves a procedural gap when disputes involve mixed actors (states, regulators, operators) and when individuals or communities seek meaningful participation or remedies. Safeguards arrangements (as operationalized through INFCIRC/153-type agreements) structurally prioritize confidentiality and technical verification; safety and emergency conventions focus on prevention, notification, and assistance rather than remedial pathways; and civil liability conventions channel compensation primarily through harmonized domestic processes rather than a dedicated international forum. The hub blueprint is designed as a complement to these regimes: it does not replace safeguards or liability rules, but supplies a structured dispute-processing layer for disagreements that otherwise escalate or remain unaddressed.³⁸

A third finding concerns the minimum procedural guarantees needed for the hub to plausibly function as an access-to-justice mechanism in a technically asymmetric field. The study identifies a minimum package: 1) independence and conflict-of-interest controls for mediators and experts; 2) equality of arms through managed access to expertise (including neutral technical experts and the ability to contest expert input); 3) reasoned procedural determinations on admissibility, confidentiality designations, and participation modalities; 4) translation and accessibility supports where disputes affect non-specialist participants; and 5) a lightweight internal review channel for core procedural decisions (especially confidentiality and participation). While nuclear mediation is not adjudication, these safeguards are derived from widely recognized fair-process baselines and are necessary to prevent mediation from becoming a purely discretionary, insider-driven process in disputes that implicate public interests.³⁹

37 UN, *Guidance for Effective Mediation* (n 12).

38 International Atomic Energy Agency, *The Structure and Content of Agreements* (n 2).

39 UN, *Guidance for Effective Mediation* (n 12).

Table 1. Core procedural outputs of the proposed mediation hub

Design output	Operational content	Interpretation (what the output achieves)
Multi-door access model	Separate tracks for a) state-state disputes (e.g., safeguards disagreements), b) regulator-operator disputes, and c) disputes with affected-person participation where legally appropriate	Avoids one-size-fits-all procedure; aligns process intensity with dispute type and sensitivity
Independent roster + vetted technical expertise	Standing panel of mediators plus a screened roster of technical experts; mandatory disclosure rules; challenge procedure	Reduces capture risks and addresses technical asymmetry without converting mediation into adjudication
Tiered confidentiality with public-interest exception	Information classified into levels with access controls; default protection for safeguards data; narrowly tailored disclosure where needed for legitimacy and participation	Makes confidentiality manageable and reviewable instead of absolute, enabling calibrated transparency
Participation and support measures	Participation modes (submission, consultation, representation) + translation/accessibility supports	Enables meaningful access-to-justice functions without collapsing into mass-claims litigation
Outcome formalization and compliance pathway	Standard settlement recording; choice of enforceability route depending on dispute type	Enhances implementation and reduces the «settlement without compliance» risk

The fourth finding is that tiered confidentiality is legally and practically feasible if structured as a reviewable protocol rather than a blanket rule. The hub's confidentiality design uses (a) strict protection for safeguards-sensitive information (reflecting safeguards practice), (b) secure handling for national-security and proprietary technical data, and (c) limited transparency for procedural legitimacy (e.g., publication of anonymized procedural summaries, aggregate reporting, or redacted settlement terms when public safety is implicated). As a comparative model, the UNCITRAL Transparency Rules demonstrate how procedural systems can incorporate transparency defaults and exceptions (including protections for confidential or protected information) while preserving process integrity-an

approach adaptable to nuclear mediation through more stringent security screening and narrower disclosure gateways.⁴⁰

Finally, the study differentiates enforceability by dispute track. The article proposes that only certain Track B settlements, and those Track C settlements that remain international and commercial under Article 1 of the Singapore Convention, be drafted so as to benefit, where possible, from the Convention's enforcement mechanism. This is not proposed for Track A state-to-state or state-to-institution disputes, nor for settlements whose essential character remains public-law, regulatory, or rights-remedial. For those categories, implementation should rely on recorded settlements, monitoring clauses, agreed reporting timetables, escrow or insurance arrangements where relevant, and optional conversion into arbitration clauses, consent orders, or intergovernmental instruments.⁴¹

6 DISCUSSION AND IMPLICATIONS

The results support the working hypothesis that an international mediation hub for nuclear-related disputes can be normatively defensible and practically useful if it is designed as an independent, institutionally anchored, and procedurally robust international mechanism rather than as an informal settlement channel or a domestic court annex. Mediation is expressly recognized among the peaceful means of dispute settlement in the UN Charter, and the United Nations Guidance for Effective Mediation emphasizes consent, impartiality, inclusivity, coherence, and complementarity.⁴² In this sense, the proposed hub operationalizes an existing peaceful-settlement tool for a domain in which fragmentation, secrecy, and technical asymmetry frequently obstruct workable dispute processing. Seen in this wider context, the proposed hub is not justified merely because mediation is less adversarial than adjudication. Its normative force depends on whether it can be designed to address the concerns identified in mediation and access-to-justice scholarship: procedural fairness, meaningful participation, institutional neutrality, and protections against information and power asymmetries. This is why the article links dispute classification, intake design, confidentiality controls, and expert governance into a single procedural model.⁴³

Interpreted against prior nuclear law scholarship, the hub blueprint addresses a structural mismatch repeatedly noted in the field: the nuclear governance architecture is legally dense but lacks an integrated, user-facing pathway for disputes that fall between technical verification, regulatory cooperation, and domestic compensation schemes. OECD/NEA

40 International Atomic Energy Agency, *The Structure and Content of Agreements* (n 2).

41 UNCITRAL, *Model Law on International Commercial Mediation* (n 13).

42 UN Charter (n 1) art 33; UN, *Guidance for Effective Mediation* (n 12).

43 Carrie Menkel-Meadow, 'When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering' (2002) 10 Washington University Journal of Law & Policy 37.

and IAEA handbooks characterize international nuclear law as a composite of safeguards, safety, security, and liability regimes implemented through specialized institutions and domestic legislation rather than through a unified international forum.⁴⁴ The proposed hub complements this «regime complex» by providing a structured interface for disputes that involve multiple actors (states, regulators, operators, affected persons) and multiple legal registers (security, safety, environment, human rights), without displacing the foundational instruments of non-proliferation and safeguards practice.⁴⁵

A central legitimacy question is whether confidentiality can be reconciled with the public interest in nuclear governance. The answer cannot be that secrecy always prevails. In disputes touching evacuation, environmental exposure, lifetime extension, incident management, or participation rights, affected communities require at least intelligible reasons, structured opportunities to be heard, and access to the maximum disclosure compatible with safety and security. The proposed model treats confidentiality as a reviewable, proportionate constraint, rather than a jurisdiction-wide default. This is the point at which nuclear mediation departs from purely private ADR: legitimacy depends not only on party consent, but also on whether the process preserves a minimum level of public accountability where community rights and transboundary risks are materially affected.

The access-to-justice implications of the findings are best understood through the 'waves' framework in access-to-justice scholarship, which emphasizes that effective remedies depend on procedural design, participation, and the capacity to overcome informational and resource asymmetries.⁴⁶ In environmental law, the Aarhus Convention crystallizes the idea that access to information, participation, and review mechanisms are mutually reinforcing components of accountability—an orientation that becomes salient where nuclear activities generate transboundary risk and public concern.⁴⁷ Due process norms in human rights law similarly highlight equality before tribunals and fair-hearing requirements, providing a principled basis for insisting that even non-adjudicative processes should incorporate baseline safeguards when legal interests and public welfare are materially affected.⁴⁸ The European Court of Human Rights has also illustrated, in sensitive contexts, how information asymmetries and non-disclosure can impair the practical ability of individuals to vindicate rights, reinforcing the need for procedurally managed access to relevant information (including through controlled disclosure techniques).⁴⁹

The findings on enforceability align with established ADR instruments but also expose their limits in nuclear governance. The Singapore Convention and the UNCITRAL

44 Nick and Burns (n 5); Stoiber and others (n 5).

45 NPT (n 2); International Atomic Energy Agency, *The Structure and Content of Agreements* (n 2).

46 Cappelletti and Garth (n 7) 196.

47 Convention on Access to Information (n 9).

48 International Covenant on Civil and Political Rights (n 8); UN Human Rights Committee, *General Comment No 32* (n 8).

49 *McGinley and Egan v United Kingdom* (n 10).

Model Law (as amended in 2018) strengthen cross-border reliance on mediated settlement agreements in *commercial* disputes, offering a meaningful compliance pathway where nuclear disputes have commercial characteristics (for example, certain operator-supplier or operator-insurer conflicts).⁵⁰ However, many nuclear-related disputes are predominantly public-law or state-to-state in character, falling outside the scope of these instruments and relying instead on political commitment, institutional follow-up, and (where parties consent) conversion pathways into other dispute-settlement formats. This constraint reinforces, rather than undermines, the hub concept: the hub's value proposition in public-law disputes lies in de-escalation, structured participation, and procedurally credible problem-solving, not in replicating adjudicatory enforcement through private-law analogs.

Contemporary practice also demonstrates that the need for an intermediate dispute-management mechanism is not hypothetical. The IAEA reports daily monitoring of nuclear safety, security, and safeguards in Ukraine, continued Agency presence at all five Ukrainian nuclear power plant sites, Russian armed forces control over the Zaporizhzhya Nuclear Power Plant, and the earlier control of the Chornobyl site in 2022. In March 2026, the Agency further reported deterioration of Ukraine's high-voltage transmission system and the need for locally negotiated ceasefires to repair a ZNPP back-up power line. These developments do not suggest that mediation can replace accountability, sanctions, or the law on the use of force. They do show, however, that there is a concrete operational space for structured third-party facilitation in matters such as inspector access, staff rotation, emergency coordination, protection of external power supply, and other risk-reduction arrangements.⁵¹

Several limitations should be acknowledged. First, this article grounds the proposal in illustrative disputes, but it still does not provide a full quantitative dataset of dispute incidence, duration, cost, or settlement performance across jurisdictions. Second, because the analysis relies primarily on public materials, it cannot fully model how classification rules and safeguards would, in practice, constrain evidentiary disclosure of sensitive information. Third, the proposal assumes a threshold level of political will and inter-institutional coordination that may be absent in highly coercive environments. Finally, the hub's legitimacy will depend on careful boundary-setting so as to avoid forum shopping, duplication, or perceived encroachment on existing institutional mandates.⁵²

Future work should therefore build a coded dataset of publicly reported nuclear-related disputes, identifying dispute type, forum, parties, jurisdiction, confidentiality issues, and

50 UNCITRAL, *Model Law on International Commercial Mediation* (n 13) art 7; Singapore Convention on Mediation (n 13) art 5(1).

51 'Update 343 - IAEA Director General Statement on Situation in Ukraine' (*International Atomic Energy Agency - IAEA*, 6 March 2026) <<https://www.iaea.org/newscenter/pressreleases/update-343-iaea-director-general-statement-on-situation-in-ukraine>> accessed 12 March 2026.

52 Nick and Burns (n 5); Stoiber and others (n 5); NPT (n 2); International Atomic Energy Agency, *The Structure and Content of Agreements* (n 2).

outcome. Even an initial dataset covering 2001-2026 would allow the field to test whether certain jurisdictions or dispute clusters recur and whether mediation suitability varies systematically across them.⁵³

7 CONCLUSION

The article has argued that nuclear-related disputes expose a persistent procedural deficit produced by fragmentation, secrecy, and the absence of an intermediate forum capable of combining technical sensitivity with fair-process guarantees. It therefore proposes an international mediation hub that is internationally administered, consent-based, and non-adjudicative. The hub is conceived as a complementary interface, not a substitute for adjudication, liability regimes, IAEA safeguards, or emergency conventions, and its feasibility is deliberately bounded to disputes where some zone of negotiated risk management remains.

The principal contribution of the article lies in specifying how such a hub could actually be designed: through a dispute typology tied to mediation-suitability criteria, a three-track intake model, an independent mediator or expert roster, a reviewable confidentiality-public-interest protocol, and differentiated enforcement paths. The principal conclusion is accordingly narrower and stronger than the draft previously suggested: a carefully delimited international mediation hub can be justified and practically useful for certain classes of nuclear-related disputes, but only if its institutional independence, ethical standards, public-interest safeguards, and relationship to existing forums are specified with precision.

The study's limitations are inherent to its design-oriented character. It does not provide an empirical dataset of dispute incidence or settlement performance, and it cannot fully anticipate how classification practices will operate across jurisdictions without a pilot framework and institutional trust-building. Future research should therefore a) compile and code publicly reported nuclear-related disputes to test the hub's scenario assumptions; b) refine expert-evidence and controlled disclosure protocols suitable for safeguards- and security-sensitive contexts; and c) assess feasible hosting models and inter-institutional coordination arrangements that preserve both independence and mandate compatibility. Even with these constraints, the article concludes that a procedurally fortified, confidentiality-capable mediation hub is a realistic and normatively defensible pathway to strengthen access to justice in nuclear governance without requiring wholesale redesign of substantive treaty obligations.

The current geopolitical context also calls for caution regarding institutional optimism. The proposed hub cannot substitute for criminal accountability, sanctions, or coercive

53 UNCITRAL, *Model Law on International Commercial Mediation* (n 13) art 7; Singapore Convention on Mediation (n 13) art 5(1).

enforcement, and it is least likely to function where one party seeks outright domination rather than risk management. Its realistic role is narrower but still valuable: facilitating technical access, safety arrangements, monitoring commitments, compensation frameworks, humanitarian risk reduction, and information-sharing in disputes where parties retain an operational need to cooperate despite deeper political conflict.

The principal conclusion is that a 'court-adjacent' mediation hub, equipped with robust procedural safeguards and carefully defined transparency exceptions, can complement existing nuclear regimes by lowering escalation risks, improving legitimacy, and widening practical access to remedies without requiring wholesale redesign of substantive treaty obligations.

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Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact from any organizations.

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EDITORS

Managing editor – Dr. Olena Terekh. **English Editor** – Robert Reddin.

Ukrainian language Editor – Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Saimova S, Bolat A, Irzhanov A, and Chingayeva B, 'Designing an International Mediation Hub for Nuclear-Related Disputes: Procedural Guarantees and Access to Justice' (2026) 9(2) Access to Justice in Eastern Europe 435-60 <<https://doi.org/10.33327/AJEE-18-9.2-a0001967>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a0001967>

Summary: 1. Introduction. – 2. Methodology. – 3. State of Play: Existing Procedures and Their Limitations. – 4. Scope, Jurisdiction, and Procedure of the Proposed Hub. – 5. Design Outputs. – 6. Discussion and Implications. – 7. Conclusion.

Keywords: *Nuclear governance; dispute settlement mechanisms; procedural legitimacy; confidentiality management; safeguards-related compliance; transboundary nuclear risk.*

FUNDING

This article was prepared as part of the scientific project by the Science Committee of the Ministry of Science and Higher Education of the Republic of Kazakhstan, grant number AP 26100031

DETAILS FOR PUBLICATION

Date of submission: 9 Jan 2026

Date of acceptance: 30 Mar 2026

Publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in first round: 3 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

During the preparation of this article, the author(s) used ChatGPT (GPT-5.4 Thinking, OpenAI; March 2026 release) for limited research support and editorial tasks, including search-string formulation, concordance checking, and language polishing. No AI system was used to autonomously select authorities, generate unverified citations, or determine the legal analysis or conclusions. All sources, case references, and doctrinal propositions were reviewed and verified by the author(s), who take full responsibility for the manuscript.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЗРОБКА МІЖНАРОДНОГО ЦЕНТРУ МЕДІАЦІЇ ДЛЯ ВИРІШЕННЯ СПОРІВ, ПОВ'ЯЗАНИХ З ЯДЕРНОЮ ЕНЕРГЕТИКОЮ: ПРОЦЕСУАЛЬНІ ГАРАНТІЇ ТА ДОСТУП ДО ПРАВОСУДДЯ

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АНОТАЦІЯ

Вступ. Спори, пов'язані з ядерною енергетикою, що охоплюють дотримання гарантій, інциденти з безпеки та охорони, відповідальність за нанесення ядерної шкоди та транскордонне екологічне забруднення, свідчать про постійний дефіцит механізмів вирішення міжнародних спорів. Особи, які зазнають ядерних ризиків, часто не мають повноцінного доступу до засобів правового захисту, тоді як держави та оператори часто уникають судових процесів через чутливість питань суверенітету, фрагментовану юрисдикцію та необхідність захисту засекреченої або комерційно конфіденційної інформації. Наявні форуми та адміністративні процеси забезпечують лише часткове охоплення та рідко поєднують конфіденційність з мінімальними процесуальними гарантіями. Тому в цій статті ставиться питання про те, як можна створити міжнародний центр медіації для вирішення спорів, пов'язаних з ядерною енергетикою, щоб забезпечити надійний доступ до правосуддя, одночасно захищаючи інформацію, що стосується безпеки, та підтримуючи довіру між державами, операторами та постраждалими громадами.

Методи. У дослідженні використовується доктринальний та порівняльно-правовий аналіз. У ньому розглядаються договірні режими та загальні принципи, що стосуються управління ядерною енергетикою та розгляду спорів, зокрема стандарти належної правової процедури та участі, питання процесуальної правосуб'єктності та прийнятності, прозорості та конфіденційності, відповідальності держав, а також механізми визнання результатів медіації. Потім порівнюються процесуальні моделі усталених міжнародних систем медіації та арбітражу, щоб визначити конструктивні особливості, які можна адаптувати до чутливих питань у ядерній сфері. Серед проаналізованих джерел є договори, інституційні правила, судова практика, практика держав та рецензовані наукові дослідження.

Результати та висновки. У статті пропонується план створення спеціалізованого міжнародного центру медіації для вирішення спорів, пов'язаних з ядерною сферою: механізм, що базується на згоді та не виноситься на розгляд суду, який би адмініструвався незалежним міжнародним секретаріатом та підтримувався багатопрофільним списком медіаторів та перевірених технічних експертів. Замість того, щоб розширювати національне судочинство на міжнародному рівні, цей центр задуманий як додатковий

міжнародний інструмент, здатний розглядати спори щодо координації гарантій, безпеки та захисту, змішані публічно-приватні експлуатаційні спори та спори, що стосуються участі різних сторін, згідно з диференційованими правилами допустимості. Оригінальний внесок статті полягає у чотирьох результатах розробки: типології спорів, пов'язаних з критеріями придатності для медіації; трирівневій моделі прийому; багаторівневому протоколі конфіденційності або врахування суспільних інтересів; та диференційованій моделі забезпечення виконання домовленостей. У випадках, коли угоди мають міжнародний та комерційний характер, пропонується структуроване використання Сінгапурської конвенції; коли ж спори мають державний або публічно-правовий характер, виконання забезпечується за допомогою зареєстрованих домовленостей, механізмів моніторингу та узгоджених методів переходу до інших процедур.

Ключові слова. Управління ядерною енергетикою; механізми вирішення спорів; процесуальна легітимність; управління конфіденційністю; дотримання вимог щодо гарантій; транскордонний ядерний ризик.

Research Article

THE CLAUSE ON THIRD-PARTY-FUNDING AND THE DISCLOSURE OBLIGATION IN ARTICLE 17.6 OF THE SCCA ARBITRATION RULES, AS A MANIFESTATION OF PROCEDURAL TRANSPARENCY IN ARBITRATION

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DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a0001968>

Date of submission: 10 Dec 2025

Date of acceptance: 06 Apr 2026

Publication: 20 May 2026

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ABSTRACT

Background: *Third-party financing (TPF) agreements have become increasingly relevant in international arbitration, generating various procedural challenges that complicate the balance between procedural transparency and the principle of confidentiality. This paper studies TPF in international commercial arbitration, with a focus on the regulations applied by the Saudi Arbitration Court. After a general overview of TPF mechanisms and their increasing prevalence in international arbitration, this article reviews the obligation to disclose TPF under Article 17.6 of the Arbitration Rules of the Saudi Commercial Arbitration Centre (SCCA) (2023), an instrument designed to protect the independence and impartiality of arbitrators.*

Method: *This research follows a legal-dogmatic approach, based on the systematic and exegetical interpretation of the rule, particularly the literal wording of Article 17.6 of the SCCA Rules. This method is complemented by a comparative analysis of standard arbitration models to categorize the SCCA's regulatory framework. This study identifies the scope of disclosure and its function within the Saudi arbitration system, and defines the content of the disclosure obligation regarding TPF within the Saudi arbitration process. Furthermore, the connection with the principle of confidentiality is examined.*

Results and Conclusions: *The research findings demonstrate that Article 17.6 establishes a generic disclosure regime that imposes transparency levels limited to disclosing only the existence of the TPF contract and the identity of the third-party funder, excluding the contractual content of the agreement.*

This regulatory structure is conducive to detecting conflicts of interest at the outset of the procedure, preventing the integrity of the arbitral tribunal from being compromised while preserving the confidentiality of financing agreements and ensuring the legal security of arbitration.

The research infers that Article 17.6 of the SCCA Arbitration Rules (2023) establishes a generic disclosure model, grounded in a general framework for disclosing matters outside the contractual terms of financing agreements. This leads to the early detection of procedural risks, thereby preserving the arbitral tribunal's impartiality and independence. The disclosure obligation does not extend to the contractual terms of the agreement, maintaining an asymmetry between the principles of transparency and confidentiality.

1 INTRODUCTION

Within the broader process of structural transformation driven by the innovative Vision 2030 agenda,¹ the restructuring of the Saudi arbitration system is a key step toward increasing investor confidence and consolidating a secure and predictable legal environment. Some statistics confirm that arbitration remains the preferred dispute resolution mechanism in sectors such as construction, raw materials, and maritime.²

As a part of the regulatory reform carried out by the Saudi Center for Commercial Arbitration (SCCA hereafter), the concept of third-party funding (TPF) was incorporated in 2023, introducing the obligation to disclose and reveal any circumstance that could affect or undermine the integrity of the arbitral process, preserving the principle of

1 Saudi Vision 2030 <<https://www.vision2030.gov.sa/en>> accessed 8 January 2026.

2 Yarik Kryvoi, 'Improving Saudi Arabia's Arbitration Climate: Comparative Study and Recommendations' (SSRN, 9 January 2023) doi:10.2139/ssrn.4640956 <<https://ssrn.com/abstract=4640956>> accessed 8 January 2026.

transparency (Article 17.6 SCCA).³ In this climate of openness, the Saudi arbitral framework safeguards arbitral integrity and harmonizes its practice with international standards of transparency and good procedural governance.

This expansion of TPF raises specific concerns about potential conflicts of interest, particularly regarding the independence and impartiality of arbitrators. Disclosure to address the procedural risk triggered by TPF has been the primary regulatory response to these concerns.

In this vein, Article 17.6 of the SCCA Arbitration Rules (2023) enshrines, for the first time within the Saudi arbitral framework, a clear obligation of disclosure. On the grounds of Article 17.6, this paper aims to examine the scope of disclosure obligation in TPF. In particular, the following question arises: what should be the scope of disclosure when third-party funding is involved in international arbitration?

Based on an analysis of the 2023 Saudi SCCA Rules, this article focuses on the legal treatment of the obligation to disclose TPF arrangements under Rule 17.6, which introduces an express obligation to disclose their existence. The Saudi landscape surrounding TPF is undergoing regulatory innovation aimed at harmonizing its legal treatment with international standards of transparency and arbitral governance, as well as with best arbitral practices. The analysis conducted in our research is supplemented, where necessary, by referencing the wording of Rule 17.6 with other regulatory frameworks, insofar as they provide information that helps contextualize the scope of disclosure obligations for third-party-funded disputes in contemporary arbitration.

From a theoretical perspective, this research examines the specialized doctrine of third-party litigation funding in international arbitration, addressing issues such as the tension between confidentiality and transparency. This doctrine was selected for of its relevant contributions to defining the duty of disclosure in contemporary arbitration and for its usefulness in analyzing the scope of disclosure for TPF agreements.

2 THEORETICAL FRAMEWORK AND METHODOLOGY APPROACH TO TPF DISCLOSURE

This study relies on a conception of TPF grounded in the common law tradition, where this mechanism emerged and developed to finance and distribute litigation risk. Based on this conceptual framework, the article addresses the disclosure obligations associated with TPF agreements, focusing on their scope and limitations in the context of Saudi arbitration.

Three elements frame our theoretical analysis. First, we contextualize TPF by tracing its origins in traditional common law, where it was designed to finance litigation and distribute

3 Saudi Center for Commercial Arbitration, *SCCA Arbitration Rules: effective 1 May 2023* (SCCA publishing 2023) <<https://www.acerislaw.com/the-2023-scca-arbitration-rules/>> accessed 8 January 2026.

litigation risk. Its growing prominence in the field of arbitration has sparked doctrinal discussions regarding the potential emergence of conflicts of interest and their timely mitigation, the inappropriate control that the funder may exert over the process, and the threats to the independence and impartiality of arbitrators, with possible procedural repercussions. In response to these risks, and as a contingency, the duty of disclosure has emerged. In this sense, defining its scope is highly relevant, as it serves as a control mechanism for the arbitral process. Our research is developed within this theoretical framework. The starting point for analyzing its reception within Saudi arbitration law is its primary focus, particularly Article 17.6 of the SCCA Rules.

Secondly, the analysis addresses the duty of disclosure, considering the different configurations this obligation can take in arbitral practice, specifically, generic and selective disclosure. With this, we aim to interpret the scope of the duty of disclosure in the Saudi arbitral system and evaluate the model adopted by the SCCA Arbitration Rules (2023).

Thirdly, we assess the role of transparency as a structural element of contemporary arbitration within the Saudi arbitral process, weighing its implementation against the principle of confidentiality. This framework allows us to define the content of the disclosure duty, distinguishing between the information necessary to preserve the independence and impartiality of the arbitral tribunal and which, due to its contractual or strategic nature, must remain protected, thus preventing excessive disclosure that could affect the balance of the proceedings.

Once the theoretical framework was defined, the methodology employed in this study was structured primarily around a dogmatic approach. Specifically, an exegetical and systematic interpretation of Article 17.6 of the SCCA Arbitration Rules (2023) is carried out. This interpretation seeks to determine the scope and content of the disclosure obligation regarding TPF agreements. The systemic analysis of the rule is framed within the literal wording of Article 17.6 of the SCCA rules, which allows for an analysis of the duty to disclose and a determination of its scope. It also allows for an examination of how this disclosure operates in relation to the principles of the arbitrator's independence and impartiality.

Furthermore, the study employs a limited, functional comparative law method, matching the SCCA with other benchmark arbitration models. This comparison is specifically aimed at portraying the disclosure model adopted by the SCCA and placing it within established typologies, particularly between generic and selective disclosure. As a result of this analysis, we consider the obligation provided for in article 17.6 as a structurally generic and materially limited model, oriented towards the early detection of possible conflicts of interest and the preservation of the integrity of the arbitration procedure, without extending the disclosure obligation to the contractual or strategic content of the financing agreements.

3 ARBITRATION IN SAUDI ARABIA: UPDATE OF THE SCCA RULES (2023)

Over the past fifteen years, Saudi Arabia has undertaken a profound regulatory transformation aimed at updating its legal system and expanding its impact on international trade relations. With a focus on attracting Foreign Direct Investment, Saudi Arabia has made significant efforts to build trust in institutions, particularly the Saudi arbitration system. Transparency standards are one of the indicators that most affect increasing trust. Robust levels of transparency strengthening the parties' trust and the legitimacy of the process, as well as international confidence.

The 2012 Arbitration Law,⁴ inspired by the United Nations Commission on International Trade Law (UNCITRAL hereafter) model law,⁵ achieved progress in its regulatory framework regarding party autonomy in the choice of applicable law, procedural terms, and venue: limiting judicial intervention in the arbitration process, preserving religious and traditional values.⁶ However, the law maintained the requirement that arbitration awards could not contravene the provisions of Sharia law or the public order established in accordance with its principles. These changes, while far-reaching, did not resolve the problems, as investors remained skeptical about whether the existing legal framework guaranteed genuine legal certainty, a perspective that clashed with local legal particularities.⁷

In 2017, the Implementing Regulations of the Arbitration Law were published by a Council of Ministers Resolution no. 541 dated 26/08/1438H⁸ with the aim of complementing the regulatory framework introduced in 2012 and making it more operational. While these regulations represented progress from a technical standpoint, their scope was limited and did not fully resolve the structural issues of the arbitration system.⁹ In any case, they constituted an intermediate phase within the reform process, which would later be deepened through the institutional update of the SCCA Arbitration Rules.

4 Royal Decree No M/34 of 2012 'On approving the Law of Arbitration' <https://www.lexismiddleeast.com/law/SaudiArabia/RoyalDecree_M34_1433/en> accessed 8 January 2026.

5 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996: with additional article 5 bis as adopted in 1998* (UN publication 1999).

6 Ahmad Bedaiwi, 'Alternative Dispute Resolution: Toward a Clear, Reliable and Effective Dispute Resolution System in Saudi Arabia' (PhD thesis, The Pennsylvania State University, 2019) 122.

7 Sarah Mohammed Alshahrani and Surya P Subedi, 'The Law, Policy and Practice of a Major Petroleum Exporting Country on Investor-State Dispute Settlement Mechanism: The Experience of Saudi Arabia and Its Significance for the Development of International Investment Law' (2022) 19(3) *Manchester Journal of International Economic Law* 287.

8 Ministerial Resolution No 541 of 26 Sha'aban 1438 'Implementing Regulations of the Law of Arbitration' (22 May 2017) <<https://www.wipo.int/wipolex/en/legislation/details/21901>> accessed 8 January 2026.

9 Bedaiwi (n 6) 130.

Simultaneously, Saudi Arabia's regulatory landscape has undergone reforms regarding the enforcement of arbitral awards, aimed at enhancing the effectiveness of arbitration, without affecting the specific critical examination of the TPF disclosure duty. These measures are a significant step forward, particularly in adapting the Kingdom to international standards such as the 1958 New York Convention, and in creating specialized enforcement courts.¹⁰

With its updated 2023 Arbitration Rules, the SCCA consolidated its position in the region and became a leading arbitration center for alternative dispute resolution (ADR).¹¹ This led to its practices being more aligned with the highest international standards, enhancing its competitiveness compared to other arbitration courts in the MENA region. The SCCA also achieved technological and procedural enhancements.

Among the reform's key elements, transparency takes center stage, not only as a general procedural principle, but also through the introduction of specific obligations designed to preserve the integrity of arbitration. In this domain, making TPF disclosure an explicit requirement seeks to lessen conflicts of interest and to reinforce parties' confidence in the arbitral tribunal's impartiality.

The 2023 Rules strengthen the institutional role of the Arbitral Tribunal as the body responsible for key procedural decisions, strengthening procedural oversight. This strengthening and effective¹² institutional control provides the structural basis for introducing transparency-oriented obligations, including mandatory disclosure of TPF and the disclosure by arbitrators of circumstances that could compromise the proceedings.

4 THE DISCLOSURE DUTY IN THIRD-PARTY FUNDING AGREEMENTS

4.1. TPF: Legal Foundations and Evolution

TPF, grounded on a body of doctrine, has been hostile to the idea of interference by unrelated third parties in a process to which they are not involved. In the common law system, we find several doctrines about malpractice. First, maintenance, which posits the intervention of a third party who lacks a legitimate interest in litigation, with the aim of supporting one of the parties. This support could be financial or strategic. Second,

10 Saud Al-Ammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) *Arbitration International* 390, doi:10.1093/arbitration/30.2.387

11 *SCCA Arbitration Rules* (n 3).

12 C Mark Baker (ed), 'International Arbitration Report' (2024) 21 Norton Rose Fulbright <<https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/glo-iar-24-pdf.pdf?revision=a9948e3e-f89c-4dff-826b-ba85317a2553&revision=5250241169497387904>> accessed 8 January 2026.

champerty, an aggravated form of maintenance in which the third party not only finances the litigation but also obtains a financial benefit from it in the event of a positive outcome. The historical justification for the prohibition was to prevent what is recognized today as abuse of process and undue interference in the administration of justice.¹³ Finally, barratry referred to the repeated or abusive promotion of litigation by third parties, historically rejected for its potential to disrupt the proper functioning of justice.

The argument of these doctrines is linked to the abuse of the judicial system, i.e., the instigation of unfounded lawsuits for pure economic or harassment purposes; even in some jurisdictions, opposition to these practices persists. With the progressive strengthening of institutions and the consolidation of an independent judiciary, these prohibitions gradually lost their original basis, although the doctrines of maintenance and champerty survived in common law as ethical vestiges, no longer as criminal offenses, but as practices contrary to public order. Therefore, English law understood that the intervention of a third party could “*sully the purity of justice*.”¹⁴

Institutional strengthening and the establishment of regulatory mechanisms—driven by the professionalization of the courts and landmark judicial decisions—effectively ended the distortion of these prohibitions. Nonetheless, the doctrines of maintenance and champerty endured as ethical vestiges in common law, transitioning from criminal offenses to practices regarded as contrary to public order.¹⁵

At the beginning of the Twentieth Century, as litigation became more complex litigation and economic growth accelerated, access to justice became dependent on the parties' financial capacity. The absolute prohibition of maintenance and champerty became untenable. This gave rise to a model of ethical control based on transparency and judicial oversight, replacing the exclusion of third parties with their regulation. The ethical foundation of these prohibitions weakened as institutions strengthened, since “*as legal systems have become more formalized... the justification for these doctrines has waned*.”¹⁶ The system ceased to be vulnerable to external influences and evolved into a structure capable of controlling conflicts of interest through regulations.

13 David R Glickman, 'Embracing Third-Party Litigation Finance' (2016) 43(3) Florida State University Law Review 1052. See, *Wolford v Tankersley* (Idaho Supreme Court, 22 May 1984) 695 P2d 1201.

14 Eva Lein and others, *Mapping Third Party Litigation Funding in the European Union* (European Commission DG Justice and Consumers 2025) 507, doi:10.2838/3795189.

15 David S Abrams and Daniel L Chen, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) 15(4) University of Pennsylvania Journal of Business Law 1082-3; Kaira Pinheiro and Disha Chitalia, 'Third-Party Funding in International Arbitration: Devising a Legal Framework for India' (2021) 14(2) NUJS Law Review 265.

16 Abrams and Chen (n 15) 1083.

In the United States, case law followed a pragmatic approach to this concept. Rather than considering a relevant breach, the reinterpretation focused on the disclosure of the third party's existence, identity, and the substance of their interest. **As Glickman points out:**

*"Many courts around the country nowadays are unwilling to bar modern TPLF agreements under these ancient doctrines."*¹⁷

This transition or reinterpretation constitutes the root of contemporary discussions on disclosure: what was previously prohibited to preserve the purity of justice is now regulated to protect procedural integrity. This transition produced a revaluation of third-party intervention, now understood not as a threat but as a functional mechanism. From a legal economics approach, Abrams and Chen argue that:

*"selling litigation rights to parties with the resources to pursue the claims may address the problem of litigation undersupply."*¹⁸

This same premise is extended to international arbitration, where the independence of the arbitrators and the arbitral institution, as well as transparency standards in the composition of the body, become relevant and are integrated as key elements of the system. The extensive study coordinated by the European Commission concludes:

*"Regulation of funders seems a good thing. Approval and control of third-party funders, modeled on the regulation of financial institutions, seems necessary."*¹⁹

In this vein, disclosure is not only an ethical requirement but also an institutional guarantee of confidence in arbitral justice.

4.2. An approach to the definition of third-party funding

In a lay rather than technical sense, TPF has been described as a mechanism whereby a party to litigation or arbitration obtains financial support from an external entity with no prior connection to the dispute, in exchange for a return linked to the outcome of the proceedings, typically assuming the costs and risks associated with the case.²⁰ For its part, the Litigation Finance describes it as:

"Litigation funding is where a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has

17 Glickman (n 13) 1052; Mariel Rodak, 'It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and its Effect on Settlement' (2006) 155 (2) University of Pennsylvania Journal of Business Law 511, doi:10.2307/40041312.

18 Abrams and Chen (n 15) 1076.

19 Lein and others (n 14) 681.

20 Maya Steinitz, 'Third Party Funding of Investment Arbitration' (2021) 42 University of Iowa College of Law Legal Studies Research Paper Series, doi:10.2139/ssrn.3873523.

*no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money, and nothing is owed by the litigant.*²¹

As Sahani pointed out:

*“traditional third-party funding involves an external entity providing dispute-related financing to one of the parties in exchange for a share of the case's proceeds if the lawsuit is successful, typically without recourse. Unlike a loan, the funded party is not obligated to repay the funder if the lawsuit is unsuccessful.”*²²

The main arbitral institutions do not offer a uniform definition of third-party funding (TPF), although they agree on a functional characterization. Instruments such as the IBA Guidelines on Conflicts of Interest, the ICC Practice Note, and the SIAC guidelines describe the funder as a third party, unrelated to the dispute, that provides resources to one of the parties in exchange for a financial interest in the outcome of the arbitration. More precisely, the ICSID Rules (2022) do include an explicit definition, understanding TPF as funding provided by a non-party whose remuneration depends on the outcome of the dispute. For its part, and as we will discuss later, the SCCA does not define the concept of TPF, but acknowledges its existence by imposing disclosure obligations (Art. 17.6). Therefore, it can be stated that, from an institutional perspective, TPF is based on three essential elements: the involvement of a non-party third party, the funding of the costs of the proceedings, and the existence of a financial interest contingent upon the outcome of the arbitration.

TPF has evolved into a transnational industry, independent of the forum.²³ The concepts offered by arbitral institutions and even by legal scholarship must consider these new scenarios. The terminology and understanding of the TPF phenomenon will change as the sector evolves.²⁴ Third-party financing is booming, adapting to new global scenarios and multinational litigation or disputes, becoming a dynamic and adaptable mechanism whose conceptual development reflects both its global expansion and the inherent limitations of static regulatory definitions.

We consider it prudent to note that in civil law jurisdictions, typical of codified law, the legal nature of this concept is still debated. Academics have identified it with legal institutions such as “contingency fees, assignment of receivables, partial loans, and joint venture accounts”.²⁵ Saudi Arabia is currently codifying its legal system, but an analysis of this

21 'Litigation Finance' (ALF Association of Litigation Funders of England and Wales, 2025) <<https://associationoflitigationfunders.com/about-us/litigation-finance/>> accessed 8 January 2026.

22 Victoria Sahani, 'Keep to the Code: A Global Code of Conduct for Third-Party Funders' (2022) 102 Boston Law Review 2339.

23 ibid 2377.

24 ibid 2377-8.

25 See, Diego Agulló Agolli, 'Los Contratos de Financiación de Litigios por Terceros (Third-Party Funding) en España' (2022) 9(1) Revista de Derecho Civil 183; Daniel Fernández Bermejo, 'En Torno al Concepto del Blanqueo de Capitales: Evolución Normativa y Análisis del Fenómeno Desde el

concept from a purely civil law perspective, that is, unraveling its legal nature, would, in our opinion, be futile. This is because it offers concepts specific to Anglo-Saxon law, which, along with Sharia, ultimately exerts the greatest influence and finds a place in Saudi Arabia. The rise of the TPF has compelled legal doctrine to address new aspects and reconfigure concepts such as transparency, which has emerged as a cross-cutting principle in contemporary arbitration systems. From a procedural perspective, third-party funding involves assessing the impact of a third-party funder on the arbitral tribunal's independence and impartiality, which justifies determining the scope of the disclosure obligation.

4.3. TPF disclosure obligation: under Article 17.6 of the SCCA Arbitration Rules (2023). Generic disclosure or selective disclosure?

In international arbitration, a broad debate arises regarding the disclosure obligation of third-party financing agreements, the identity of the financier, and, in some cases, even the terms that govern the financing.²⁶ All this with the aim of preventing the arbitral court from any conflict of interest and empowering the opposing party, in exceptional cases, to know the means used by the opponent. Throughout the arbitration process, the impartiality and independence of the arbitrators must be safeguarded.²⁷ This justifies imposing a duty of disclosure regarding any third party with an economic interest in the dispute, especially when that third party could influence the strategy and relevant decision-making.

This information may be relevant for challenging arbitrators or for setting aside the award. However, there is no clear consensus on the scope of this duty.²⁸

In Saudi arbitration, these disclosure obligations are primarily set out in Article 17 of the SCCA Rules.²⁹ Paragraphs 1 to 4 of Article 17 of the SCCA Arbitration Rules³⁰ establish a disclosure framework designed to ensure the objective and autonomous stance of arbitrators. This framework imposes a continuing duty to disclose any circumstances that may raise reasonable doubts, the failure to do so of which may lead to the arbitrator's disqualification or to a challenge to the award. The specific treatment of TPF, expressly addressed in paragraph 6 of the same article, is built upon this prior regulatory framework.

Derecho Penal' (2016) 69(1) Anuario de Derecho Penal y Ciencias Penales 211; José Carlos Fernández Rozas, 'El Mercado Emergente Sobre la Financiación Privada de Litigios Responsable en la Unión Europea: Un Cauce Para Facilitar el Acceso a la Justicia a Los Ciudadanos y Las Empresas Privadas' (2022) 108 La Ley Unión Europea 1.

26 Sofía Vicente Mazzuz, 'Extensión y Límites al Deber de Divulgación En Materia de Financiación Por Terceros En El Arbitraje' (2023) 10320 Diario La Ley 2.

27 *ibid* 6.

28 *ibid* 9.

29 *SCCA Arbitration Rules* (n 3).

30 *ibid*

Section 6 of Article 17, which serves as the primary motivation for this study, introduces a TPF *disclosure* clause that requires parties to identify any third party holding a financial interest in the outcome of the arbitration, including external funders. In addition, these obligations extend to the other entities with a financial interest in the claim, such as the *subrogated insurer*, the *indemnitor*, the *after-the-event insurer*, or the *assignees*. This disclosure obligation applies throughout the entire procedure, including the addition of a new third party or even any modification to the financing. This requirement has significant implications for the management of potential conflicts of interest³¹, allowing the court and the parties to identify the “*true interested party*” in the dispute. It may also constitute a legitimate basis for decisions on costs and, where appropriate, *security for cost* measures, aligning with international trends in arbitration transparency.³²

While establishing a duty to disclose is advisable, it is necessary to define its scope and determine what information must be communicated to the parties and the arbitral tribunal.

In this sense, we should answer the following question:

What should be the scope of disclosure?

In arbitration practice, the minimum requirement is to disclose the existence of the financing agreement and the identity of the TPF, but not the contractual terms or clauses that make up the contract.

As we have previously noted, it is essential to ensure the arbitrator's independence and impartiality. We take the view that this justifies imposing a duty of disclosure on any third party with an economic interest in the dispute.

The disclosure should occur at the outset of the proceedings; a delayed disclosure could have detrimental consequences for the process, particularly regarding the existence and identity of the TPF involved. This could lead to challenges to the arbitrators or even grounds for setting aside the arbitral award.

While the disclosure obligation is an essential mechanism for preventing conflicts of interest, it may not, in all cases, fully guarantee the independence of arbitrators and the integrity of the proceedings. A comprehensive analysis of the procedural consequences of non-compliance would, however, exceed the scope of this study and could itself constitute the subject of a separate investigation.

In this regard, the possible challenge of the arbitrators or even the possible challenge of the award that may lead to its annulment may result from the insufficiency or inadequate disclosure, highlighting the procedural relevance of this obligation, emphasizing its direct

31 See, Agulló Daario (n 25); Oliver Cojo, 'Arbitraje y Financiación Procesal Parciaria (Third-Party Funding) En España: Un Análisis Bajo El Prisma de Las Nuevas Directrices de La IBA Sobre Conflictos de Interés' (2014) 8 La Ley Mercantil 68; Steinitz (n 20); Vicente Mazzuz (n 26).

32 Agulló Daario (n 25) 216-7.

impact on the stability and effectiveness of the arbitration procedure, as it projects onto the validity of the decisions adopted.

From this perspective, it is worth questioning whether the mere obligation of disclosure is sufficient; however, the answer will depend largely on the legal and institutional system governing the arbitration procedure, as well as the degree of intervention that the system considers appropriate to guarantee the independence, impartiality, and efficiency of the process. In this sense, the obligation to disclose is not limited to identifying the funder, but also serves an instrumental function in managing various procedural incidents, such as the challenge of arbitrators, the possible request for guarantees for costs, or the validity of the award itself, which shows that defining its material scope is crucial to the balance of the arbitration procedure. The literature indicates that any assessment of potential conflicts of interest or procedural implications necessarily presupposes knowledge of the existence of third-party funding, which thus acts as a prerequisite for the court and the parties to be able to effectively address these issues.³³

In this regard, greater precision regarding the minimum content of the disclosure might be advisable, particularly concerning the identity of the third-party funder and the existence of the financing agreement, a matter that must be maintained throughout the entire procedure, and any change or circumstance that produces a variation with respect to the information that could be provided at the beginning must be reported, since ultimately such disclosure can contribute to reducing legal uncertainty and ensuring greater procedural consistency. Regarding the TPF disclosure, some arbitral rules remain silent on the matter; for example, the London Court of International Arbitration (LCIA) Rules 2020³⁴, which have a strong presence in the MENA region, make no pronouncement on the matter. The same applies to Arbitration Law in Spain,³⁵ which does not contain, in its current regulations, specific provisions relating to the existence, content, or identification of the third funder. The same applies to the UNCITRAL³⁶ framework, which does not establish a general duty of disclosure regarding third-party financing, leaving the issue outside of express regulation. In this respect, and despite differences of opinion, it is undeniable that when the duty of disclosure is not regulated, the existence of the agreement may become known to the opposing party, its defense, or the arbitral tribunal. This could lead to procedural consequences related to the arbitrator's abstention

33 Alberto Favro, 'Duty to Disclose Third-Party Funding in International Arbitration: Scope, Purpose and Limits' (2022) 12 *La Ley: Mediación y Arbitraje* 6-7.

34 The London Court of International Arbitration, *LCIA Arbitration Rules: effective 1 October 2020, Including Schedule of Costs effective 1 December 2023* (LCIA publishing 2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 8 January 2026.

35 Ley núm 60/2003, de 23 de Diciembre 2003 'de Arbitraje' [2004] BOE 309 <<https://www.boe.es/buscar/act.php?id=BOE-A-2003-23646>> accessed 8 January 2026.

36 United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (UN publishing 2014).

due to a conflict of interest, a late challenge, or ultimately, the annulment of the award. This could translate into increased costs for the parties and an unnecessary prolongation of the proceedings. This regulatory silence may coincide with the institution's implicit preference for a selective disclosure approach (which will be examined below), which, as we have pointed out before, triggers disclosure only when it raises specific concerns about conflicts of interest or procedural integrity.

Depending on the type of disclosure, the obligation to disclose in relation to TPF has been described in practice as either a generic disclosure obligation, requiring notification of the funder's existence and identity at the start of the process, or a selective disclosure mechanism, activated only if a specific risk is identified that could compromise the arbitrator's independence or the course of due process.

The literal meaning of Article 17.6 requires the SCCA and the constituted arbitral tribunal, as well as the parties involved in the dispute, to be notified of the existence and identity of any natural or legal person who will finance the proceedings, as well as any contingent economic interest tied to the outcome of the arbitration.

Based on the Saudi regulatory framework, specifically Article 17.6 of the SCCA Rules, this study examines the procedural scope of the TPF disclosure. It determines whether the disclosure regime is structured as a generic obligation or as a selective disclosure mechanism.

Generic disclosure obliges the funded party to report, from the outset of the arbitration proceedings, both the funding agreement and the identity of the third-party funder, regardless of whether a specific conflict of interest has been identified. Nevertheless, *selective disclosure* defers this burden to a later stage, making disclosure contingent upon the identification of a specific risk that could affect the arbitrator's independence or the proper conduct of the proceedings.

Therefore, we conclude that the disclosure obligation contained in Article 17.6 falls under the category of structural generic disclosure, insofar as it establishes the duty of disclosure as a prerequisite for the full constitution and operation of the arbitral tribunal. The requirement to notify the existence and identity of any natural or legal person financing the proceedings or holding an economic interest linked to the outcome of the arbitration operates independently of any *prior* assessment of potential conflict. Procedurally, this configuration directly affects the allocation of burdens between the parties and the arbitral tribunal. In particular, early disclosure allows examination of conflicts of interest at an early stage of the arbitration, preventing such issues from subsequently affecting the validity of procedural acts already carried out or, ultimately, the effectiveness of the award.

Conversely, the regulations found in other arbitration rules can be linked to an implicit conception of selective disclosure, in which TPF only becomes procedurally relevant when its existence directly and concretely affects the arbitrator's independence or the respect for

due process guarantees. For instance, the disclosure duty provided in the Singapore International Arbitration Centre (SIAC) Rules, Rule 20³⁷ and the Oman Commercial Arbitration Centre Arbitration Rules, article 12³⁸ imposes on the arbitrator the obligation to disclose only those circumstances that may raise justifiable doubts about their independence or impartiality, without establishing a generic or automatic disclosure duty, which corresponds to the selective model.

From this perspective, the difference between the two categories lies not so much in the degree of transparency required,³⁹ but rather in the procedural stage at which risk control is implemented and in the consequences that a potential late disclosure may generate in terms of recusal, challenge, or the validity of the arbitral award.

4.4. The boundary between disclosure obligations and confidentiality

What information should be disclosed and what should remain confidential?

This matter is fundamental to the regulatory treatment of third-party funding in arbitration. In Saudi arbitration, in the context of Article 17.6, which governs disclosure obligations-operates as a light-touch regulatory approach.⁴⁰ This category is characterized by the regulation of the basic duty of disclosure, without specific requirements regarding financial control or authorization prior to the possibility of TPF, or sanctions. According to the Mapping Report: “*experts and stakeholders from different countries are in favor of a ‘balanced’ or ‘light-touch’ regulation of TPLF, which would provide basic, not too specific, rules, but be careful to keep TPLF a viable option.*”⁴¹

This opinion constitutes a powerful rationale for maintaining limited disclosure obligations that balance transparency and conflict prevention, while preserving the confidentiality of the funding arrangement, which contains highly specific clauses tailored to the financing structure and projected likelihood of success in dispute.

Under the regulatory framework for arbitration in Saudi Arabia, Article 17.6 of the SCCA Rules establishes a limited disclosure model to prevent conflicts of interest. In this context, disclosure is generally limited to the existence of the TPF agreement and the identity of the third-party funder, while the financial content and contractual terms of the agreement remain confidential. This article conforms to the International Bar Association (IBA) Rule 7(a)

37 Singapur Internacional Arbitration Centre, *SIAC Arbitration Rules* (7th edn, SIAC publishing January 1, 2025) <<https://siac.org.sg/siac-rules-2025>> accessed 8 January 2026.

38 Oman Commercial Arbitration Centre, *OAC Arbitration Rules* (OAC publishing 2020) <<https://jusmundi.com/en/document/rule/en-ocac-oman-commercial-arbitration-center-arbitration-rules-2020-oac-arbitration-rules-2020-wednesday-25th-november-2020>> accessed 8 January 2026.

39 Vicente Mazzuz (n 26) 7.

40 Lein and others (n 14).

41 *ibid* 694.

of the Guidelines on Conflicts of Interest,⁴² which mandates the disclosure of any direct or indirect relationship between the arbitrator and the funder, without requiring the disclosure of the content of the funding agreement. In both cases, disclosure is an instrumental element that serves to identify potential future conflicts and does not constitute a substantive control requirement or a procedural prerequisite in the preliminary phase of the arbitration process. The terms of the funding agreement remain protected by the principle of confidentiality, which, in our opinion, is consistent with the procedural structure of arbitration and its traditional requirement of confidentiality.

For its part, the Asian International Arbitration Centre (AIAC) rule 28 e)⁴³ adopts an intermediate solution, which is entirely within the tribunal's discretion. Its disclosure regime follows a selective model -in which the initiative rests with the arbitral tribunal, which is empowered to order the disclosure of third-party financing agreements and the financier's financial interest when it deems it necessary for the proper conduct of the proceedings. From a procedural perspective, this design prevents the disclosure duty from resting with the financed party and facilitates control over relevant aspects, such as the potential assumption of costs by the third-party financier, though at the cost of granting the tribunal broad discretion. In contrast, the model adopted by the Arbitration Rules of the Saudi Center for Commercial Arbitration (SCCA), by imposing a generic *ex ante* disclosure duty, enhances predictability and legal certainty from the initial stages of proceedings, reducing the risk of unforeseen procedural issues. From this comparative perspective, the Saudi approach can offer greater normative certainty than silent or purely discretionary models, by clearly identifying what should be disclosed (existence and identity) and what should remain confidential (content and terms of the agreement), aligning itself with international good practices represented by the IBA and preserving, at the same time, confidentiality as an essential and structural feature of arbitration.

5 TRANSPARENCY DISCLOSURE AND PROCEDURAL RISKS ASSOCIATED WITH TPF

Transparency thus operates as a normative bridge between the practice of TPF and the requirements of impartiality and due process in contemporary arbitration. Disclosure mechanisms are designed to prevent conflicts of interest without imposing indiscriminate disclosure of the economic content of funding agreements.⁴⁴ However,

42 International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration: Approved by the IBA Council, 25 May 2024* (IBA publishing 2024) <<https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024>> accessed 8 January 2026.

43 Asian International Arbitration Centre, *AIAC Arbitration Rules* (AIAC publishing 2026) <https://admin.aiac.world/uploads/ckupload/ckupload_20251008054348_16.pdf> accessed 8 January 2026.

44 Steinitz (n 20).

such mechanisms must be sufficiently extensive to encompass the management of the entire process- including costs- and to identify the beneficial owner of the interest in the dispute. Disclosure mechanisms should guarantee the integrity of the process, equality between the parties, and the legitimacy of arbitration by ensuring a uniform level of transparency for all parties.

As outlined in the previous section, contemporary arbitration reflects the coexistence of multiple disclosure mechanisms regarding TPF. These approaches range from more rigid models imposing predefined disclosure obligations to regimes centered on broad or even absolute tribunal discretion, as well as frameworks based on minimum disclosure requirements limited to the existence of the funding arrangement and the identity of the funder. The ICCA Report states that the presence and identity of a funder must be disclosed or disclosable to allow arbitrators to assess conflicts of interest and the arbitrator's potential for them. However, as a general rule, this should not be sufficient to require disclosure of additional details about the funding relationship or the funding agreement. These details are usually irrelevant to the arbitrator's conflict-of-interest considerations. Nevertheless, according to the report, transparency and conflict avoidance must be balanced to prevent the parties from gaining an unreasonable strategic advantage. Tribunals must be cautious about potential dilatory strategies or arguments before the tribunal, based on unsubstantiated claims about the consequences of a funder's involvement.⁴⁵

Therefore, transparency supported solely by disclosure may not always be sufficient to guarantee the arbitrator's independence and impartiality. As we mentioned above, revealing the funder's identity is necessary, but it does not, by itself, reduce all risks stemming from TPF. Thus, in some cases, additional measures must be implemented, such as granting the tribunal wider powers to examine the relationship between the funder and the party, or adopting specific procedural safeguards

Overall, these diverse models show a shattered but progressive regulatory environment aimed at safeguarding the impartiality and integrity of arbitral proceedings, without converging on a single, consistent disclosure pattern. In summary, transparency balances good practices and regulatory principles, grounded in a consolidated legal framework that institutionalizes TPF disclosure to warrant compliance with the principles of impartiality and due process. Nevertheless, TPF disclosure may entail risks regarding the scope of information disclosed, such as the strategic use of information by the counterparty, tensions with confidentiality, and legal privilege. The Report EC Mapping TPLF notes that TPF has raised concerns about potential conflicts of interest, ethical challenges, and the possibility of unfounded claims initiated by funders, mainly driven by financial gain.⁴⁶

45 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration: The ICCA Reports no 4* (ICCA Publishing 2018) 98.

46 Lein and others (n 14) 9.

The disclosure of TPF may influence case dynamics by creating a financial imbalance, reducing the claimant's compensation, and increasing incentives for speculative litigation. From a procedural perspective, the disclosure of TPF can ultimately affect the dynamics of the proceedings, leading to financial imbalances that directly affect costs. If agreements are forced solely by the third-party funder's financial interests, the results can lead to complete dissatisfaction for the plaintiff or a reduction in the amount of compensation. These results would undermine the purpose of the process, which is to compensate those whose rights have been violated. In short, an excessive increase in the third-party funder's incentives can lead to speculative financing. The risks are varied and result in a structural asymmetry stemming from the TPF agreement itself. The most concerning aspects revolve around the funder's influence on the direction of the proceedings, which could impact professional independence or influence strategic procedural decisions. This may lead to excessive control by the funder. However, in our assessment, such risks could be contained through applying professional ethics (codes of conduct) that place the strategic and procedural leadership of the proceedings steadfastly under the authority of the attorney.

In closing, the arbitration principles of transparency and confidentiality should balance the disclosure of TPF agreements with the extended confidentiality of their terms. The lack of uniform criteria about what should be disclosed and what should remain confidential could trigger regulatory uncertainty and inconsistent outcomes across jurisdictions. This circumstance might impair procedural efficiency and the institutional solidity of the international arbitration system.

6 CONCLUSIONS

In response to the objective pursued by this study, the following conclusions can be drawn regarding the scope and extent of the disclosure obligation provided for in Article 17.6 of the SCCA Arbitration Rules.

The TPF disclosure obligation, set out in Article 17.6 of the SCCA Arbitration Rules, stipulates a generic disclosure model. This disclosure framework is based on a defined transparency model that aims to safeguard the independence and impartiality of the arbitrators. This setting provides legal certainty to the arbitral process, without undermining the confidentiality principle inherent in TPF in Saudi arbitration.

From a legal-procedural perspective, Article 17.6 is integrated within the general framework of the duty of disclosure of Article 17 of the SCCA Regulation. This article provides a preventive mechanism for the early detection of conflicts of interest, applicable throughout the process and extendable to subsequent modifications in the financing structure.

In determining the scope of the disclosure obligation, it is possible to affirm that the model adopted by the SCCA responds to a generic *ex ante* disclosure, insofar as it requires disclosure from the initial phase of the arbitration, informing of the existence of the financing agreement and the identity of the third-party funder, regardless of whether a specific conflict of interest has been identified.

The scope of the disclosure duty is limited, excluding the obligation to reveal the economic, contractual, or strategic terms of the financing agreement, which remain protected by the principle of confidentiality.

The regulatory design of disclosure under the SCCA shows a functional balance between transparency and confidentiality. Transparency serves as a structural mechanism to guarantee independence and impartiality, rather than a total disclosure strategy. Disclosure, by itself, is not always enough to secure procedural guarantees. On this point, each case must be assessed individually, and arbitrators may receive broader powers.

From a comparative perspective, the Saudi model aligns with international trends favoring generic and functional disclosure regimes, such as standards developed in the field of soft arbitration law. It diverges from both systems by balancing normative silence with those that grant wide discretion to the arbitral tribunal to order additional disclosures, thereby reinforcing the predictability and legal certainty of the arbitral proceedings. In this way, the predictability and legal certainty of arbitral proceedings are reinforced, and the extent to which the disclosure obligation can effectively serve the arbitral process is clarified, although it should not be considered the only mechanism ensuring its proper functioning.

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Co-author, conceptualization, investigation, methodology, validation, writing – original draft.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact from any organizations.

ACKNOWLEDGMENT

The authors would like to thank Prince Sultan University for their support.

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EDITORS

Managing editor – Dr. Olena Terekh. **English Editor** – Robert Reddin.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Behar C and Bastida F, ‘The clause on third-party funding and the disclosure obligation in Article 17.6 of the SCCA Arbitration Rules, as a manifestation of procedural transparency in arbitration’ (2026) 9(2) Access to Justice in Eastern Europe 461-84 <<https://doi.org/10.33327/AJEE-18-9.2-a0001968>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a0001968>

Summary: 1. Introduction. – 2. Theoretical framework and methodology approach to TPF disclosure. 3. Arbitration in Saudi Arabia: Update of the SCCA Rules (2023). 4. The disclosure duty in third-party funding agreements. - 4.1. *TPF: Legal Foundations and Evolution.* - 4.2. *An approach to the definition of third-party funding.* - 4.3. *TPF disclosure obligation: under Article 17.6 of the SCCA Arbitration Rules (2023). Generic disclosure or selective disclosure?* - 4.4. *The boundary between disclosure obligations and confidentiality.* - 5. Transparency disclosure and procedural risks associated with TPF. – 6. Conclusions.

Keywords: *Third-Party Funding, Saudi arbitration, disclosure obligation, procedural transparency, SCCA Arbitration Rules (2023), Conflict of interest, confidentiality.*

DETAILS FOR PUBLICATION

Date of submission: 10 Dec 2025

Date of acceptance: 06 Apr 2026

Publication: 20 May 2026

Was the manuscript fast-tracked? – No

Number of reviewer reports submitted in first round: 3 reports

Number of revision rounds: 2 rounds with minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

We confirm that no artificial intelligence tools or services were used at any stage of writing, translating, editing, or analyzing content for this manuscript.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПОЛОЖЕННЯ ПРО ФІНАНСУВАННЯ ТРЕТІМИ СТОРОНАМИ ТА ОБОВ'ЯЗОК ЩОДО РОЗКРИТТЯ ІНФОРМАЦІЇ У СТАТТІ 17.6 АРБІТРАЖНИХ ПРАВИЛ SCCA ЯК ПРОЯВ ПРОЦЕСУАЛЬНОСТІ В АРБІТРАЖІ

Карла Бехар* та Франсіско Бастіда

АНОТАЦІЯ

Вступ. Угоди про фінансування третіми сторонами (TPF) стають дедалі актуальнішими в міжнародному арбітражі, створюючи різні процедурні проблеми, які ускладнюють дотримання балансу між принципами прозорості та конфіденційності. У цій статті досліджується TPF у міжнародному комерційному арбітражі, з особливою увагою на правилах регулювання, що застосовуються Арбітражним судом Саудівської Аравії. Після загального огляду механізмів TPF та їх дедалі ширшого застосування в міжнародному арбітражі, у цій статті розглядається зобов'язання розкривати інформацію про TPF, як це передбачено статтею 17.6 Арбітражних правил Саудівського комерційного арбітражного центру (SCCA) (2023), як інструмент, призначений для захисту незалежності та неупередженості арбітрів.

Методи. Це дослідження дотримується юридично-догматичного підходу, що ґрунтується на системному та екзегетичному тлумаченні правила, зокрема буквального формулювання статті 17.6 Правил SCCA. Цей метод доповнюється порівняльним аналізом зі стандартними арбітражними моделями з метою категоризації нормативно-правової бази SCCA. Це дослідження визначає обсяг розкриття інформації, її функцію в арбітражній системі Саудівської Аравії, а також окреслює зміст зобов'язання щодо розкриття інформації стосовно TPF в межах арбітражного процесу Саудівської Аравії. Крім того, розглядається зв'язок з принципом конфіденційності.

Результати та висновки. Результати дослідження показують, що стаття 17.6 встановлює загальний режим розкриття інформації, який передбачає обмежений рівень прозорості лише щодо факту існування договору TPF та ідентифікації третьої сторони, що здійснює фінансування, без розкриття змісту самого договору.

Така регуляторна структура сприяє виявленню конфлікту інтересів на початку провадження, запобігаючи порушенню цілісності арбітражного суду, водночас зберігає конфіденційність угод про фінансування та гарантує правову безпеку арбітражу.

Дослідження показує, що стаття 17.6 Арбітражних правил SCCA (2023) встановлює загальну модель розкриття інформації, яка ґрунтується на загальному підході та не охоплює договірні умови фінансування. Це дозволяє своєчасно виявити процесуальні ризики та забезпечити неупередженість та незалежність арбітражного суду.

Зобов'язання щодо розкриття інформації не поширюється на договірні умови угоди, що зберігає асиметрію між принципами прозорості та конфіденційності.

Ключові слова. Фінансування третіми сторонами, арбітраж Саудівської Аравії, зобов'язання щодо розкриття інформації, процедурна прозорість, Арбітражні правила SCCA (2023), конфлікт інтересів, конфіденційність.

ABSTRACT IN ARABIC*

مقال بحثي

البند المتعلق بتمويل الأطراف الثالثة وواجب الإفصاح المنصوص عليه في المادة 17.6 من قواعد التحكيم الصادرة عن المركز السعودي للتحكيم التجاري، كدليل على الشفافية الإجرائية في التحكيم.

كارلا بيهار وفرانيسكو باستيدا*

الملخص:

الخلفية:

أصبحت اتفاقيات تمويل الأطراف الثالثة ذات أهمية متزايدة في التحكيم الدولي، مما أدى إلى ظهور تحديات إجرائية متنوعة تُعقد الموازنة بين الشفافية الإجرائية ومبدأ السرية. تتناول هذه الورقة البحثية تمويل الأطراف الثالثة في التحكيم التجاري الدولي، مع التركيز على اللوائح التي تطبقها محكمة التحكيم السعودية. بعد تقديم لمحة عامة عن آليات تمويل الأطراف الثالثة وانتشارها المتزايد في التحكيم الدولي، تستعرض هذه المقالة واجب الإفصاح عن تمويل الأطراف الثالثة، كما هو منصوص عليه في المادة 17.6 من قواعد التحكيم الصادرة عن المركز السعودي للتحكيم التجاري (2023)، كأداة تهدف إلى حماية استقلالية المحكمين ونزاهتهم.

*. The publication metadata in Arabic is presented as submitted by the authors.

المنهجية:

يتبع هذا البحث منهجاً قانونياً تحليلياً، قائماً على التفسير المنهجي والتفسيري للقاعدة، ولا سيما الصياغة الحرفية للمادة 17.6 من قواعد المركز السعودي للتحكيم التجاري. ويستكمل هذا المنهج بتحليل مقارن مع نماذج التحكيم المعيارية، بهدف تصنيف الإطار التنظيمي للمركز. تُحدد هذه الدراسة نطاق الإفصاح ووظيفته ضمن نظام التحكيم السعودي، مُبيّنةً مضمون التزام الإفصاح المتعلق بالتمويل من طرف ثالث في عملية التحكيم السعودي. كما تُدرس العلاقة بمبدأ السرية

النتائج والاستنتاجات:

تُبين نتائج البحث أن المادة 17.6 تُرسّخ نظاماً عاماً للإفصاح، يُطبق مستويات من الشفافية تقتصر على الكشف عن وجود عقد التمويل من طرف ثالث وهوية المُمول من طرف ثالث، دون الخوض في تفاصيل بنود العقد.

تُظهر نتائج البحث أن المادة 17.6 تُرسّخ نظاماً عاماً للإفصاح، يُطبق مستويات من الشفافية تقتصر على الكشف عن وجود عقد التمويل من طرف ثالث وهوية المُمول من طرف ثالث، دون الخوض في بنود العقد.

يُسهّم هذا الهيكل التنظيمي في الكشف عن تضارب المصالح في بداية الإجراءات، مما يحمي نزاهة هيئة التحكيم ويصون سرية اتفاقيات التمويل ويضمن الأمن القانوني للتحكيم.

يستنتج البحث أن المادة 17.6 من قواعد التحكيم الصادرة عن المركز السعودي للتحكيم التجاري تُرسّخ نموذجاً عاماً للإفصاح، قائماً على إطار عام للكشف عن المسائل التي لا تدرج ضمن (2023) بنود اتفاقيات التمويل التعاقدية. ويؤدي ذلك إلى الكشف المبكر عن المخاطر الإجرائية، وبالتالي الحفاظ على حياد واستقلالية هيئة التحكيم. ولا يمتد التزام الإفصاح إلى البنود التعاقدية للاتفاقية، مما يُحافظ على توازن بين مبدأي الشفافية والسرية.

الكلمات المفتاحية:

التمويل من طرف ثالث، التحكيم السعودي، التزام الإفصاح، الشفافية الإجرائية، قواعد التحكيم الصادرة عن المركز السعودي للتحكيم التجاري (2023)، تضارب المصالح، السرية

Research Article

FAMILY AUTHORITY AND DOMESTIC JUSTICE
IN ANCIENT ROME
AND ALBANIAN CUSTOMARY LAW:
A COMPARATIVE ANALYSIS

Berat Aqifi and Artan Maloku*

ABSTRACT

Background: This paper examines the similarities and differences between the institution of the family in ancient Roman law and Albanian customary law, known as the Kanun of Lekë Dukagjini. The analysis focuses on the role of the pater familias, first within the agnatic family and later within the cognatic family, as well as on the role of the head of the household or village elder under the Kanun. These figures reveal not formal institutional equivalence, but meaningful functional parallels in the organization of domestic authority, responsibilities, and the exercise of paternal power over persons classified in Roman law as *alieni iuris*. Since antiquity, the Kanun has been preserved as an important historical, moral, and legal expression of Albanian customary order. It regulated relations between individuals, including family relations, by treating the family as the foundation of social organization. In both traditions, the household served as an important normative space in which authority, discipline, and internal order were maintained. The topic is also relevant to

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-a0001976>

Date of submission: 03 Feb 2026

Date of acceptance: 07 May 2026

Publication: 20 May 2026

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contemporary legal scholarship because it contributes to debates on legal pluralism, informal justice, and the historical foundations of non-state normative orders.

Method: The methodology of this scientific study is based on a broad range of legal, historical, and doctrinal sources. It draws on primary materials such as the Law of the Twelve Tables, the Digest of Justinian, the Kanun of Lekë Dukagjini, and related historical texts, as well as modern scholarship on Roman law, customary law, and comparative legal history. The methods employed include legal, historical, analytical, and comparative approaches.

Results and Conclusions: The study shows that Roman law and Albanian customary law did not produce identical institutions or equivalent legal doctrines. However, they reveal limited yet significant functional parallels in the organization of household authority, family discipline, and domestic justice. The comparison is strongest at the level of legal and social function rather than formal institutional identity. In this way, the article offers a more precise comparative account of how pre-modern legal orders structured authority, belonging, and internal regulation within the family.

1 INTRODUCTION

Since antiquity, the family has occupied a central place in legal and social thought, and, from Aristotle onward, it has been understood not merely as a private unit of cohabitation but as a foundational structure of social organization. This question remains relevant in contemporary scholarship because current debates on legal pluralism, informal justice, and non-state normative orders continue to examine how authority, conflict resolution, and social discipline were historically exercised outside centralized judicial institutions.¹ In this respect, the study of family-based authority in earlier legal traditions offers a useful perspective for understanding the historical foundations of normative ordering.

In Roman law, the concept of the family was more complex than its modern equivalent. The terms *gens*, *familia*, *agnates*, and *cognates* did not simply denote kinship in the contemporary sense but reflected economic organization, legal dependence, and household authority. As Roman legal sources indicate, the term *familia* had a dual meaning, referring both to persons and to property, and therefore cannot be reduced to the modern notion of the nuclear family.² In the earliest periods of Roman history, before the consolidation of the *civitas* as a structured political community, the individual did not

1 Petrit Nimani, Shëfqet Avdiqja, and Artan Maloku, 'Customary Law and Modern Legal Systems: A Comparative Perspective' (2025) 7(2) Corporate Law & Governance Review 78-9, doi:10.22495/clgrv7i2p8.

2 Ulpian, 'Digest 50.16.195.1-2' in Alan Watson (ed), *The Digest of Justinian*, vol 4 (University of Pennsylvania Press 2011) book 46 ad Edictum; Edoardo Volterra, 'Famiglia' in *Scritti Giuridici*, vol 8 (Jovene 1991) esp note 47; Max Kaser, *The Archaic Roman Family* (Dott A Giuffrè Editore 1960) 47 ff; Giorgio Franciosi, *Famiglia e persone in Roma antica dall'età arcaica al principato* (G Giappichelli Editore 1992) 7 ff.

enjoy the autonomous legal standing later understood, since legal authority and social belonging were mediated through the family group. As productive relations evolved, broader kinship structures gradually fragmented into smaller household units, including those described as *familia pecuniaque*, thereby contributing to the emergence of more distinct forms of property holding and domestic authority.

These developments are significant not only for Roman legal history but also for comparative inquiry. Albanian customary law, especially as expressed in the Kanun of Lekë Dukagjini, likewise treated the family as the primary unit of social order and recognized the household as a central site of authority, regulation, and dispute resolution.³ The Kanun emerged within the Albanian highland world as a body of customary norms shaped by specific historical, geographical, social, and political conditions. It developed in communities organized around kinship, patriarchal household structures, clan solidarity, and strong concepts of honor, where state authority was often weak, distant, or historically absent. For that reason, its authority did not derive from formal state enactment but from long-standing customary acceptance and its perceived legitimacy within the community's social life.⁴

Yet the purpose of this comparison is not to suggest direct legal continuity between Roman law and Albanian customary law, nor to argue that the two systems were identical in structure. Rather, the comparison seeks to identify limited functional parallels between two historically distinct normative orders in which family authority and domestic justice performed important regulatory roles. At the same time, it is important to clarify that the Kanun is not in force today as positive state law in either Albania or Kosovo. Nevertheless, its normative legacy continues to exert cultural and, in certain settings, practical influence on social attitudes concerning family authority, honor, inheritance, and informal dispute resolution. This continuing relevance makes the Kanun particularly significant for contemporary discussions of informal justice, legal pluralism, and non-state normative orders in modern Europe.⁵

This perspective is necessary because scholarship on Roman family law and scholarship on Albanian customary law have largely developed separately, while studies directly comparing family-based justice mechanisms across the two traditions remain limited. This article addresses this gap by examining the household not merely as a social unit, but as a normative institution through which authority was exercised, disputes were managed, and status within the family was defined. The analysis focuses in particular on

3 Ismet Elezi, *E Drejta Zakonore Shqiptare* (Tiranë 2002); Margaret Hasluck, *The Unwritten Law in Albania* (CUP 1954); Shtjefën Gjeçovi, *Kanuni i Lekë Dukagjinit* (Shkodër 1933).

4 Besim Muhadri and Kamber Kamberi, 'The Canon of Lekë Dukagjini, a Monumental Work of the Spiritual Culture on dhe Albanian People (History, Name, Codification)' (2023) 42(1) *Technium Social Sciences Journal* 283, doi:10.47577/tssj.v42i1.8682.

5 Andreas Hemming, Gentiana Kera and Enriketa Pandejmoni (eds), *Albania: Family, Society and Culture in the 20th Century* (LIT Verlag 2012).

the roles of the *pater familias* and the Albanian head of household, the operation of domestic courts or household-based adjudication, and the treatment of selected family-law questions within both legal traditions.

Accordingly, this paper argues that the most meaningful points of comparison lie not in formal legal equivalence but in the similar functions performed by household authority within pre-modern legal settings. Through a legal-historical and comparative analysis of Roman sources and Albanian customary law, the study aims to clarify both the parallels and the limits of comparison between these two traditions. In doing so, it contributes to wider discussions in legal history, comparative law, and socio-legal scholarship concerning the relationship between family authority, informal justice, and the ordering of social life before the rise of the modern state.

2 METHODOLOGY

This article adopts a doctrinal, legal-historical, and comparative research design. Its primary purpose is to examine how family authority and domestic justice were structured and exercised within two distinct normative traditions: ancient Roman law and Albanian customary law, as embodied in the Kanun of Lekë Dukagjini. The study does not seek to establish direct legal continuity between these traditions, nor does it assume their formal equivalence. Rather, it employs comparison as an analytical tool to identify functional parallels and significant differences in the ways household authority, legal status, and dispute resolution were organized within pre-modern legal settings.⁶

The primary materials for the Roman law component include classical legal texts and related historical sources, particularly the Law of the Twelve Tables, the *Digest* of Justinian, references to the *Codex Papirianus*, and selected passages from Cicero and Servius.⁷ For the Albanian customary law component, the principal sources are the Kanun of Lekë Dukagjini, as recorded by Shtjefën Gjeçovi, and related doctrinal and historical works on Albanian customary law. These primary materials are supplemented by secondary scholarship in Roman legal history, comparative law, and Albanian customary law, including both classical authorities and modern academic studies. This combination of sources enables interpretation of the institutions under examination within their respective legal and historical contexts.

In addition to doctrinal and legal-historical analysis, the paper also considers the broader social and anthropological context in which both Roman family authority and

⁶ Nimani, Avdijsa and Maloku (n 1) 78-9.

⁷ 'Lex XII Tabularum' in Michael H Crawford (ed), *Roman Statutes*, vol 2 (Institute of Classical Studies 1996) 555-722; Ulpian, 'Digest 50.16.195.1-2' (n 2); Marcus Tullius Cicero, *De Legibus*, book 3 (1842) (Kessinger Publishing 2010); Orazio Licandro and Nicola Palazzolo, *Papirius Iustus: Libri XX de Constitutionibus* (L'Erma di Bretschneider 2021).

Albanian customary law operated. This is particularly important in relation to the Kanun of Lekë Dukagjini, whose authority cannot be understood solely through normative provisions, but also through kinship structures, patriarchal household organization, honor, clan solidarity, and customary forms of social regulation.⁸ For that reason, the study relies not only on formal legal sources but also, where relevant, on historical and literary materials to understand the wider normative environment in which family authority and domestic justice functioned.

Methodologically, the article applies legal analysis to the normative content of the sources, historical analysis to situate these norms within the broader development of Roman and Albanian society, and comparative analysis to evaluate selected points of convergence and divergence. The comparison is structured around clearly defined analytical categories, namely the concept of the family as a legal unit, the authority of the *pater familias* and the Albanian head of household, the role of domestic adjudication, and the treatment of specific family-related issues, including lineage, household discipline, and the status of the newborn child. These categories were selected because they allow comparison at the level of legal function rather than mere terminological similarity.

Particular care is taken to avoid anachronism and overstatement, and the article therefore distinguishes between similarities in legal or social function and differences in doctrinal form, institutional setting, and historical development. Roman law and Albanian customary law emerged in very different temporal, political, and intellectual contexts, and the comparative value of the study lies precisely in examining how distinct legal orders addressed analogous social problems through different normative techniques. In this sense, the article uses a restrained comparative approach that emphasizes interpretive caution, source sensitivity, and the limits of cross-historical analogy.

The study also acknowledges certain limitations, given that it relies primarily on normative and doctrinal materials and therefore does not seek to reconstruct the full diversity of social practice across different historical periods, local contexts, or regional variations. In addition, Albanian customary law is treated mainly through the Kanun of Lekë Dukagjini and related scholarship, without extending the analysis to all regional customary variants. Likewise, the Roman law discussion focuses on the elements most relevant to family authority and domestic justice rather than offering a complete account of Roman family law across all its chronological phases. These limitations, however, do not diminish the value of the inquiry; rather, they define its scope and clarify the article's specific contribution to legal-historical and comparative scholarship.

8 Hemming, Kera, and Pandelejmoni (n 5).

3 THE FAMILY IN ARCHAIC ROME AND UNDER THE KANUN

The concept of the family, although familiar in modern legal and social discourse, carried a more complex and historically contingent meaning in both Roman law and Albanian customary law. In Roman legal thought, *familia* did not denote only a kinship group in the modern sense, but could also refer to a household as an economic and juridical unit composed of persons, property, and relations of dependence.⁹ Modern scholarship likewise emphasizes that the Roman family should not be treated as a fixed or static institution, since both its legal definition and its internal power relations evolved significantly between the Law of the Twelve Tables and the later imperial compilations.¹⁰

This complexity is already visible in the classical juristic sources, where in Book Forty-Six of the *Digest*, Ulpian explains that the term *familia* may refer either to property or to persons. In one sense, it is connected with inheritance and patrimonial transmission, as reflected in the provision of the Twelve Tables, according to which the nearest agnate may take the family estate. In another sense, it refers to persons linked by household authority and legal dependence, including those who belonged to the same domestic unit by status rather than solely by blood.¹¹ The term could therefore encompass a broader household structure, extending beyond the narrow circle of biological relatives.

In this respect, Roman law conceived the family primarily through authority and legal status, so that a family, in the strict legal sense, consisted of those subject to the power of one person, whether by nature or by law, including children, descendants, and, in some contexts, dependents whose position was defined through household subordination. The central legal figure in this structure was the *pater familias*, whose authority defined the household's juridical unity. At the same time, current research cautions against reading all phases of Roman family law through a single model, since the structure and practical operation of household power changed over time, particularly as property relations, the position of women, and inheritance practices developed.¹²

The historical development of Roman society also affected the material organization of the family, as earlier kinship formations connected to the *gens* gradually gave way to narrower household units associated with domestic production, property holding, and relations of authority. In this context, expressions such as *familia pecuniaque* reflected not only kinship

9 Ulpian, 'Digest 50.16.195.1–2' (n 2).

10 Suzanne Dixon, 'Family' in Paul J du Plessis, Clifford Ando and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (OUP 2016) 461, doi:10.1093/oxfordhb/9780198728689.013.35. Noting that the Roman family changed substantially between the Twelve Tables and Justinian, and that modern scholarship treats law and social practice with greater nuance.

11 Ulpian, 'Digest 50.16.195.1–2' (n 2).

12 Dixon (n 10); Timothy Lubin and others, 'Status and Family' in Caroline Humfress, David Ibbetson and Patrick Olivelle (eds), *The Cambridge Comparative History of Ancient Law* (CUP 2024) 376, doi:10.1017/9781009452243.009, which emphasizes the broader comparative significance of status, emancipation, and *patria potestas*.

ties but also the household's economic dimension, including persons, labor, and assets organized under a single authority.¹³ The Roman family, therefore, should be understood not merely as a biological grouping but as a normative and economic structure through which status, labor, and property were ordered.

A comparable, though not identical, centrality of the family can be observed in Albanian customary law. Within the Kanun of Lekë Dukagjini, the family likewise functioned as the primary unit of social order, collective identity, and internal regulation.¹⁴ Yet the comparison with Roman law must be formulated with caution. The Kanun emerged in a different historical, political, and intellectual environment, and its norms were preserved within a customary rather than a classical juristic tradition. For this reason, the point of comparison lies not in formal legal equivalence but in the fact that both traditions treated the household as a key normative space in which authority, discipline, belonging, and dispute management were organized.

The family under the Kanun should not be understood solely as a legal unit, but also as a social, economic, kinship-based, and honor-centered community. It was embedded in a wider structure of clan solidarity, collective reputation, and patriarchal household organization, in which the house functioned not only as a place of residence but also as a space of authority, production, protection, and social identity.¹⁵ In this sense, the Albanian household was tied simultaneously to bloodline, property, labor, mutual obligation, and honor, all of which shaped the normative force of customary rules within everyday life.

The patriarchal dimension of the Albanian household remained particularly strong over a long historical period and, in some regions, continued to shape social practice well into the modern era.¹⁶ The family was conceived not only as a group of persons living together, but as a community united under the authority of a single head and structured around shared work, mutual obligations, and collective property. In its broader form, it often included parents, married brothers, their wives and children, and other relatives cohabiting under one roof, frequently in fortified household compounds known as kulla.¹⁷ This form of organization illustrates the extent to which the household served as both a social and an economic unit.

13 Franciosi (n 2); Karl-Joachim Hölkeskamp, 'Under Roman Roofs: Family, House, and Household' in Harriet I Flower (ed), *The Cambridge Companion to the Roman Republic* (2nd edn, CUP 2014) 101, doi:10.1017/CCOL0521807948.006; Kaser (n 2); Volterra (n 2).

14 Muhamed Çitaku, Orhan Çeku and Ardian Emini, 'Blood Feud in "Leke Dukagjini Code" (Kanuni i Lekë Dukagjinit) and Its Impact in the Contemporary Law in Albania and Kosovo' (2022) 12(4) *The Lawyer Quarterly* 318.

15 Nebi Bardhoshi, 'Family Property in Albanian Customary Law' in Andreas Hemming, Gentiana Kera and Enriketa Pandejmoni (eds), *Albania: Family, Society and Culture in the 20th Century* (LIT Verlag 2012) 67.

16 Elezi (n 3); Hasluck (n 3).

17 Hasluck (n 3).

The Kanun itself defines the family as a community of members living under one roof for biological continuity, moral formation, and the maintenance of household life.¹⁸ It also regulates the position of the head of the household, the role of the woman of the house, relations between spouses, the treatment of dependents, and various forms of spiritual and social kinship, including godparenthood, hospitality, and adoption.¹⁹ These elements show that Albanian customary law, like Roman law in its own distinct manner, treated the family as a normative institution rather than a merely private arrangement.

Accordingly, the comparison developed in this article proceeds from a limited but analytically meaningful proposition. Roman law and Albanian customary law did not construct the family in the same doctrinal form, nor did they operate through the same legal techniques. Nevertheless, both traditions attributed central normative significance to household authority and recognized the family as a privileged site for the ordering of status, discipline, and social continuity.

4 THE ROLE OF FAMILY JUSTICE (DOMESTIC COURTS)

In the Roman context, the available sources do not justify treating household adjudication as a fully institutionalized court system equivalent to later state tribunals. Rather, they suggest that certain matters concerning family discipline, marital conduct, household honor, and the status of dependents could be addressed within the domestic sphere, under the authority of the *pater familias* and, in some instances, with the participation of relatives or advisers. In this limited sense, the notion of domestic justice is analytically useful, provided that it is understood as a form of household-based adjudicatory practice rather than a formal court in the modern sense.²⁰

Roman legal and historical materials nevertheless indicate that the domestic sphere occupied an important regulatory role. Alongside the severe sanctions associated with the Law of the Twelve Tables and later legislation such as the *Lex Julia de adulteriis*, Roman legal tradition preserved the idea that certain matters touching the moral order of the household could be handled within a private or quasi-domestic framework.²¹ References associated with early Roman legal tradition, including those linked to the *Codex Papirianus*, also suggest an early distinction between public adjudication and forms of internal familial control, even if the exact procedural contours of such domestic intervention remain difficult to reconstruct with certainty.²²

18 Gjeçovi (n 3) book 2, sec 9, para 18.

19 Elezi (n 3); Gjeçovi (n 3).

20 Dixon (n 10); Lubin and others (n 12).

21 'Lex XII Tabularum' (n 7). *Lex Julia de adulteriis*, enacted under Augustus in 18 BCE, see Pal Csillag, *The Augustan Laws on Family Relations* (Akademiai Kiado 1976).

22 Dimitrij Apasiev, 'Iudicia Publica: Roman Criminal Procedural Law with Special Reference to the Judicial System During the Republic' (PhD thesis, Faculty of Law "Iustinianus Primus" Ss Cyril and Methodius University in Skopje, 2015); Licandro and Palazzolo (n 7).

For this reason, it is more accurate to speak of household-based justice or domestic adjudicatory practice in Roman law than to assume the existence of a uniform and fully developed institution of family courts. Recent scholarship has also cautioned against broad or uncritical uses of the concept of *consilium domesticum*, especially where the surviving evidence is fragmentary or filtered through later literary tradition. Accordingly, the Roman material in this article is interpreted with restraint and with attention to the distinction between legal ideology, juristic formulation, and actual social practice.²³

Within Albanian customary law, by contrast, the role of domestic justice is more explicitly embedded in the normative organization of the household and the clan. According to the Kanun, the family and the head of the household were directly involved in resolving conflicts arising within the domestic sphere. In this framework, the elder of the house occupied a central position, not as a state judge, but as a customary authority responsible for maintaining discipline, preserving honor, and restoring internal order. Decisions were taken in accordance with customary norms and were expected to be respected by all household members.²⁴

These household-based processes extended beyond purely internal matters because the Albanian family was inseparable from the wider clan structure, and domestic justice also operated at the intersection of household authority and collective social responsibility. Disputes could involve questions of family conduct, property, moral transgression, and inter-family hostility, and were often addressed through the intervention of elders or assemblies acting within the moral and customary framework of the Kanun.²⁵ In this respect, Albanian customary law presents a clearer and more socially embedded model of non-state domestic justice than the Roman material, where the evidence is more dispersed and conceptually debated.

The comparison between the two traditions must therefore remain carefully delimited, since Roman law and Albanian customary law did not create identical institutions of family adjudication or attribute the same procedural form to household authority. What can be compared, however, is the normative function performed by the household in both systems. In each case, the family served as a privileged site of discipline, dispute management, status determination, and social regulation before the consolidation of the modern state. The comparison is thus strongest at the level of legal and social function, not at the level of strict institutional equivalence.

In this sense, domestic justice in both traditions reveals how pre-modern legal orders relied on family-based authority to regulate conduct and preserve social cohesion. In Roman law, this authority was more tightly bound to the legal power of the *pater familias*, whereas

23 Elia T Schnaible, 'Lucretia and Her *Consilium Domesticum*' (2024) 71(1) *Greece & Rome* 76, doi:10.1017/S0017383523000244.

24 Elezi (n 3); Gjeçovi (n 3).

25 Gjeçovi (n 3); Hasluck (n 3).

under Albanian customary law it operated more visibly through the interaction of the household, the clan, and the assembly.

4.1. The Role of the *Pater Familias* and the Head of Household in Roman and Albanian Family Justice

From a comparative perspective, both Roman law and Albanian customary law attributed substantial normative importance to the male head of the household. This parallel, however, should not be understood as evidence of institutional identity. In Roman law, household authority was articulated through the legal framework of *patria potestas* and the status distinctions between *sui iuris* and *alieni iuris*, whereas under Albanian customary law, the authority of the head of household derived primarily from customary hierarchy, age, reputation, and his role within the broader kinship and clan structure.²⁶

In both traditions, women occupied an indispensable place within the family, yet they were generally excluded from the highest forms of domestic authority, especially from formal decision-making concerning lineage, property, discipline, and dispute resolution.²⁷ This gendered distribution of authority reflects the patriarchal character of both systems, although the legal and social mechanisms through which such authority was exercised differed significantly.

In Roman society, the extended household included not only parents and children but also more distant relatives, dependents, freed persons, and slaves, all of whom could fall within the broader orbit of household organization.²⁸ Under Albanian customary law, the family likewise extended beyond the nuclear unit and frequently included married brothers, their wives and children, common property, and shared obligations within the same domestic and kinship framework.²⁹ In both contexts, therefore, the household functioned as more than a private living arrangement; it was a normative unit through which authority, labor, discipline, and social identity were organized.

This broader household setting is particularly relevant to the operation of domestic justice, since in Roman law the authority of the *pater familias* created the legal unity of the household and made him the central point through which questions of status, dependence, and internal order were mediated.³⁰ Under the Kanun, the head of the household and, where necessary, the elders of the family or clan, exercised a comparable regulatory role within the

26 Barry Nicholas, *An Introduction to Roman Law* (OUP 1962); Gjeçovi (n 3); Ulpian, 'Digest 50.16.195.1-2' (n 2).

27 Elezi (n 3); Hasluck (n 3).

28 Franciosi (n 2); Volterra (n 2).

29 Gjeçovi (n 3); Hasluck (n 3).

30 Nicholas (n 26); Ulpian, 'Digest 50.16.195.1-2' (n 2).

customary sphere.³¹ The comparison is therefore strongest where attention is directed to the social and normative functions of authority rather than to formal legal equivalence.

The same caution applies to the classification of domestic adjudication according to agnatic and cognatic lines. In this article, these expressions are used as analytical categories to explain how disputes could be structured around lineage, descent, and household belonging. They should not be read as evidence of rigidly institutionalized courts operating under identical procedural forms in both traditions.³² Such caution is particularly important in the Roman context, where the surviving evidence is often fragmentary and where modern scholarship urges a careful distinction between juristic formulation, social practice, and later reconstruction.

A similar need for restraint applies to the early Roman *consortium*, sometimes referred to as *anticum consortium* or *societas fratrum*. The available evidence suggests that these broader formations of agnatic cooperation played an important role in household organization and property management, but it does not always permit precise conclusions about the exact procedural form of domestic adjudication within them.³³ What can be stated with greater confidence is that, in both Roman and Albanian settings, family authority served as a mechanism for maintaining internal cohesion, regulating conduct, and managing disputes before or alongside the emergence of more formalized public institutions.

At a later stage, Roman consortia gradually fragmented into narrower household units, often associated with *domus* and *familia pecuniaque*, in which economic self-sufficiency and internal hierarchy became increasingly pronounced.³⁴ In Albanian customary society, by contrast, the extended family remained socially and normatively more visible for a longer period. This difference should be acknowledged. It shows that the two traditions converged only in certain functional respects, while differing considerably in institutional development, historical duration, and legal form.

The comparison advanced in this study does not rest on the claim that Roman and Albanian family justice were structurally the same. Rather, it argues that both traditions placed the household at the center of authority and conflict management, thereby allowing a limited but meaningful comparison between two distinct legal cultures.

31 Elezi (n 3); Gjeçovi (n 3).

32 Dimitar Apasiev, 'Domestic Family Trials in Ancient Roman Law' (2022) 12(12) Annual Yearbook of the Faculty of Law 15.

33 Kaser (n 2); Volterra (n 2).

34 Kaser (n 2); Franciosi (n 2).

4.2. The Head of the Family (*Pater Familias*) in Ancient Rome

In Ancient Rome, the *familia* constituted a fundamental legal and social unit, but its internal structure must be understood within the specific categories of Roman private law. At the center of this structure stood the *pater familias*, namely the person who, in legal terms, possessed independent status (*sui iuris*) and exercised authority over the household.³⁵ His position was not defined merely by biological fatherhood, but by legal capacity and the power to represent the household as a unified normative and proprietary entity.³⁶

The authority of the *pater familias* was primarily expressed through *patria potestas*, a legal power exercised over descendants who remained under his authority, and through related forms of control recognized in Roman law, including *manus* in certain marital arrangements and *dominica potestas* over slaves.³⁷ For this reason, the Roman household should not be reduced to a simple kinship group. It was also a structured legal order in which status, dependence, and authority were organized around the household head. Modern scholarship has emphasized that this authority, although conceptually broad, must be interpreted historically and contextually, since its practical scope and operation changed over time and were not identical in all periods of Roman law.³⁸

Within this framework, the *pater familias* occupied a unique position as the legal center of the household and the person through whom family continuity, property management, and internal order were mediated.³⁹ Persons under his authority were classified as *alieni iuris*, meaning that they did not possess full independent legal standing so long as they remained within the household power structure.⁴⁰ This legal arrangement explains why the Roman family was understood not merely in biological terms, but as a hierarchy of legally ordered relationships.

The proprietary dimension of the Roman household further reinforced this structure, as the authority of the *pater familias* extended not only to persons but also to the material basis of household life, including land, buildings, movable goods, productive assets, and, in broader historical contexts, the labor performed within the domestic unit.⁴¹ In this respect, Roman family organization combined personal authority with economic control, making the household both a legal community and a productive unit.

At the same time, current scholarship cautions against describing Roman paternal authority in overly simplistic or static terms. Although the *pater familias* was the juridical head of the household, the historical operation of family relations in Rome was shaped by chronological

35 Nicholas (n 26); Ulpian, 'Digest 50.16.195.1-2' (n 2).

36 Ulpian, 'Digest 50.16.195.1-2' (n 2).

37 Dixon (n 10); Nicholas (n 26).

38 Dixon (n 10); Lubin and others (n 12).

39 Franciosi (n 2); Volterra (n 2).

40 Ulpian, 'Digest 50.16.195.1-2' (n 2).

41 Kaser (n 2); Franciosi (n 2).

development, social practice, and changing legal doctrine.⁴² Consequently, the Roman model should be understood as a historically evolving institution rather than as an unchanging form of patriarchal domination.

For this study, the significance of the *pater familias* lies not only in his formal legal powers but also in the normative role he played within the household. He embodied the principle that family order, authority, and internal regulation were concentrated in a single legal subject. This feature makes the Roman household particularly relevant for comparison with Albanian customary law, while underscoring the doctrinal differences that separate the two traditions.

4.3. The Head of the Family Under Albanian Customary Law

Under Albanian customary law, the head of the household held a central normative authority within the family structure. His authority did not derive from a juristically elaborated doctrine comparable to the Roman categories of *patria potestas* or *sui iuris*, but from customary hierarchy, seniority, household leadership, and recognition within the broader kinship community.⁴³ For this reason, the Albanian head of household should not be described as the doctrinal equivalent of the Roman *pater familias*, even though both figures performed important regulatory functions within their respective family orders.

In the Kanun of Lekë Dukagjini, the head of the household was usually the eldest male member of the family, although in some circumstances another male relative of recognized wisdom, authority, or experience could assume that position.⁴⁴ His authority extended to the internal administration of the household, the representation of the family in external relations, the management of common property, and the preservation of domestic discipline. In this sense, the household was not merely a residential unit, but a customary community governed through hierarchy, collective obligations, and internal norms.

From a broader anthropological perspective, the head of the household was not only a normative figure, but also a moral and social embodiment of the house itself. His role was closely connected to the honor of the family, the reputation of the kin group, and the continuity of the household within the wider clan structure. He represented the family not only in matters of property and internal order, but also in its external standing before relatives, elders, and the wider customary community. In this respect, his authority was inseparable from the values of honor, responsibility, seniority, and collective representation that structured traditional Albanian social life.⁴⁵

42 Dixon (n 10).

43 Nimani, Avdijsa and Maloku (n 1) 77-9.

44 Gjeçovi (n 3) book 2, sec 20, para 21.

45 Gigliola Bejj, 'History and Sense-Making in Present-Day Albania' (2024) 8(2) *Giornale di Filosofia* 177, doi:10.7413/1827-5834097.

The patriarchal nature of this structure has long been recognized in the literature on Albanian customary law, and more recent scholarship has continued to underline its historical significance. Recent Albanian legal scholarship has stressed that customary family organization in Albania preserved a strongly patriarchal model in which the male head of household exercised primary authority over family property, household order, and social representation, while women remained in a structurally subordinate position within the customary order.⁴⁶ Contemporary legal analysis has also noted that the legacy of the Kanun continued to shape social attitudes toward domestic hierarchy and gender roles long after the formal decline of customary adjudication.⁴⁷ These observations are relevant to the present study because they confirm the household head's centrality as a normative figure, while also showing that his authority must be understood within the social realities of customary patriarchy rather than through overly abstract comparisons.

At the same time, the authority of the Albanian head of household was not unlimited in an abstract legal sense. It operated within a customary framework that linked household leadership to family honor, collective reputation, and the expectations of the wider clan. The head of household represented the family before the kin group and, in some matters, before the broader customary community, but his conduct remained tied to standards of wisdom, moderation, and responsibility.⁴⁸ Where household interests of major importance were involved, especially in relation to common property or disputes affecting the larger family unit, the role of elders and kinship structures could become significant.

The Kanun itself reflects this authority not merely as power, but as duty, as the head of the household was expected to preserve internal order, administer common resources, protect the integrity of the family, and act in accordance with the moral expectations of the house and the clan; accordingly, his role should be understood not only in legal or administrative terms, but also as part of a customary ethics of household leadership.

This distinguishes Albanian customary authority from the Roman legal model in an important respect. In Roman law, the *pater familias* occupied a more clearly defined legal status as the juridical center of the household. In contrast, under Albanian customary law, the head of household exercised authority within a social and moral order that was less systematically juristic but more openly embedded in kinship and communal life.⁴⁹ The comparison between the two figures is therefore strongest when made at the level of function. In both traditions, the household head acted as the primary point of internal regulation, authority, and representation. Yet the sources, limits, and forms of that authority remained distinct.

46 Çitaku, Çeku and Emini (n 14) 318-9; Entoni Miska, 'Historia dhe procesi i kodifikimit të së drejtës civile dhe zhvillimi i të drejtës familjare në Republikën e Shqipërisë' (National Scientific Conference "Developments and Innovation in Private Law", University of Tirana, 12 June 2024) 185.

47 E ntela Kadriu, 'Progress, Challenges, and Comparative Insights regarding the Implementation of Domestic Violence Legislation in Albania' (2025) 19(1) *Jus & Justicia* 40, doi:10.58944/frdm9323.

48 Elezi (n 3); Hasluck (n 3).

49 Gjeçovi (n 3); Nicholas (n 26).

The comparison between the Albanian head of household and the Roman *pater familias* is not based on an assumption of institutional identity. Rather, it rests on the recognition that both figures performed a central role in structuring family authority, preserving domestic order, and representing the household within their respective normative systems. While their legal foundations, scope of authority, and social meanings differed, both embodied forms of household leadership that were essential to the organization of family life.

5 PROCEDURES BEFORE DOMESTIC COURTS IN ANCIENT ROME AND UNDER ALBANIAN CUSTOMARY LAW

In pre-institutional societies, justice was not exercised in the same manner as in later state-centered legal systems. For that reason, the expression “domestic courts” must be used with caution, especially in the Roman context. The available Roman sources do not support the existence of a fully institutionalized household court system in the modern sense. Rather, they indicate that certain disputes relating to family discipline, marital conduct, household honor, lineage, and dependency could be addressed within the domestic sphere, under the authority of the *pater familias* and, in some cases, with the participation of relatives or advisers.⁵⁰

This distinction is important for the comparative method adopted in this article, since household-based adjudication in Roman law should be understood as a form of domestic or intra-familial regulatory practice rather than as a court in the formal procedural sense. Early Roman legal tradition, including materials associated with the Law of the Twelve Tables, the *Codex Papirianus*, and later juristic interpretation, suggests the presence of internal mechanisms of control and sanction within the household, but the exact procedural contours of such mechanisms remain only partially recoverable from the surviving sources.⁵¹

Roman household procedure, as it can be reconstructed, appears to have been simple, oral, and strongly dependent on the family’s authority structure. Matters concerning domestic conduct, marital loyalty, the status of dependents, and internal hierarchy could be dealt with within the household before any question of public adjudication arose. In that limited sense, family-based justice in Rome served to preserve household order and protect the moral and legal integrity of the domestic unit.⁵² At the same time, current scholarship advises against presenting such practices as a uniform institution extending unchanged across all periods of Roman law.⁵³

50 Apasiev, ‘Domestic Family Trials’ (n 32); Nicholas (n 26).

51 Apasiev, ‘Iudicia Publica’ (n 22); ‘Lex XII Tabularum’ (n 7); Licandro and Palazzolo (n 7).

52 Alan Watson, *Roman Law and Comparative Law* (University of Georgia Press, 1991); Nicholas (n 26).

53 Dixon (n 10); Schnaible (n 23).

The Albanian customary context provides a more explicit normative foundation for domestic justice, as conflict resolution within the family and the clan under the Kanun of Lekë Dukagjini was more clearly integrated into customary procedures and social mechanisms of internal regulation. The head of the household, together with elders of the family or the wider kin group, was directly involved in resolving disputes arising within the domestic sphere. Such disputes could concern household conduct, honor, property, interpersonal obligations, and tensions between related family groups.⁵⁴ In this setting, justice was not conceived as the exclusive function of a centralized judicial authority, but as an integral part of the moral and social order of the household and the clan.

Procedurally, these customary mechanisms were predominantly oral and were grounded in accepted norms known to the parties and the wider community. The authority of the elder or assembly did not rest on codified procedural formalism, but on legitimacy derived from custom, age, reputation, and communal recognition.⁵⁵ Decisions were directed not only toward sanction, but also toward the restoration of social balance. In many cases, the process of reconciliation involved the giving of one's word or the pledge of *besa*, through which trust, restraint, and peace were reaffirmed within or between families.⁵⁶

These customary mechanisms were inseparable from the wider social world of the Albanian household and clan. The authority of the elder, the binding force of *besa*, the protection of family honor, and the expectations of the *fis* gave these procedures their legitimacy and effectiveness. For that reason, dispute resolution under the Kanun cannot be understood merely as a normative technique, but also as a socially embedded form of informal mediation grounded in kinship solidarity, collective reputation, and the moral authority of elders.⁵⁷ In this setting, justice was linked not only to sanction but also to reconciliation, the containment of hostility, and the preservation of communal equilibrium.

A key comparative difference concerns the structure of decision-making: as Roman law located domestic authority more clearly in the juridical person of the *pater familias*, while still allowing the possibility that important household decisions may, in practice, have been accompanied by forms of internal consultation. In contrast, under Albanian customary law, dispute resolution more visibly involved the household head, elders, and wider kinship structures acting together within a customary framework.⁵⁸ For this reason, the Albanian model presents a more openly collective form of domestic justice, while the Roman model is more closely tied to the legal centrality of household authority.

54 Elezi (n 3).

55 Çitaku, Çeku and Emini (n 14) 318-9; Hasluck (n 3).

56 Gjeçovi (n 3).

57 Fatos Tarifa, 'Of Time, Honor, and Memory: Oral Law in Albania' (2008) 23(1) Oral Tradition 3, doi:10.1353/ort.0.0017.

58 Nimani, Avdija and Maloku (n 1) 78-9.

The comparison should therefore be framed at the level of function rather than institutional identity. Both traditions treated the household as an important site of regulation, discipline, and conflict management, operating alongside, or even before, more formal public authority. Yet the procedural shape, normative basis, and social embedding of these practices remained distinct. Roman domestic adjudication was more tightly linked to the doctrinal structure of household power, whereas Albanian customary procedure was more directly embedded in collective social practice and clan-based mediation.⁵⁹

Accordingly, the value of the comparison lies in showing how two different legal cultures relied on household authority to organize social order, manage disputes, and preserve communal cohesion.

5.1. The Non-Acceptance of the Newborn Child under Roman Customary Law

The question of the non-acceptance of the newborn child in Roman law must be approached with particular caution, since both the literary sources and the legal materials have generated substantial scholarly debate. Earlier scholarship often described the *pater familias* as possessing an almost unrestricted right to accept or reject the newborn by means of a formal act commonly known as *tollere liberum*. More recent research, however, has shown that this issue is more complex and that the ritualized “lifting” of the child should not be readily treated as a universally decisive legal act throughout Roman law.⁶⁰

What can be stated with greater certainty is that the status of the child in Roman law depended fundamentally on lawful birth within a recognized family structure and on incorporation into the domestic order governed by the *pater familias*.⁶¹ In this context, Roman law connected the position of the child to the legal framework of *matrimonium iustum*, household authority, and *patria potestas*. The legal relevance of the newborn was therefore not reducible to a single symbolic gesture, but must be understood within the broader juridical structure of family power and status.

The literary and legal traditions nevertheless indicate that the newborn child could be exposed, and that the authority of the household head was central to such decisions. Yet even here, Roman law must be interpreted carefully. In classical Roman law, the private act of exposing a child did not in itself automatically alter the child's original freeborn status as a matter of doctrine, although in practice, exposure could place the child in a highly vulnerable position and make enslavement or social loss of status a factual reality.⁶²

59 Nicholas (n 26).

60 Brent D Shaw, 'Raising and Killing Children: Two Roman Myths' (2001) 54(1) *Mnemosyne* 31, doi:10.1163/15685250151099463.

61 Dixon (n 10).

62 Yifat Monnickendam, 'The Exposed Child: Transplanting Roman Law into Late Antique Jewish and Christian Legal Discourse' (2019) 59(1) *American Journal of Legal History* 1, doi:10.1093/ajlh/njy030.

This distinction between legal doctrine and social practice is important and should be made explicit in the article.

Ancient and later Roman materials also connect child exposure with broader concerns of household order, legitimacy, poverty, deformity, and family honor. The *mores maiorum* and later legal developments show that Roman society did not treat all newborns identically and that questions of viability, legitimacy, and domestic authority could affect how the child was regarded within the household.⁶³ At the same time, more recent scholarship warns against reproducing simplified assumptions that every case of non-acceptance followed a uniform legal script or that exposure functioned as a straightforward institutional right exercised in the same manner across all historical phases of Roman law.⁶⁴

Particular caution is also required when discussing children born with visible deformities or uncertain prospects of survival. Roman sources contain references to categories such as *monstra*, *portenta*, *ostenta*, and *prodigia*, but these references belong to a broader symbolic, religious, and legal vocabulary and should not be read in an overly literal or mechanically doctrinal way.⁶⁵ What is clear is that such cases were associated with anxieties about order, nature, and legitimacy, and that the household remained the primary space in which these questions were initially confronted.

The central point is not to portray Roman law as recognizing an unqualified and mechanically exercised paternal right to reject the newborn. Rather, it is to show that the child's status and fate were closely linked to household authority, lawful family formation, and the wider legal logic of *patria potestas*. This makes the Roman material comparable to Albanian customary law only in function, insofar as both traditions treated the family as the primary setting in which the acceptance, protection, and social positioning of the child were normatively mediated.

5.2. The Non-Acceptance of the Newborn Child Under Albanian Customary Law

In Albanian customary law, the family was treated as the basic unit of social and normative order, and the birth of a child had significance that extended beyond the private sphere of the parents. Within the logic of the Kanun of Lekë Dukagjini, the child was connected not only to the household as a domestic unit but also to bloodline, family honor, and clan continuity. For that reason, the question of the newborn's acceptance cannot be approached as a purely individual matter of paternal discretion, but as an issue situated within the wider customary structure of kinship and collective responsibility.⁶⁶

63 Cicero (n 7); 'Lex XII Tabularum' (n 7).

64 Dixon (n 10); Shaw (n 60).

65 Monnickendam (n 62).

66 Gjeçovi (n 3).

At the same time, caution is needed in comparative terms, since Albanian customary law did not formulate a doctrinally elaborated institution directly equivalent to the Roman *tollere liberum*. The Kanun does not present the acceptance of the newborn through a single ritualized legal act comparable in form to Roman juristic categories. What it does make clear, however, is that the legal and social position of the child depended heavily on lawful family affiliation, paternal household membership, and recognition within the customary order.⁶⁷ For this reason, the comparison with Roman law should again be framed at the level of function rather than strict legal equivalence.

Under the *Kanun*, a child born within marriage was ordinarily integrated into the father's family and clan, so that legitimacy and household affiliation were central to the child's social and normative status. The father could not arbitrarily deny such a child in a purely private and unilateral manner where the matter implicated the honor of the household or the interests of the kin group. Questions touching paternity, family recognition, or the child's place within the lineage were capable of engaging the authority of elders and the wider customary community, rather than remaining solely within the subjective will of the father.⁶⁸

A different situation arose regarding children born outside marriage, as Albanian customary law imposed stricter limitations in such cases, especially regarding inheritance and full clan affiliation. In such cases, the child's legal and social position was more fragile, and responsibility was linked more closely to the mother and her family. Yet even in this context, the issue should not be described in overly absolute terms. The exclusion concerned status within the customary family order and the distribution of certain rights, not the denial of the child's human existence as such.⁶⁹

This distinction is important to the article's analytical balance. The non-acceptance of the newborn under Albanian customary law should not be portrayed as a mechanical customary right identical to the Roman paternal model. Rather, it should be understood as part of a broader normative order in which family legitimacy, honor, lineage, and communal oversight shaped the child's place within the household. The family remained the primary framework through which the child was recognized, protected, or, in certain cases, limited in rights.

Recent scholarship from Kosovo further underscores the continued relevance of this issue in broader legal and social contexts. Studies on inheritance and women's family rights in Kosovo have shown that customary norms associated with the Kanun continue to influence attitudes toward family membership, authority, and patrimonial rights, even within the framework of modern positive law. These contemporary analyses do not address newborn

67 Elezi (n 3); Hasluck (n 3).

68 Gjeçovi (n 3).

69 *ibid*; Elezi (n 3).

status directly, but they do confirm the enduring significance of customary family structures in shaping the social meaning of belonging and rights within the family.⁷⁰

Therefore, the Albanian material best shows that the acceptance and position of the child were mediated through family legitimacy and household recognition rather than an exclusively private paternal act. This allows a careful comparison with Roman law, while preserving the historical and doctrinal differences between the two traditions.

6 CONCLUSIONS

This study has examined family authority and domestic justice in ancient Roman law and Albanian customary law through a legal-historical and comparative perspective. Its purpose has not been to claim direct continuity between these two traditions, nor to suggest that they produced identical legal institutions. Rather, the study has sought to identify limited but meaningful functional parallels in the ways both normative orders located authority, discipline, status, and conflict management within the household.

The comparative value of the study lies precisely in this restrained approach. Roman law and Albanian customary law emerged in different historical, political, and intellectual contexts and developed through different legal techniques. Roman law articulated household authority through a more formal juristic vocabulary centered on *patria potestas*, status, and the legal position of the *pater familias*. Albanian customary law, by contrast, embedded household authority more directly in social hierarchy, kinship solidarity, and the moral order of the family and clan. Yet despite these differences, both traditions attributed central normative significance to the household as a site of regulation and social continuity.

From this perspective, the article contributes to broader discussions in legal history and comparative law by showing that family-based authority should not be understood merely as a private social arrangement. In both traditions, the household functioned as a normative institution through which belonging, internal order, and dispute management were structured before or alongside the development of centralized public adjudication. This makes the topic relevant not only for the history of Roman law or Albanian customary law, but also for contemporary debates on legal pluralism, informal justice, and the historical foundations of non-state normative orders.

The study also demonstrates the importance of methodological caution in cross-historical comparison. The strongest points of comparison between Roman law and the Kanun do not lie in formal institutional equivalence, but in the similar functions performed by household authority within distinct legal cultures. Framing the comparison in this way

70 Dardan Lajci and others, 'The Position of Women in Kosovo: Perspectives and Socio-Economic Challenges' (2024) 19(1) International Journal of Sustainable Development and Planning 221, doi:10.18280/ijstdp.190120.

allows for analytical rigor while avoiding anachronism and overstatement. In this respect, the article responds to the need for more precise comparative work between legal traditions that have usually been studied separately.

Certain limitations should nevertheless be acknowledged. The article relies primarily on normative, doctrinal, and legal-historical materials and therefore does not claim to reconstruct the full diversity of lived practice in every period or region. In addition, the Albanian component of the analysis focuses primarily on the Kanun of Lekë Dukagjini and does not extend to all regional customary variants. Likewise, the Roman law discussion is limited to those aspects most directly connected to family authority and domestic justice, and does not attempt a comprehensive reconstruction of Roman family law across all its chronological phases.

These limitations also indicate productive directions for future research. Further studies could expand the comparative framework to include other customary legal traditions, explore regional variations within Albanian customary law, or examine more closely the relationship between household authority and the gradual development of public legal institutions. Additional work could also examine how the legacy of customary family structures continues to shape modern legal consciousness, particularly regarding family status, inheritance, and gendered authority.

In the contemporary legal context, it should be clarified that the Kanun no longer operates as positive state law. Nevertheless, its legacy continues to exercise cultural, social, and informally normative influence in certain areas of contemporary life, particularly in relation to family authority, honor, inheritance, and informal dispute resolution. In this respect, the Kanun remains relevant not as a formal legal system, but as a reference point in current debates on informal justice, legal pluralism, and non-state normative orders.

This study argues that the household occupied a central legal and social place in both ancient Roman law and Albanian customary law, although in different doctrinal and institutional forms. By focusing on family authority and domestic justice as functional categories of comparison, the study offers a more nuanced understanding of how pre-modern legal orders organized internal regulation and social cohesion.

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Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free from the impact of any organizations.

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EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Robert Reddin.
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ABOUT THIS ARTICLE

Cite this article

Aqifi B and Maloku A, ‘Family Authority and Domestic Justice in Ancient Rome and Albanian Customary Law: A Comparative Analysis’ (2026) 9(2) Access to Justice in Eastern Europe 485-510 <<https://doi.org/10.33327/AJEE-18-9.2-a0001976>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-a0001976>

Summary: 1. Introduction. – 2. Methodology. – 3. The Family in Archaic Rome and under the Kanun. – 4. The Role of Family Justice (Domestic Courts). – 5. Procedures before Domestic Courts in Ancient Rome and under Albanian Customary Law. – 6. Conclusions.

Keywords: *pater familias, Kanun of Lekë Dukagjini, patria potestas, informal dispute resolution*

DETAILS FOR PUBLICATION

Date of submission: 03 Feb 2026

Date of acceptance: 07 May 2026

Publication: 20 May 2026

Was the manuscript fasttracked? - No

Number of reviewer reports submitted in the first round: 4 reports

Number of revision rounds: 2 rounds, onewith major and one with minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The authors confirm that no artificial intelligence tools or services were used at any stage of writing, translating, editing, or analyzing content for this manuscript.

FUNDING AND APC STATEMENT

The authors received no specific grant or external funding for the research and publication of this article. Consequently, the APC was partially waived (50%) by the publisher under the AIP funding strategy, in accordance with the AJEE Charges Policy for authors from Lower-Middle-Income countries (as per World Bank classification). The balance was covered by the authors.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СІМЕЙНА ВЛАДА ТА ВНУТРІШНЄ ПРАВОСУДДЯ У ДАВНЬОМУ РИМІ
ТА АЛБАНСЬКОМУ ЗВИЧАЄВОМУ ПРАВІ:
ПОРІВНЯЛЬНИЙ АНАЛІЗ

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АНОТАЦІЯ

Вступ. У цій статті розглядаються подібності та відмінності між інститутом сім'ї в давньоримському праві та в албанському звичаєвому праві, відомому як Канун Леки Дукаджині. Аналіз зосереджений на ролі батька сім'ї (*pater familias*), спочатку в агнатичній родині, а пізніше в когнатичній родині, а також на ролі голови домогосподарства або сільського старійшини згідно з Кануном. Ці цифри виявляють не формальну інституційну еквівалентність, а значущі функціональні паралелі в організації домашньої влади, обов'язків та здійснення батьківської влади над особами,

класифікованими в римському праві як *alieni iuris*. З давніх-давен Канун зберігався як важливий історичний, моральний та юридичний вияв албанського звичаєвого порядку. Він регулював стосунки між людьми, зокрема сімейні взаємини, розглядаючи сім'ю як основу соціальної організації. В обох традиціях домогосподарство служило важливим нормативним простором, в якому підтримувалися влада, дисципліна та внутрішній порядок. Ця тема також актуальна для сучасної юридичної науки, оскільки вона сприяє дебатам щодо правового плюралізму, неформального правосуддя та історичних основ недержавних нормативних порядків.

Методи. Методологія цього наукового дослідження ґрунтується на широкому спектрі юридичних, історичних та доктринальних джерел. Воно спирається на такі первинні матеріали, як Закон Дванадцяти таблиць, Дигести Юстиніана, Канун Леки Дукаджині та пов'язані з ними історичні тексти, а також на сучасні дослідження римського права, звичаєвого права та порівняльні дослідження історії права. Використані методи містять юридичний, історичний, аналітичний та порівняльний підходи.

Результати та висновки. Дослідження показує, що римське право та албанське звичаєве право не створили ідентичних інститутів чи еквівалентних правових доктрин. Однак вони виявляють обмежені, але суттєві функціональні паралелі в організації домашньої влади, сімейної дисципліни та внутрішнього правосуддя. Порівняння є найбільш обґрунтованим на рівні правових та соціальних функцій, а не формальної інституційної ідентичності. Таким чином, у статті було запропоновано точніший порівняльний огляд того, як досучасні правові порядки структурували владу, приналежність та внутрішнє регулювання в сім'ї.

Ключові слова. *Pater familias*, Канун Леки Дукаджині, *patria potestas*, неформальне (альтернативне) врегулювання спорів.

Review Article

DETERMINING JURISDICTION IN CHILD
RETURN PROCEEDINGS
UNDER THE 1980 HAGUE CONVENTION:
EUROPEAN STANDARDS
AND UKRAINIAN JUDICIAL PRACTICE

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DOI:

<https://doi.org/10.33327/AJEE-18-9.2-r0001971>

Date of submission: 14 Jan 2026

Date of acceptance: 14 Apr 2026

Publication: 20 May 2026

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ABSTRACT

Background: Cross-border disputes concerning the removal or retention of children expose the decisive role of jurisdiction in the effective protection of children's rights: procedural choices frequently predetermine substantive outcomes. This relevance has become particularly acute in relation to Ukrainian children following the large-scale displacement triggered by the Russian Federation's armed aggression against Ukraine, which has multiplied transnational family conflicts and intensified jurisdictional uncertainty in child return proceedings.

Method: This article examines the jurisdictional architecture of the 1980 Hague Convention on the Civil Aspects of International Child Abduction through the lens of Ukrainian legal practice. It analyses how the Convention's jurisdictional logic, anchored in the notion of the child's habitual residence, interacts with Ukrainian procedural regulation, primarily the

Civil Procedure Code of Ukraine, and assesses whether the existing framework ensures predictability, coherence, and effective access to justice in return cases.

The study focuses on the legal nature of return proceedings as an interim procedural remedy distinct from custody adjudication, the conceptual boundary between jurisdiction and judicial competence, and the practical challenges faced by national courts in cases involving parallel proceedings and competing jurisdictional claims. Drawing on doctrinal sources, Ukrainian case law, and European standards developed by the European Court of Human Rights, the article identifies recurrent methodological inconsistencies in determining habitual residence and in balancing security-related considerations with the Convention's objectives of prompt return and prevention of forum shopping.

Results and Conclusions: *By situating Ukrainian judicial practice within the broader European interpretative context, conclusions contribute to the development of a more consistent jurisdictional methodology for child return disputes, particularly in exceptional circumstances characterised by armed conflict and mass displacement.*

1 INTRODUCTION

The protection of children's rights in cross-border family disputes constitutes one of the most sensitive areas of contemporary private international law.¹ This sensitivity is particularly evident in cases involving the wrongful removal or retention of children across national borders, where legal, social, and emotional dimensions intersect. In such situations, the law is required not only to resolve conflicts between parental claims but also to ensure that procedural mechanisms genuinely serve the child's long-term interests rather than formal jurisdictional convenience.²

In recent years, the scale and complexity of international child abduction disputes have increased significantly, especially in the context of large-scale forced displacement caused by armed conflict. The full-scale invasion of Ukraine by the Russian Federation has led to the relocation of millions of children beyond national borders, often under conditions of urgency and insecurity. These circumstances have exposed structural weaknesses in existing legal frameworks, particularly in determining jurisdiction in child return proceedings, where traditional assumptions about stability, residence, and integration are increasingly difficult to apply.

1 Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Hart Publishing 2013) doi:10.5040/9781474200318.

2 Özlem Canbeldek Akin, 'Applying the Principle of Best Interests to the Hague Convention on the Civil Aspects of International Child Abduction in Light of the Decisions of the European Court of Human Rights and of Turkish Courts' (2023) 43(1) Public and Private International Law Bulletin 177, doi:10.26650/ppil.2023.43.1.1202464.

Within this evolving context, the 1980 Hague Convention on the Civil Aspects of International Child Abduction remains the cornerstone of international cooperation in cases concerning the return of children.³ The Convention establishes a procedural mechanism to prevent unilateral alterations of the child's living environment through wrongful removal or retention, and to ensure the prompt restoration of the status quo ante. However, the effective operation of this mechanism depends less on the Convention's formal existence and more on how its jurisdictional logic is interpreted and implemented by national courts.

A central difficulty arises from the Convention's deliberate avoidance of defining key concepts, most notably the notion of the child's habitual residence. While this open-textured approach offers flexibility, it also creates legal uncertainty and divergent judicial practices. Courts are required to engage in a complex factual assessment to determine whether they are competent to hear a case, often in circumstances where the child's living situation has been shaped by temporary protection regimes, emergency relocation, or prolonged displacement.

The determination of jurisdiction in child return cases thus operates as a critical gateway: it shapes the procedural trajectory of the dispute and directly influences the effectiveness of the child's protection. An erroneous or overly formalistic approach to jurisdiction may result in delayed proceedings, conflicting decisions, or the erosion of the Convention's preventive function against forum shopping. These risks are particularly pronounced in cases involving States affected by armed conflict, where security considerations may implicitly reshape judicial reasoning. Against this background, the present article examines the problem of jurisdictional determination in cases concerning the return of children from abroad through the prism of the 1980 Hague Convention. Particular attention is paid to the legal nature of child return proceedings, the role of habitual residence as a jurisdictional connecting factor, and the interaction between international standards and national procedural law. The analysis draws on the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union, and the judicial practice of Ukrainian courts, with a view to identifying inconsistencies, structural challenges, and emerging trends.

The article argues that the principal difficulty in applying the Hague Convention does not lie in normative deficiencies but in the absence of a coherent and predictable jurisdictional methodology at the national level. By critically assessing judicial approaches to jurisdiction in child return cases, this study seeks to contribute to the development of more consistent legal standards that ensure both legal certainty and the effective protection of children's rights in cross-border family disputes.

3 Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980) <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>> accessed 10 January 2026.

2 GENERAL ISSUES CONCERNING THE TRANSFER OF CHILDREN

The international legal protection of children operates within a multifaceted regulatory framework, the structure and content of which depend on the nature of the legal relationship involving the child. At the general level, international human rights instruments articulate overarching standards to safeguard family life and the fundamental rights of the child.⁴ These instruments establish a normative foundation but, in themselves, do not provide procedural solutions to disputes arising from cross-border family relations. In response to such disputes, a range of specialised international conventions has been developed, each addressing specific categories of legal relationships involving children.

Within this specialised framework, the 1980 Hague Convention on the Civil Aspects of International Child Abduction occupies a central position.⁵ Unlike general human rights treaties, the Hague Convention introduces a procedural mechanism specifically designed to address situations in which a child has been wrongfully removed or retained across national borders. Its normative logic is based on the unilateral interference that a child's living environment, created by parental action, constitutes an autonomous legal wrong and, as a rule, undermines the stability necessary for the child's development.

The conceptual foundations of this approach were articulated in the early explanatory work accompanying the Convention. Adair Dyer's report underscored that international child abduction primarily affects children themselves, exposing them to abrupt disruptions of their social environment, the loss of meaningful contact with a primary caregiver, and the psychological strain associated with forced adaptation to unfamiliar cultural, linguistic, and educational settings. Although acknowledging that relocation may, in exceptional circumstances, result in improved living conditions, particularly in situations involving domestic violence, Dyer emphasised that the act of abduction or forced retention, as such, is generally incompatible with the child's interests.⁶ This premise is particularly important, as the Hague Convention deliberately refrains from defining the "best interests of the child" in abstract terms and instead structures its procedural response on the presumption that wrongful removal is inherently detrimental.

An examination of the Convention's operative provisions reveals several interconnected elements that shape its application. These include the temporal dimension of the child's absence from the State of habitual residence, the procedural time limits for initiating

4 Convention on the Recovery Abroad of Maintenance (adopted 20 June 1956) [1957] UNTS 268/3; Declaration of the Rights of the Child (adopted 20 November 1959 UNGA Res 1386(XIV)) United Nations, Treaty Series <<https://digitallibrary.un.org/record/195831>> accessed 10 January 2026; Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25) [1999] UNTS 1577/3.

5 Convention on the Civil Aspects of International Child Abduction (n 3).

6 Adair Dyer, 'Report on International Child Abduction by One Parent ("Legal Kidnapping")' in *Actes et documents de la Quatorzième Session, t 3: Enlèvement D'enfants, Child Abduction* (SDU Publishers 1982) 12.

return proceedings, the factual assessment of habitual residence itself, and the existence of narrowly construed grounds that may justify a refusal to order the child's return. Together, these elements form a procedural architecture intended to ensure both efficiency and legal predictability.

Despite this structured framework, determining the competent court remains one of the most contested aspects of child return proceedings. Jurisdictional uncertainty arises from a combination of legal and factual factors that directly affect the protection of children's rights and the effectiveness of the Convention mechanism. Socio-economic disparities between States may influence parental decisions to relocate with a child, often under the justification of securing better living conditions. In disputes arising from such relocations, courts are required to assess the strength and stability of the child's social, educational, and familial ties in a particular State in order to determine whether that environment genuinely reflects the child's habitual residence.

Concerns relating to the child's safety further complicate jurisdictional determinations. The Hague Convention permits exceptions to the obligation of return where there is a grave risk that return would expose the child to physical or psychological harm. However, distinguishing between legitimate protective measures and the misuse of safety arguments to justify wrongful removal presents a significant challenge. This difficulty is particularly acute in contexts of armed conflict or occupation, where claims of child protection may intersect with practices amounting to forced displacement.

The ongoing armed aggression against Ukraine illustrates the extent to which such exceptional circumstances strain the Convention's jurisdictional framework. Official statements by the Russian authorities indicate that hundreds of thousands of Ukrainian children have been transferred to the territory of the Russian Federation since the beginning of the full-scale invasion. At the same time, data from Ukrainian authorities demonstrate that only a limited number of these children have been successfully identified and returned.⁷ These figures underscore the scale of the problem and the limitations of existing legal mechanisms in responding to mass violations.

The international legal response to these events confirms their gravity. In March 2023, the International Criminal Court issued arrest warrants in connection with the unlawful deportation and transfer of Ukrainian children from occupied territories, qualifying such conduct as war crimes under the Rome Statute.⁸ This assessment was subsequently reinforced by the European Parliament, which characterised the forced transfer of

7 Mariia Ulianovska, 'Lubinet: Ukraine's appeal to the UN court regarding the genocide committed by the Russians is a matter of time' (VOA - Voice of America, 1 February 2024) <<https://www.holosameryky.com/a/sud-on/7465574.html>> 10 January 2026.

8 International Criminal Court, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova: Press Release' (ICC – International Criminal Court, 17 March 2023) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>> accessed 10 January 2026.

Ukrainian children as a serious violation of international law and emphasised the obligation of States to facilitate their return.⁹

These developments demonstrate that the forced removal of children from Ukraine has been unequivocally recognised by the international community as a violation of international law. At the same time, they reveal the necessity of ensuring the effective operation of civil and procedural instruments governing the return of children, particularly with regard to jurisdictional determination. Against this background, the present article focuses on the legal assessment of parental actions involving the cross-border relocation of a child against the will of the other parent, with particular emphasis on jurisdictional determination under the 1980 Hague Convention and its interaction with national procedural law.

3 ANALYSIS OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Although the 1980 Hague Convention establishes a uniform procedural framework for addressing cases of wrongful removal or retention of children, its practical operation cannot be assessed in isolation from the broader human rights context in which national courts function.¹⁰ The interpretative role of the European Court of Human Rights is therefore of particular significance, as it delineates the limits within which domestic authorities may exercise jurisdictional discretion while remaining compatible with the guarantees enshrined in the European Convention on Human Rights.¹¹

Rather than treating the Hague Convention as a self-contained instrument, the ECtHR has consistently approached child return disputes as situations engaging fundamental rights, most notably the right to respect for private and family life. Through its jurisprudence, the Court has articulated a set of procedural expectations applicable to national authorities when dealing with return applications, thereby transforming jurisdictional determination into a matter of substantive human rights relevance.

A pivotal shift in this regard emerged from the Court's reasoning in *Neulinger and Shuruk v. Switzerland*,¹² which reframed the relationship between the Hague Convention and the

9 European Parliament resolution 2025/2691(RSP) of 8 May 2025 'On the Return of Ukrainian Children Forcibly Transferred and Deported by Russia' <https://www.europarl.europa.eu/doceo/document/TA-10-2025-0096_EN.html> accessed 10 January 2026.

10 Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017).

11 Maja Stanivuković and Sanja Djajić, 'The Right of the Parent to Return to Its Country of Origin in the Light of the Hague Convention on the Civil Aspects of International Child Abduction and the European Convention on the Protection of Human Rights' (2022) 70(1) *Anali Pravnog Fakulteta u Beogradu* 123, doi:10.51204/Anali_PFB_U_22105A.

12 *Neulinger and Shuruk v Switzerland* App no 41615/07 (ECtHR, 6 July 2010) <<https://hudoc.echr.coe.int/?i=001-99817>> accessed 10 January 2026.

European Convention on Human Rights. Instead of prioritising the automatic operation of the return mechanism, the Court emphasised the need to situate Hague proceedings within a broader normative framework that includes the Convention on the Rights of the Child. This approach underscored that the restoration of the status quo ante cannot be pursued at the expense of a meaningful assessment of the child's concrete situation.

From a jurisdictional perspective, this judgment signalled a move away from rigid proceduralism towards a model requiring contextual judicial engagement.

In subsequent case law, the ECtHR further conceptualised the Hague Convention as an element of European public policy, the effectiveness of which depends on mutual trust between Contracting States. However, this trust is not unconditional. The Court has asserted its supervisory role over national procedures to verify whether domestic courts have genuinely examined the parties' arguments and afforded sufficient weight to the interests at stake. The decisive issue is not whether national authorities enjoy a margin of appreciation, but whether that margin has been exercised in a manner that reflects a fair and reasoned balancing of competing interests.

This approach directly affects jurisdictional determination, as it limits the scope for formalistic reliance on territorial or procedural criteria detached from the child's lived reality.

The Court's understanding of the child's best interests further illustrates this evolution. Rather than treating the concept as an abstract principle, the ECtHR has consistently linked it to two interrelated dimensions: the maintenance of meaningful family relationships and the assurance of a stable environment conducive to the child's development. While the Hague Convention presumes that prompt return ordinarily serves these interests, the Court has clarified that this presumption may be rebutted in narrowly defined circumstances. The exceptions contained in Articles 12, 13, and 20 of the Convention are therefore not peripheral safeguards but integral components of the jurisdictional assessment that must be explicitly addressed by national courts.¹³

This interpretative stance was refined in *X v. Latvia*, where the ECtHR rejected the notion that the best interests of the child could be equated with the preferences or claims of either parent. Instead, the Court required domestic authorities to engage in a structured examination of the factual elements relevant to the child's situation, including the passage of time, the existence of a serious risk, and the compatibility of the requested return with fundamental human rights standards.¹⁴

The judgment thus reinforced the requirement that jurisdictional decisions under the Hague Convention be grounded in individualised reasoning rather than automatic application of predefined rules.

13 *ibid*

14 *X v Latvia* App no 27853/09 (ECtHR, 26 November 2013) <<https://hudoc.echr.coe.int/?i=001-138992>> accessed 10 January 2026.

A similar emphasis on substantive judicial reasoning can be observed in *Satanovska and Rodgers v. Ukraine*. In that case, the ECtHR identified deficiencies in the manner in which domestic courts had handled the return proceedings, noting that mechanical reliance on the Convention's objectives is insufficient where relevant arguments concerning the child's welfare have been raised. While recognising that national authorities are best placed to assess factual circumstances, the Court reaffirmed that such assessments remain subject to European supervision.¹⁵

This reasoning illustrates that jurisdictional autonomy at the national level is conditioned upon demonstrable engagement with the Convention's exceptions and with the child's individual circumstances.

Taken together, the ECtHR's jurisprudence reveals persistent structural challenges in the application of the Hague Convention by domestic courts. Inconsistent reasoning, excessive formalism, and insufficient articulation of the jurisdictional basis for return decisions continue to undermine the predictability and coherence of child return proceedings. These shortcomings not only expose States to findings of Convention violations but also weaken the preventive function of the Hague Convention by creating uncertainty about the competent forum.

Against this background, the comparative examination of national judicial practice becomes an essential complement to the Strasbourg case law, enabling the identification of recurring patterns and the formulation of more consistent jurisdictional standards.

4 CRITERIA FOR DETERMINING THE «PERMANENT RESIDENCE OF A CHILD»

The procedural mechanism established by the 1980 Hague Convention on the Civil Aspects of International Child Abduction is built around a single, decisive connecting factor: the child's habitual residence. This concept performs a dual function. On the one hand, it serves as the legal benchmark for determining whether a removal or retention is wrongful; on the other hand, it serves as the primary basis for allocating jurisdiction between national courts. The effectiveness of the Convention, therefore, depends largely on how this notion is interpreted and applied in practice.

Rather than offering a detailed definition, the Hague Convention deliberately relies on an open-textured understanding of habitual residence. The Convention's operative provisions indicate that a return order is contingent upon the existence of a prior factual situation in which the child was integrated into the social and family environment of a particular State and that this situation was disrupted through unilateral parental action. From this

15 *Satanovska and Rodgers v Ukraine* App no 12354/13 (ECtHR, 28 January 2021) <<https://hudoc.echr.coe.int/fre?i=001-207480>> accessed 10 January 2026.

perspective, habitual residence functions less as a formal legal status and more as a factual point of reference anchoring jurisdiction to the child's lived reality.

The temporal dimension of this assessment further illustrates its jurisdictional significance. Where return proceedings are initiated within a relatively short period following the child's removal, the Convention presumes that restoring the pre-existing situation best serves both legal certainty and the child's interests. However, as time passes, the factual circumstances surrounding the child's life may evolve, complicating the identification of the relevant connecting factor. In such cases, national courts are required to navigate between the Convention's objective of prompt return and the emerging reality of the child's integration elsewhere.

The absence of an autonomous definition of habitual residence in both international and domestic law inevitably grants national courts a broad margin of appreciation. This discretion, while necessary, also carries the risk of inconsistent jurisdictional determinations. The complementary role of the 1996 Hague Convention on Parental Responsibility is, therefore, particularly important. By emphasising the primary competence of the authorities of the State of the child's habitual residence to adopt long-term protective measures, the 1996 Convention reinforces jurisdictional stability and seeks to curb strategic relocation and forum shopping.

Comparative judicial practice has consistently treated habitual residence as a factual construct reflecting the child's degree of integration into a specific environment. Courts are expected to examine a constellation of factors, including the continuity and regularity of the child's presence, the circumstances surrounding the family's relocation, educational and healthcare arrangements, linguistic and cultural adaptation, and the existence of stable personal relationships. No single element is determinative; rather, the assessment requires a contextual evaluation of how the child's daily life is structured in practice.

This approach is clearly reflected in the Supreme Court of the United States's reasoning in *Monasky v. Taglieri*. Rejecting rigid formulas, the Court framed habitual residence as a fact-sensitive inquiry guided by common sense and attentive to the child's actual circumstances. While acclimatisation may be a relevant indicator for older children, the situation of infants and very young children necessitates greater attention to the caregiving environment created by those responsible for them. Crucially, the Court dismissed the notion that physical presence alone could establish habitual residence.¹⁶

From a jurisdictional standpoint, this reasoning confirms that habitual residence must be derived from a holistic factual assessment rather than inferred from formal or territorial indicators.

16 *Monasky v Taglieri* no 18-935 (US Supreme Court, 25 February 2020) 140 S Ct 719.

A similar emphasis on stability can be found in the jurisprudence of the United Kingdom's courts. In *In re Bates*, the High Court articulated habitual residence as requiring a sufficient degree of permanence and settled purpose. Temporary motives, such as short-term employment, education, or medical treatment, may explain a person's presence in a given location but are insufficient, in themselves, to establish habitual residence.¹⁷

This distinction plays a crucial jurisdictional role by preventing the artificial creation of competence through transient or opportunistic relocation.

The relevance of time and continuity was further elaborated by the United States Court of Appeals for the Sixth Circuit in *Friedrich v. Friedrich*. The Court stressed that habitual residence must be identified on the basis of past and present factual circumstances rather than future plans or speculative intentions. Priority was accorded to the child's actual living conditions at the moment of removal, thereby anchoring jurisdiction to objectively verifiable elements.¹⁸

Such an approach enhances legal predictability and limits the potential for strategic manipulation of jurisdiction.

Within the legal order of the European Union, the Court of Justice of the European Union has adopted a convergent position. While recognising that physical presence in a Member State is a necessary prerequisite, the Court has consistently held that it is not sufficient on its own to establish habitual residence. Additional factors must demonstrate that the child's presence reflects genuine integration into a social and family environment. Parental intentions may inform the overall analysis, but, in isolation, cannot determine the outcome.¹⁹

Taken together, the CJEU's jurisprudence reinforces the understanding of habitual residence as a stabilising jurisdictional connecting factor designed to ensure coherence, predictability, and the effective protection of the child's interests.

5 PROBLEMS OF JURISDICTIONAL DETERMINATION IN UKRAINIAN JUDICIAL PRACTICE

The practical application of the 1980 Hague Convention in Ukraine has revealed a range of jurisdictional challenges, many of which stem from the unprecedented scale of cross-border displacement caused by the ongoing armed aggression against Ukraine. The determination of a child's habitual residence, a cornerstone of the Convention's jurisdictional framework,

17 *In re Bates* no CA 122/89 (UK High Court of Justice (Fam Div), 23 February 1989).

18 *Friedrich v Friedrich (Friedrich I)* no 92-3117 (6th Cir, 22 January 1993) 983 F2d 1396; *Friedrich v Friedrich (Friedrich II)* no 94-3832 (6th Cir, 13 March 1996) 78 F3d 1060.

19 Case C-111/17 PPU *OL v PQ* (CJEU, 8 June 2017) paras 31–70; Case C-512/17 *HR* (CJEU, 28 June 2018) paras 38–46; Case C-393/18 *UD v XB* (CJEU, 17 October 2018) paras 43–55.

has become particularly complex in circumstances where millions of children have been forced to leave the country under conditions of urgency and insecurity.²⁰

Since the beginning of the full-scale invasion, a substantial number of Ukrainian children have relocated to foreign States and obtained temporary protection status.²¹ While such status facilitates access to education, healthcare, and social services in host States, it does not, in itself, resolve the jurisdictional question of whether the child's habitual residence has shifted for the purposes of return proceedings. Ukrainian courts are therefore confronted with the difficult task of distinguishing between emergency-driven displacement and a genuine reconfiguration of the child's social and family environment.

This difficulty is compounded by the evolving geopolitical assessments adopted by foreign States. In some jurisdictions, the armed conflict in Ukraine has been treated as a generalised risk factor affecting the entire territory of the State, whereas other States have begun to recognise specific regions as relatively safe.²² These divergent external evaluations inevitably influence domestic judicial reasoning and create uncertainty about the identification of the competent forum.

An examination of the jurisprudence of the Civil Court of Cassation of the Supreme Court of Ukraine reveals an absence of a consistent methodological approach to these issues. In its decision, the Court explicitly acknowledged that the concept of habitual residence lacks a conventional definition and must be determined through an individualised assessment of all relevant circumstances.²³

While this position formally aligns with international standards, it also leaves considerable discretion to lower courts, increasing the risk of divergent interpretations.

In a subsequent judgment, the Supreme Court clarified the evidentiary burden resting on the applicant in return proceedings. The Court emphasised that the claimant must demonstrate both the existence of the child's habitual residence in the requested State and the actual exercise of custody rights prior to removal. The Court identified a range of factual indicators relevant to this assessment, including educational enrolment, access to healthcare, social relationships, and the stability of family ties.²⁴

20 UNHCR, 'Ukraine Refugee Situation' (*Operational Data Portal (ODP)*, 2025) <<https://data.unhcr.org/en/situations/ukraine>> accessed 10 January 2026.

21 *ibid*

22 EnableMe Ukraine, 'Changes in the Stay of Refugees from Ukraine in Hungary in 2024' (*EnableMe*, July 2024) <<https://www.enableme.com.ua/ua/article/zmini-v-perebuvanni-v-ugorsini-dla-bizenciv-z-ukraini-v-2024-roci-11777>> accessed 10 January 2026; Norwegian Directorate of Immigration, 'More Areas Excluded from the Right to Collective Protection' (*UDI - Utlendingsdirektoratet*, 13 January 2025) <<https://www.udi.no/uk/important-messages/more-areas-excluded-from-the-right-to-collective-protection/>> accessed 10 January 2026.

23 Case no 336/5265/22 (Civil Cassation Court of the Supreme Court of Ukraine, 31 January 2024) <<https://reyestr.court.gov.ua/Review/117015388>> accessed 10 January 2026.

24 Case no 753/197/23 (Civil Cassation Court of the Supreme Court of Ukraine, 6 November 2024) <<https://reyestr.court.gov.ua/Review/123601846>> accessed 10 January 2026.

This reasoning reflects a fact-based understanding of habitual residence consistent with the jurisprudence of the ECtHR and the CJEU, yet its application remains uneven in practice.

Notwithstanding these clarifications, Ukrainian judicial practice continues to exhibit internal tension. The Civil Court of Cassation has repeatedly stated that a child's presence abroad, even if prolonged, cannot automatically justify a refusal to recognise Ukraine as the relevant jurisdiction. Neither the introduction of martial law nor the child's residence outside the territory of Ukraine is regarded as determinative in isolation. Instead, these elements must be weighed alongside other considerations, including parental equality and the child's best interests.²⁵

This position underscores an attempt to preserve jurisdictional continuity but may also conflict with the Convention's emphasis on factual integration.

This tension is particularly evident in cases involving interim measures that restrict a child's departure from Ukraine without the consent of one parent. In such proceedings, the Supreme Court has acknowledged that ongoing hostilities and potential threats to the child's safety cannot be disregarded. At the same time, the Court has insisted that both parents bear equal responsibility for protecting the child's life and health. Accordingly, the objections raised by the non-consenting parent, especially when framed in terms of safety, must be duly considered.

In several instances, the Court has opted to preserve the status quo by temporarily limiting the child's right to leave Ukraine, thereby prioritising precaution over procedural symmetry.

While this approach reflects judicial caution, it also illustrates a broader tendency to allow security considerations to exert a decisive influence on jurisdictional determinations. As a result, the structured criteria developed under the Hague Convention risk being applied selectively or subordinated to context-specific concerns.

Such practice undermines legal certainty and weakens the Convention's objective of ensuring predictable and uniform jurisdictional outcomes.

Overall, Ukrainian judicial practice demonstrates an ongoing struggle to reconcile international jurisdictional standards with the realities of armed conflict and mass displacement. Although national courts formally reference the principles articulated by the ECtHR and comparative jurisprudence, their practical application remains inconsistent. This divergence not only generates uncertainty for the parties involved but also threatens the coherence of the Hague Convention mechanism itself. The development of a more consistent and transparent jurisdictional methodology, therefore, remains a pressing task for Ukrainian courts adjudicating child return disputes.

25 Case no 711/4569/23 (Civil Cassation Court of the Supreme Court of Ukraine, 31 January 2024) <<https://reyestr.court.gov.ua/Review/116890959>> accessed 10 January 2026.

6 CONCLUSIONS

The analysis in this article confirms that determining jurisdiction in cases concerning the return of children from abroad is one of the most intricate challenges in contemporary private international law. While the 1980 Hague Convention on the Civil Aspects of International Child Abduction establishes a common procedural framework designed to ensure the prompt return of wrongfully removed or retained children, its practical effectiveness is contingent upon the consistent and methodologically sound identification of the child's habitual residence as the central jurisdictional connecting factor.

The study demonstrates that return proceedings under the Hague Convention are inherently procedural and interim in nature. They do not resolve disputes concerning parental responsibility on the merits, but instead seek to neutralise the legal consequences of unilateral parental action by restoring the factual situation that existed prior to the wrongful removal or retention. In this sense, jurisdiction under the Hague Convention performs a substantive protective function: it safeguards legal certainty, prevents jurisdictional manipulation, and ensures that decisions on long-term child protection measures are taken by the authorities most closely connected to the child's social and family environment.

A central finding of the article is that the Convention's deliberate omission of an autonomous definition of «habitual residence» constitutes both a source of flexibility and a catalyst for legal uncertainty. As demonstrated through the analysis of the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union, and comparative national case law, habitual residence must be understood as a factual concept grounded in the child's actual integration into a specific social and familial context. This assessment requires a holistic evaluation of objective circumstances and cannot be replaced by formal indicators, abstract parental intentions, or the child's physical presence alone.

The examination of Ukrainian judicial practice highlights the particular strain placed on this jurisdictional framework in situations of large-scale forced displacement resulting from armed conflict. Although Ukrainian courts formally rely on international and European interpretative standards, their application remains fragmented. Security considerations, temporary protection regimes, and emergency-driven relocation increasingly influence jurisdictional determinations, at times eclipsing the structured criteria embedded in the Hague Convention. Such an approach risks undermining legal predictability, producing inconsistent outcomes in analogous cases, and weakening the Convention's preventive function against forum shopping through international child abduction.

Against this background, the article argues that the primary difficulty lies not in deficiencies of the 1980 Hague Convention itself, but in the absence of a coherent, uniform methodology for jurisdictional determination at the national level. Greater emphasis must be placed on aligning domestic judicial reasoning with the

interpretative principles articulated by the ECtHR and the CJEU, particularly with respect to the factual assessment of habitual residence and the careful calibration of security-related concerns against the Convention's objectives.

In conclusion, the effective functioning of the Hague Convention in contemporary conditions - especially in contexts marked by armed conflict and mass displacement - requires a reinforced commitment to consistent jurisdictional reasoning. This includes developing clearer judicial guidelines, enhancing training for judges handling cross-border child disputes, and clarifying the criteria underpinning jurisdictional decisions. Only through such measures can the Convention continue to serve as a reliable instrument for the protection of children's rights and for the maintenance of trust and cooperation between States in cross-border family law matters.

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Competing interests: Dr Serhii Kravtsov serves as a Section Editor for Access to Justice in Eastern Europe. To ensure a rigorous and unbiased peer-review process, he was not involved in the editorial handling, selection of reviewers, or the final decision-making regarding this manuscript. No other competing interests were disclosed.

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EDITORS

Managing editor – Valentina Krivolapova. **English Editor** – Robert Reddin.

Ukrainian language Editor – Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Kravtsov S, Panchenko V, Cherevatenko I, and Leiba L, 'Determining Jurisdiction in Child Return Proceedings under the 1980 Hague Convention: European Standards and Ukrainian Judicial Practice' (2026) 9(2) Access to Justice in Eastern Europe 511-28 <<https://doi.org/10.33327/AJEE-18-9.2-r0001971>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-r0001971>

Summary: 1. Introduction. – 2. General issues concerning the transfer of children. – 3. Analysis of the Case Law of the European Court of Human Rights. – 4. Criteria for determining the «permanent residence of a child». – 5. Problems of Jurisdictional Determination in Ukrainian Judicial Practice. – 6. Conclusion.

Keywords: *international child abduction, jurisdiction, return of children, 1980 Hague Convention, civil proceedings, cross-border family disputes, protection of children's rights.*

DETAILS FOR PUBLICATION

Date of submission: 14 Jan 2026

Date of acceptance: 14 Apr 2026

Publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in the first round: 3 reports

Number of revision rounds: 1 round with major revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review

<https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

This article was prepared with the assistance of AI tools. Specifically, Grammarly was employed for proofreading during the drafting process. The authors confirm that all content, arguments, and conclusions were generated independently and remain their sole responsibility. No AI tool was used for generating original research findings or analysis.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ВИЗНАЧЕННЯ ЮРИСДИКЦІЇ У СПРАВАХ ПРО ПОВЕРНЕННЯ ДІТЕЙ ЗГІДНО З ГААЗЬКОЮ КОНВЕНЦІЄЮ 1980 РОКУ: ЄВРОПЕЙСЬКІ СТАНДАРТИ ТА УКРАЇНЬСЬКА СУДОВА ПРАКТИКА

Сергій Кравцов*, Вікторія Панченко, Ірина Череватенко та Людмила Лейба

АНОТАЦІЯ

Вступ. Транскордонні спори щодо незаконного переміщення або утримання дітей демонструють вирішальну роль юрисдикції в ефективному захисті прав дітей: процесуальні рішення часто зумовлюють матеріально-правові наслідки. Ця проблема стала особливо актуальною стосовно українських дітей після масштабного переміщення населення, спричиненого збройною агресією Російської Федерації проти України, що призвело до зростання кількості транснаціональних сімейних конфліктів та посилення юрисдикційної невизначеності у справах щодо повернення дітей.

Методи. У цій статті розглядається юрисдикційна архітектура Гаазької конвенції про цивільно-правові аспекти міжнародного викрадення дітей 1980 року крізь призму української юридичної практики. У ній аналізується, як юрисдикційна логіка Конвенції, що ґрунтується на понятті звичайного місця проживання дитини, взаємодіє з українським процесуальним регулюванням, насамперед Цивільним процесуальним кодексом України, та

оцінюється, чи забезпечує наявна система передбачуваність, узгодженість та ефективний доступ до правосуддя у справах про повернення дітей.

Дослідження зосереджується на правовій природі проваджень про повернення дітей як тимчасового процесуального засобу захисту, відмінного від розгляду справ про визначення місця проживання дитини (опіки), на концептуальному розмежуванні між юрисдикцією та судовою компетенцією, а також на практичних труднощах, з якими стикаються національні суди у справах із паралельними провадженнями та суперечливі претензії щодо юрисдикції. Спираючись на доктринальні джерела, українську судову практику та європейські стандарти, сформовані Європейським судом з прав людини, у статті виявлено повторювані методологічні неузгодженості у визначенні звичайного місця проживання дитини, а також у балансуванні між міркуваннями безпеки та цілями Конвенції — оперативним поверненням дітей і запобіганням *forum shopping* (вибору найвигіднішої юрисдикції).

Результати та висновки. Розміщуючи українську судову практику в ширшому європейському тлумачному контексті, стаття сприяє розробці більш послідовної юрисдикційної методології у справах про повернення дітей, особливо за виняткових обставин, що пов'язані зі збройним конфліктом та масовим переміщенням населення.

Ключові слова. Міжнародне викрадення дітей, юрисдикція, повернення дітей, Гаазька конвенція 1980 року, цивільне судочинство, транскордонні сімейні спори, захист прав дітей.

Afterword
and Guest Editorial for the Special Issue AI and Law 2025

AI AND JUDICIAL INDEPENDENCE:
A CRITICAL ANALYSIS

Costas Popotas

ABSTRACT

Judicial independence, long seen as a cornerstone of democratic governance and the rule of law, is facing new conceptual and practical challenges in the era of artificial intelligence (AI). This academic analysis examines the history of the principle of judicial independence, its embedding in European and international law, and the current impact of AI on judicial discretion, institutional autonomy, and legitimacy. It argues that, while artificial intelligence offers unprecedented opportunities for efficiency and consistency, it also raises concerns about transparency, accountability, and the erosion of judicial autonomy.

The analysis of the impact of AI on judicial independence highlights the need for judges to become AI-literate, the inevitable shift in their role from sole adjudication of cases to management, and, in particular, the importance of maintaining control over the implementation of AI in judicial systems and of developing relevant datasets. The integration of artificial intelligence will not be uniform across the judiciary, as differences arise from judges' varying levels of technological literacy and the complexity of the cases they handle.

DOI:

<https://doi.org/10.33327/AJEE-18-9.2-o000195>

Date of submission: 12 Mar 2026

Date of acceptance: 26 Mar 2026

Publication: 20 May 2026

Disclaimer:

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1 INTRODUCTION

This opinion article examines the anticipated impact of AI on judicial independence. It is premised on the belief that the judicial function is a core state responsibility and that, even with the proliferation of online alternative dispute resolution, the legitimacy and trust in state authority will always rest on judicial independence. The rise of AI and its use, whether openly acknowledged or not, by judges introduces new threats and questions for judicial independence. While AI can improve the administration of justice and ease litigation backlogs, its applications, ranging from assisting in judicial decision-making and case allocation to enabling virtual hearings or even substituting for judges, pose new challenges.

The pivotal question is whether individual judges should be permitted to use AI of their choice, or if the national or supranational justice system should provide a single, verified AI platform based on controlled, transparent datasets to ensure quality and trust. At the current stage of evolution, judges might, even with an official system available, opt for their own AI tools, which could result in significant equality problems, introduce biases due to the diversity of AI systems, and lead to errors influenced by the data used. Furthermore, using AI outside a secure, dedicated system could compromise data protection and the confidentiality of judicial deliberations. Nevertheless, establishing such secure systems requires considerable investment, which is challenging given the already strained resources of any justice system.

The use of AI also introduces additional challenges. Judicial reforms based on AI can reinforce or weaken judicial independence and could create avenues for undue influence over the judiciary. Examples of such influence include establishing liability regimes for judges using AI, linking judicial salaries to performance, or cutting judicial funding once AI systems are introduced. Control by the executive or legislative branches over the management of data spaces, the selection of training data, or the design of court algorithms could raise doubts about the judiciary's autonomy. The technical complexities of AI require specialist knowledge and the recruitment of professionals to translate legal rules into digital processes. There is also the question of whether judges themselves should be trained in AI or rely on technical experts, and how liability should be distributed between judges and AI technicians. A joint liability regime may be appropriate, but it must not undermine judicial independence.

2 ON JUDICIAL INDEPENDENCE: FOUNDATIONAL PRINCIPLES

The notion of judicial independence, much debated recently, rests on two basic assumptions: first, judges must be impartial and free from external pressures, whether from the media, litigants, or even other judges; second, independence ensures fair decisions based solely on evidence and law. These principles have been codified in

several standard-setting global declarations,¹ including the UN Basic Principles on the Independence of the Judiciary² and the ELI.³

Judicial independence is essential for democracy and the rule of law. Judges must not only be independent but also demonstrate independence to the public.⁴ Their independence justifies the immunity they enjoy for actions taken in court. Judges are, though, evaluated periodically and can even be removed for misconduct. They are also liable to declare personal interests and avoid conflicts of interest or perceived bias.

3 HISTORICAL EVOLUTION OF JUDICIAL INDEPENDENCE

The roots of judicial independence trace back to the Act of Settlement in England and Wales in 1701⁵ and later to the Enlightenment on the continent, notably to Montesquieu's "De l'esprit des lois" (1748),⁶ which first articulated the separation of powers as a safeguard against despotism. Gradually, during the Nineteenth Century, this principle took root in European constitutions.

After World War II, judicial independence was codified at the international level through Article 6 of the European Convention on Human Rights (ECHR).⁷ Within the European Union, the Court of Justice of the European Union (CJEU) elevated judicial independence to a constitutional principle, grounded in Article 19 of the Treaty on European Union (TEU)⁸ and Article 47 of the Charter of Fundamental Rights.⁹ The CJEU considers judicial independence essential for national courts to safeguard EU rights and to avoid violating the rule of law.

- 1 Reed Brody (ed), *The Independence of Judges and Lawyers: A Compilation of International Standards*, Centre for the Independence of Judges and Lawyers (CIJL) Bulletin no 25-26, Centre for the Independence of Judges and Lawyers 1990).
- 2 UN, 'Basic Principles on the Independence of the Judiciary' (adopted 6 September 1985) in OHCHR, *Human Rights: A Compilation of International Instruments*, vol 1, pt 1: Universal Instruments (UN 2002) 409.
- 3 European Law Institute, *ELI-Mount Scopus European Standards of Judicial Independence* (ELI 2024).
- 4 Anna Fine, Emily R Berthelot and Shawn Marsh, 'Public Perceptions of Judges' Use of AI Tools in Courtroom Decision-Making: An Examination of Legitimacy, Fairness, Trust, and Procedural Justice' (2025) 15(4) *Behavioral Sciences* 476, doi:10.3390/BS15040476.
- 5 An Act for the Further Limitation of the Crown, and Better Securing the Rights and Liberties of the Subject (1701 Act of Settlement): <<https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/parliamentary-collections/act-of-settlement/>> accessed 10 March 2026.
- 6 Charles Louis de Montesquieu, *De l'esprit des lois* (Barrillot & Fils 1748) t 1.
- 7 Council of Europe, *European Convention on Human Rights: as amended by Protocols Nos 11, 14 and 15; supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECHR 2013).
- 8 Treaty on European Union (TEU) (consolidated version 15 March 2025) <http://data.europa.eu/eli/treaty/teu_2016/oj> accessed 10 March 2026.
- 9 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

4 JUDICIAL INDEPENDENCE IN THE EUROPEAN LEGAL LANDSCAPE

The principle of judicial independence is a manifestation of the broader EU principle of effective judicial protection. Under this principle, Member States should offer effective legal remedies in the fields covered by EU law, including the guarantee of independent courts. Judicial independence, as reaffirmed by the CJEU in "*Associação Sindical dos Juizes Portugueses*" (C-64/16),¹⁰ requires that courts be free from both political and external pressures, including, increasingly, technological dependencies. In "*Commission v. Poland*" (C-619/18),¹¹ the Commission raised concerns about the recent reform empowering the Polish Minister for Justice to authorise judges to continue performing judicial duties beyond the retirement age. The CJEU found that these procedural rules failed to protect judges from potential direct or indirect influences on decision-making and thus that Poland was in breach of Articles 19(1) of the Treaty on European Union and 47 of the Charter of Fundamental Rights. In the ruling in case C-824/18,¹² the CJEU considered that judicial independence and impartiality presuppose rules, particularly regarding the composition of the body, the appointment, length of service, and the grounds for abstention, rejection, and dismissal of its members, to ensure public trust in the justice system.

The impact of artificial intelligence on judicial independence was raised in a recent request for a preliminary ruling lodged with the Court of Justice of the EU (Case C-159/25, *Rowicz*).¹³ The case questions whether Poland's system of random case allocation and judicial assignment, via an AI algorithm controlled by the executive, undermines judicial independence, impartiality, and fair trial rights under EU law. Advocate General Spielman delivered his Opinion on 19 March 2026¹⁴ whereby he considered that Article 19(1) TEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, precludes national legislation allowing to withdraw cases allocated to a judge in order to reallocate them to a different formation, without laying down the criteria to be followed nor requiring a statement of the reasons, but that it does not preclude national provisions to organise random case allocation by an automated system, involving no human intervention, provided that that system has safeguards to prevent any arbitrary use and any undue interference.

10 Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (CJEU (Grand Chamber), 27 February 2018) ECLI:EU:C:2018:117.

11 Case C-619/18 *European Commission v Republic of Poland* (CJEU (Grand Chamber), 24 June 2019) ECLI:EU:C:2019:531.

12 Case C-824/18 *AB and Others v Krajowa Rada Sądownictwa and Others* (CJEU (Grand Chamber), 2 March 2021) ECLI:EU:C:2021:153.

13 Case C-159/25 *Rowicz: Request for a preliminary ruling from the Sąd Okręgowy w Warszawie (Poland) lodged on 26 February 2025 – B.Ż., V. sp. z o.o. v T. SA, Ł. W* [2025] OJ C 3261/1.

14 Opinion of Advocate General Spielmann delivered on 19 March 2026, Case C-159/25 [*Rowicz*], ECLI:EU:C:2026:229, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62025CC0159>>

5 THE AI ACT AND RISKS TO JUDICIAL INDEPENDENCE

The EU Artificial Intelligence Act (AI Act),¹⁵ adopts a risk-based approach, classifying AI systems used in the justice sector as “high-risk.” This designation mandates strict safeguards to ensure human oversight and explainability. The underlying principle is that AI can assist but can never replace human decision-making in the judiciary. On top of that, the requirements outlined in the AI Act apply not only to systems that support judicial decision-making but also to tools used for case management and judicial administration.¹⁶ Agentic AI is a clear direction that will influence the integration of AI into the judicial system, automating case handling beyond current case management and adding problems beyond the existing framework.

A critical aspect of the Act involves the roles of AI system providers and oversight entities. Whether these are commercial organisations or government branches overseeing the configuration or operation of an AI system, their involvement could significantly impact judicial independence.

Additionally, the AI Act places high-risk AI systems under the jurisdiction of various entities responsible for conformity assessment and governance, including the European Artificial Intelligence Board, national competent authorities, and market surveillance authorities. This raises the question: how will these entities interact with judicial administration? This interaction raises concerns regarding the potential effects on judicial independence.

Particularly noteworthy is Article 29 of the Act, which mandates that those using high-risk AI systems ensure that the individuals responsible for operating them have received adequate training.

Finally, this shift introduces a liability paradox. The AI Act emphasises the need for human oversight of high-risk systems, especially judicial AI. However, it raises an important question: how is liability allocated if a judge endorses a problematic AI recommendation? Would a shared liability regime be appropriate? Importantly, any liability framework for judges in AI-assisted courts should avoid exerting influence over their judicial functions. In practice, the threat of liability may pressure judges to rely on AI recommendations, thereby subtly coercing them and undermining their autonomy.

15 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L 1689/1 <<http://data.europa.eu/eli/reg/2024/1689/oj>> accessed 10 March 2026.

16 OECD, ‘AI in Justice Administration and Access to Justice’ in *Governing with Artificial Intelligence: The State of Play and Way Forward in Core Government Functions* (OECD Publishing 2025) 265, doi:10.1787/795de142-en.

6 HUMAN RIGHTS IMPLICATIONS OF AI IN JUDICIAL SYSTEMS

The integration of AI in judicial decision-making raises significant human rights concerns, particularly regarding the right to a fair trial and the provision of reasoned judgments.¹⁷ AI systems often lack transparency, making it difficult for judges to explain AI-generated decisions, thereby violating litigants' rights to understand the reasoning behind judgments. There is a risk that AI's reuse of historical data could reinforce preexisting biases, obstruct adaptation to more recent social changes, and potentially harm marginalised groups. The Council of Europe's CEPEJ European Ethical Charter on the Use of AI in Judicial Systems¹⁸ articulates five guiding principles: respect for fundamental rights, non-discrimination, quality and security, transparency, and user control.

The European Court of Human Rights has underscored the need for legal frameworks that prevent executive interference and ensure transparent procedures for the appointment of judges. The context in which a judicial reform occurs may disclose an undue intrusion into the realm of judicial independence. Moreover, it reaffirmed the necessity of respecting the law in establishing tribunals, as it helps set out clear procedures for appointing judges. It thus prevents potential interference by the executive with the judicial power.

7 CONTEMPORARY ISSUES: THE UN REPORT ON AI IN JUDICIAL SYSTEMS

On 16 July 2025, the UN Human Rights Office published report A/80/169, "AI in judicial systems: promises and pitfalls",¹⁹ authored by Special Rapporteur Margaret Satterthwaite. The report recognises the widespread adoption of AI in judicial systems worldwide and notes that many judges are already using AI tools, often in an ad hoc manner. The Rapporteur warns against "techno-solutionism", urging states and justice professionals to scrutinise the justice problems AI can help address, to assess the suitability of AI, and to consider alternative, less risky solutions. The report advises that AI should only be adopted after careful consideration of potential harms, strategies to mitigate those risks, and an evaluation of whether other solutions may be preferable.

The Rapporteur also emphasises the necessity of access to a human judge for the right to an independent and impartial tribunal, and to a human lawyer for the right to legal

17 RaisuL Sourav, 'Judging by AI: Compromised Independence and a Threat to Human Rights?' (*PublicPolicy.ie*, 9 September 2025) doi:10.2139/ssrn.5570839 <<https://publicpolicy.ie/papers/judging-by-ai-compromised-independence-and-a-threat-to-human-rights/>> accessed 10 March 2026.

18 CEPEJ, *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment* (Council of Europe 2019).

19 Margaret Satterthwaite, 'Artificial Intelligence in Judicial Systems: Promises and Pitfalls: Report of the Special Rapporteur on the Independence of Judges and Lawyers' (A/80/169, 16 July 2025) <<https://docs.un.org/A/80/169>> accessed 10 March 2026.

counsel of one's choosing. Therefore, the judiciary must be responsible for adopting any innovation that could affect judicial decision-making. To preserve judicial independence, judges must be trained to become proficient in digital and AI technologies and empowered to consult technologists, legal experts, and the public about the appropriate use of AI systems. Once decisions regarding AI adoption are made, essential information about the systems must be made publicly available.

The intersection of AI and judicial independence is thus a complex domain in which the benefits of technological assistance must be carefully balanced against risks to fundamental judicial values. As AI systems become more advanced, there is an increasing need for comprehensive ethical frameworks and robust regulatory oversight. Any integration of AI into judicial processes should be governed by transparent guidelines, ongoing evaluation, and a steadfast commitment to both the spirit and letter of judicial independence.

8 AI IN THE COURTROOM: EMERGING ISSUES

The implementation of AI in the courts raises additional issues for judicial independence.

Judicial reforms, often including cutting judicial funding and introducing performance measures, are likely to affect independence, meaning judges should be safeguarded from interventions or pressure by a state's executive or legislative branches, especially procedural rules that could influence their decisions, even indirectly.

Moreover, due to the technicalities of AI, implementing ICT solutions requires expert knowledge and, in practice, the recruitment of new professionals to translate rules and practices into computerised processes and datasets. Thus, a complex configuration is expected to oversee Court operations, comprising judges trained in AI, capable of assessing datasets and explaining the reasoning behind their conclusions, as well as supporting technicians responsible for operating AI in the courtroom, or a combination of both.

To train judges, a curriculum of the knowledge and skills required to address AI issues needs to be drafted. Since we are still in an uncoordinated stage of AI implementation, the answer is unclear. Under the aforementioned second scenario involving AI technicians, guarantees of their independence are crucial. Any technical expert working in this field should be free from any pressure or interference of the same intensity as that faced by a judge. A related question is the relationship between the technician and the judge, as well as the distribution of liability. At the same time, any liability regime for judges in AI-assisted courts should not entail any influence over judicial functions.

Ultimately, AI artefacts for the judiciary must be designed as assistive tools for judges, not as unsupervised adjudication instruments. The principle of judicial independence demands that the final decision must always be a human one. Nevertheless, even such a stance vis-à-vis AI remains simplistic, since the judicial function cannot be seen merely as confirming the

reasoning of an AI system, but rather as a human intellectual-logical path that should also be explicated in the judgment delivered.

Judges must use AI to augment their judgment, not substitute it. They must critically evaluate AI-generated recommendations, much as they would assess the testimony of an expert witness, accepting or rejecting them based on reasoned analysis. At the same time, AI systems should be designed so as not to impose paths of reasoning. The latter should also allow judges' discretion to be part of the reasoning, grounded in human qualities of empathy and equity and taking into account the humane context and the commitment to individualised justice.

9 THE STRESS ON JUDICIAL INDEPENDENCE IN THE AI ERA

Judicial independence extends to judicial methodology. Judges enjoy considerable discretion in how they research precedents, weigh evidence, and arrive at conclusions. One could, on that basis, pretend that a judge should be free to choose which AI system to use, if any. However, AI introduces a new dimension to this independence, transforming discretion into risk.

Any judge independently employing an AI system is outsourcing elements of judicial reasoning to opaque technological systems whose inner workings, training data, and embedded biases remain hidden not only from litigants and the public but also from judges themselves.

This creates what we might call the "black box paradox": a contradiction in terms of judicial independence, a principle meant to ensure transparent accountability in a judge's reasoning, but that, despite all, permits the use of a system that advises the judge without the latter clearly understanding his own decision-making process.

10 BALANCING INDEPENDENCE AND EVALUATION

Finding a balance between judicial independence and evaluation processes is equally essential for effective justice. Judicial independence must remain the key orientation, since evaluations aim to improve judicial quality and identify training needs. The Consultative Council of European Judges (CCJE) in its Opinion No. 17 (2014)²⁰ addresses the evaluation of judges' work, emphasising the balance between judicial independence and the quality of justice, and the importance of maintaining this balance to uphold the rule of law.

20 CCJE Opinion n°17 On the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence (CCJE (2014)2, 24 October 2014) <<https://www.legal-tools.org/doc/024eff/pdf/>> accessed 10 March 2026.

Judges have essential responsibilities that must be assessed to ensure the decisions they deliver meet the required standards. They must protect rights and freedoms equally and provide efficient dispute resolution. They are required to decide cases independently and on time, with clear reasoning. Judicial independence does not exempt judges from accountability; evaluations should aim to enhance the judiciary's level of competence. Nevertheless, the introduction of AI into the Courts' operations raises the question of whether judges' evaluations include assessing their capacity to use AI tools and further clarifying their degree of AI involvement.

11 THE CASE FOR INSTITUTIONAL CONTROL OF AI IN JUSTICE

AI technologies are increasingly utilised in judicial processes across various countries, promising to enhance efficiency and reduce costs.²¹ Proponents argue that AI can deliver fairer, more consistent judgments compared to human judges, who may exhibit inherent biases and inconsistencies. AI tools can predict case outcomes and assist judges by analysing vast amounts of data, potentially transforming the judicial landscape by streamlining processes and improving access to justice.

Courts cannot avoid the AI issue. On the contrary, the trend should be to implement AI solutions to attract genuine benefits: enhanced legal research capabilities, pattern recognition across vast case databases, identification of relevant precedents that human researchers might miss, and administrative efficiencies that free judicial time for the human judgment that genuinely matters.

Nevertheless, the integration of artificial intelligence into judicial systems represents one of the most consequential transformations in modern jurisprudence. As courts worldwide experiment with AI tools, they face a fundamental question: should individual judges have the autonomy to adopt AI systems ad hoc, or must these technologies be provided and regulated exclusively by state judicial authorities?

The answer is unequivocally the latter. For as long as judicial independence remains a cornerstone of democratic society, the unregulated use of AI by individual judges threatens to undermine the very principles that independence is meant to protect: equality before the law, transparency, and the consistent application of legal standards.

Nevertheless, this cannot happen in disorder; it requires institutionalisation. State judicial authorities, supreme courts, judicial councils, and ministries of justice must assume exclusive control over AI deployment in courtrooms. This implies centralised procurement and validation. Collective judicial authorities, not individual judges, should evaluate, select,

21 B Manveel, 'Predictive Justice with Artificial Intelligence: Enhancing Efficiency and Accuracy of Judiciary' (2023) 1(2) Legal Spectrum Journal 1.

and procure AI systems. This allows for rigorous testing for bias, validation of accuracy, assessment of interpretability, and negotiation of transparency requirements with vendors.

Mandatory training and standardisation ensure all judges receive uniform training on the AI tools approved for use, ensuring consistent application and a shared understanding of their limitations. The tools themselves should be standardised across jurisdictions to prevent the inequality and incoherence that ad hoc adoption creates.

Transparency and accountability mechanisms require that institutionally deployed AI operate under clear rules that require disclosure when AI systems are used in case analysis, document the role they played in judicial reasoning, and provide opportunities for litigants to challenge AI-assisted decisions. Regular audits should assess whether AI systems produce disparate impacts across demographic groups.

The institutional framework must establish that AI systems are research and analytical tools, not decision-makers. Final judgment must remain exclusively human, with judges required to articulate their reasoning in ways that demonstrate independent analysis rather than algorithmic deference. Because AI systems in justice effectively shape legal outcomes, their adoption should be subject to public oversight, legislative input, and judicial rulemaking processes that allow for democratic accountability. Procedural rules must also be adapted to the new circumstances.

12 REDEFINING INDEPENDENCE FOR THE ALGORITHMIC AGE

This institutional approach requires us to recalibrate our conception of judicial independence. Independence has never been absolute; judges operate within procedural rules, evidentiary standards, and ethical codes designed to ensure fairness and consistency. Restricting individual judges from independently adopting AI systems is not an assault on judicial independence but rather an extension of existing frameworks that delimit discretion to protect litigants and the integrity of the justice system.

Judicial independence in the AI age will require protection from technological capture. When judges adopt AI tools without institutional support or oversight, they risk becoming dependent on systems they don't fully understand, accountable to commercial vendors rather than legal principles, and unwitting participants in the erosion of the very values their independence is meant to safeguard.

The alternative, a justice system fractured by technological inequality, compromised by unexamined algorithmic bias, and rendered unpredictable by idiosyncratic AI adoption, represents not independence but chaos. It transforms the noble concept of judicial discretion into a justification for systematised arbitrariness.

13 THE EVOLVING ROLE OF THE JUDGE: FROM ADJUDICATOR TO MANAGER AND AUDITOR

The traditional image of a judge as a passive arbiter who merely listens and pronounces judgment is becoming obsolete. AI necessitates a more dynamic, proactive, and managerial role. Especially since the intrusion of AI in the judicial domain, new imperatives dictate the development of juridical competences.

In the first place, AI literacy is no longer optional; it is now part of judges' professional responsibility. A judge who is ignorant of AI is like a judge who does not understand forensic science, vulnerable to manipulation and unable to critically assess the evidence presented. Judges must understand what a specific AI tool is designed to do. Interpreting the reasoning behind AI system outputs requires a literate judge to know the right questions to ask: What data was this model trained on? How has its accuracy been validated? Can the provider explain, in understandable terms, the factors that led to this specific output? This allows them to fulfil their duty to give reasons for their decisions, even when assisted by AI.

Safeguarding procedural fairness means AI literacy enables judges to ensure that the use of technology does not violate parties' rights to a fair trial, including the right to be informed of and challenge evidence used against them, even when that evidence is an algorithmic recommendation.

14 THE INEQUALITY RISK

An AI-literate judge will be in a different position than a judge who, for educational or geographic reasons, lacks access to AI systems. The first one could analyse thousands of cases and identify pertinent precedents based on extensive data. In contrast, the second, without such tools, relies on traditional methods and personal experience. Thus, if no commonly available AI systems are in place, two identical cases could be treated differently in sheer inequality.

The inequality deepens when we consider access across socioeconomic lines. Wealthier jurisdictions may provide their judges with superior AI tools, while rural or underfunded courts lag. Private commercial AI systems create a two-tier judiciary: those who can afford premium tools and those who cannot. Even within a single courthouse, disparities emerge based on individual judges' technical literacy, personal finances, or willingness to adopt new technologies, not to mention inequalities in lawyers' ability to provide AI-based solutions, which depend on their financial capacity.

15 BIAS AMPLIFICATION AND THE EROSION OF DUE PROCESS

Risks and concerns extend beyond inequality of access to the nature of AI systems themselves. Machine learning algorithms are trained on historical data, which may, in some cases, incorporate systemic biases.^{22 23} that are likely to be mitigated if the reasoning were orchestrated by a judge in non-AI circumstances, but can resurface in an unprocessed data pool whose relevance is judged by AI systems²⁴. When individual judges adopt AI systems without centralised screening, they risk importing these biases directly into their judgments. An AI tool trained on biased historical data will recommend inappropriate treatment for demographic groups that have historically been discriminated against. On the other hand, a legal research AI trained predominantly on “over-purified” cases might fail to surface precedents relevant to novel circumstances.

Crucially, ad hoc use of AI systems means all kinds of biases feed into the official system. Any system without the systematic review, validation, or transparency that institutional deployment would require gradually becomes polluted. Equally, privately managed systems likely lack audit trails, are not tested for disparate impact, and have no mechanism for defendants to challenge the tool's use or to interrogate its recommendations. The judge's independence thus paradoxically obstructs the detection of algorithmic discrimination.

This undermines procedural justice, the right to understand and challenge the basis of judicial decisions. When AI systems influence judicial reasoning invisibly, defendants are denied meaningful participation in their own cases. They cannot cross-examine an algorithm. They cannot appeal a sentence if they never knew it was used, even if the AI tool was flawed. Maybe one paramount ethical standard should be that judges who employ AI systems beyond officially designated ones should disclose such use.

16 PSYCHOLOGICAL DIMENSIONS: OVERRELIANCE ON AI

Psychological research suggests that overreliance on AI by judges may stem from cognitive biases, trust dynamics, and decision fatigue, potentially undermining judicial independence and moral reasoning. Automation bias leads judges to favour AI-generated recommendations even when they conflict with their own judgment, especially under time pressure or cognitive load, leading to uncritical acceptance of AI outputs.

22 Álvaro Pérez Ragone and Edilson Vitorelli, ‘Judicial Independence, Impartiality, and Judicial Decision-Making: Institutional and individual perspectives; judicial impartiality and cognitive biases; truth, evidentiary powers of the judge and confirmation bias; automated judicial decision based on artificial intelligence, independence, and impartiality’ (Judicial Independence in the Third Millennium: XVII World Congress of Procedural Law 2023) 194.

23 William Samuelson and Richard Zeckhauser, ‘Status Quo Bias in Decision Making’ (1988) 1 *Journal of Risk and Uncertainty* 7, doi:10.1007/BF00055564.

24 Mairi N Morrison, ‘May it Please Whose Court?: How Moot Court Perpetuates Gender Bias in the “Real World” of Practice’ (1995) 6 *UCLA Women's Law Journal* 49, doi:10.5070/L361017641.

Cognitive offloading means that AI systems can serve as mental shortcuts, allowing judges to delegate complex reasoning. While this reduces mental strain, it may also erode deliberative depth and moral engagement. Excessive trust in technology can lead judges to perceive AI as impartial and data-driven, fostering excessive trust. This can obscure the fact that algorithms often encode historical biases and lack contextual sensitivity.

Reduced moral engagement occurs when AI handles morally charged decisions (e.g., bail or sentencing), and judges may experience moral disengagement, treating these decisions as technical rather than ethical. The presence of AI alters the symbolic meaning of judging, from a human-centred act of justice to a procedural task. This shift can affect how judges perceive their role and how the public perceives judicial legitimacy.

Under heavy caseloads, judges may increasingly rely on AI to conserve cognitive resources. This reliance can become habitual, diminishing critical scrutiny and reinforcing systemic biases. Loss of discretion means psychological reliance on AI may lead judges to defer to algorithmic outputs even when they conflict with legal nuance or ethical judgment. Research shows that while some groups may view AI-assisted decisions as fairer, others perceive them as less legitimate than human judgments.

Recommendations include training in cognitive awareness (judges should be educated about automation bias and the psychological traps of overreliance), ethical design of AI tools (systems should be transparent, explainable, and designed to support rather than replace judicial reasoning), and preserving human judgment (AI should augment, not supplant, the moral and contextual deliberation that defines justice).

17 THE RULE OF LAW AND ALGORITHMIC CONSISTENCY

The rule of law depends on predictability and consistency, the principle that similar cases should receive similar treatment under stable, publicly known standards. This doesn't mean judges cannot exercise discretion, but rather that discretion operates within a framework of shared legal principles and transparent reasoning.

Ad hoc AI adoption shatters this framework. When different judges employ different AI systems, each with its own training data, algorithmic architecture, and embedded assumptions, the factors influencing judicial decisions become radically inconsistent and uncontrollable. From the perspective of litigants and society, the law becomes incoherent, not a rational system of rules and principles, but a maze of idiosyncratic, technologically mediated outcomes that vary based on which judge happens to hear the case and which tools that judge happens to use.

Nonetheless, the rule of law requires that legal standards evolve through transparent, democratically accountable processes, legislative action, appellate review, and public debate.

This foundation is shattered by an oligopoly of AI system providers that controls legal data. When AI systems shape judicial outcomes invisibly, the interpretation of legal norms shifts without public awareness or democratic input. The AI becomes a tyrant, its training data and algorithms effectively making law by influencing which precedents are found, which factors are emphasised, and which outcomes are suggested.

18 THE MANAGERIAL JUDGE IN THE DIGITAL ERA

Differential case management is a growing part of a judge's function, and AI supercharges this aspect. In a modern context, judges are involved in docket management and triage. Even more, AI systems can enhance these functions by analysing case files to prioritise urgent matters, suggest suitable tracks for a case (e.g., standard trial, alternative dispute resolution), and even plan case duration. The judge's role evolves to overseeing this system, validating its recommendations, and making the final managerial call.

In parallel, judges obtain enhanced process control. AI-driven analytics enable judges to monitor the progress of hundreds of cases, identify bottlenecks, and ensure the efficient administration of justice across their entire docket, not just in individual cases.

19 NEW PUBLIC MANAGEMENT: AI AS A MANAGERIAL REFORM TOOL

New Public Management (NPM) reframes public institutions through the lens of private-sector efficiency, performance metrics, and customer orientation. In this context, AI becomes a transformative tool aligned with NPM principles: performance measurement (AI enables data-driven tracking of judicial efficiency, case resolution times, and workload distribution); cost reduction (automation of routine tasks reduces administrative overhead and resource consumption); standardisation and accountability (algorithms enforce consistent decision-making, which NPM views as a safeguard against arbitrariness); and user-centric services (AI-driven platforms can improve access to justice by streamlining procedures and enhancing transparency).

However, this managerial transformation is not without risks. NPM's emphasis on efficiency may conflict with the judiciary's deeper mission of justice, fairness, and deliberation. When AI is deployed primarily to meet performance targets, it risks becoming a tool of managerial domination, sidelining ethical and civic concerns.

20 CONTROL OVER AI IMPLEMENTATION: THE CORE OF INDEPENDENCE

Effective judicial independence in an AI environment requires that the tools judges rely on are neither controlled by the executive branch nor by private vendors. Therefore, the most significant element of the judicial role nowadays is the responsibility to maintain sovereign control over the technological infrastructure of justice.

AI will not replace judges, but judges who understand and shape AI will take precedence over those who do not. The preservation of judicial independence in the age of AI demands more than caution; it requires proactive engagement, institutional adaptation, and a reimagined judicial identity that encompasses technological stewardship. By embracing AI literacy, asserting control over data and system design, and expanding their roles into governance, judges can ensure that AI enhances, rather than erodes, their independence and the legitimacy of the justice system as a whole.

The future of fair and impartial justice depends not on resisting technology, but on judges leading its ethical integration. The judiciary cannot outsource its core functions. Judges, through their judicial councils or governing bodies, must be at the forefront of defining the functional requirements for AI systems. The judiciary itself must develop stringent ethical and technical standards for any AI tool used in courtrooms. This includes mandates for transparency, auditability, anti-bias testing, and protection of fundamental rights.

Vendor scrutiny and contractual safeguards mean procurement contracts must be negotiated from a position of strength, ensuring that the judiciary retains ownership of its data, has a right to audit the algorithms, and that vendors are liable for defects that lead to miscarriages of justice.

21 DATASET DEVELOPMENT AND CONTROL: OF PARAMOUNT IMPORTANCE

Perhaps the most critical dimension of judicial control lies in the development and curation of datasets used to train AI systems. Historical legal data often encodes past injustices; uncritically using such data risks automating discrimination. Judges, through judicial councils, ethics committees, or specialised AI oversight bodies, must have a decisive voice in data selection and preprocessing.

Fundamental issues arise in determining which cases, rulings, or administrative records are appropriate for training models and which must be excluded later. Their role is also essential for bias auditing via regular audits. AI models must also guarantee transparency and explainability. Judges must insist on interpretable models and accessible documentation so that parties can challenge algorithmic inputs. If left without judicial involvement, data

control will be in the hands of technical corporations or dictated by commercial, legislative, or executive choices.

An AI model is fundamentally a product of its data. Biased, incomplete, or unrepresentative data will produce biased and unjust outcomes. Therefore, the development and curation of datasets are foundational judicial responsibilities. Unprocessed historical judicial data often reflect past societal and judicial biases, outdated solutions, or even an abolished procedural framework. Using this data to train a predictive model would automate and perpetuate these biases or errors. Judges must oversee the creation of curated, balanced, and ethically sourced datasets that are fit for purpose.

A judicial public good means that high-quality, anonymised legal datasets should be treated as a critical public good, developed and maintained by or under the authority of the judiciary. This prevents reliance on proprietary datasets from private companies, which can lead to lock-in and hidden bias.

Ongoing auditing and maintenance recognise that datasets are not static. Judges must ensure there are processes for continuously auditing data and AI performance for emerging biases or inaccuracies.

22 REWORKING BIASED DATASETS IN JUDICIAL AI SYSTEMS

Courts must rework datasets known to introduce bias through a structured, multi-stage process that aligns with fairness principles in AI governance. This involves identifying biases and applying debiasing techniques throughout the data lifecycle. The goal is to create representative, error-free datasets that minimise disparate impacts while preserving utility for judicial tasks such as risk assessment or case prediction.

Key methods include pre-processing techniques (modify the dataset before model training to address imbalances through resampling, reweighting samples based on sensitive attributes, or removing disparate impacts through data cleansing); in-processing techniques (integrate fairness constraints during algorithm training, such as adjusting the loss function to optimise for both accuracy and fairness metrics); and post-processing techniques (adjust model outputs after training to enforce fairness, such as recalibrating predictions for different demographic groups).

Courts should involve multidisciplinary teams (e.g., data scientists, ethicists, and judges) and use open-source toolkits like IBM's AI Fairness 360 or Microsoft's Fairlearn for implementation. EU regulations, such as the AI Act, mandate such quality evaluations for high-risk systems, requiring datasets to be relevant, representative, and error-free. Certification of reworked datasets by independent bodies can ensure compliance.

23 LIABILITY FOR FAULTY DATASETS

In cases of faulty datasets leading to biased judicial AI outcomes, liability can be recognised under several legal frameworks, focusing on harms like discrimination or unjust decisions. This typically falls under tort law, civil rights statutes, or product liability, without requiring proof of intent. A particular issue affected the EU domain following the withdrawal of the proposed AI liability directive.

Disparate impact liability under civil rights laws means entities can be liable if datasets cause disproportionate harm to protected groups, even if unintentional. Plaintiffs must show statistical disparities, after which the defendant proves a legitimate interest, and alternatives are considered in judicial contexts.

Negligence and duty of care mean developers, deployers, or courts may be liable if they fail to mitigate foreseeable biases, based on a calculus weighing the burden of prevention against the probability and severity of harm. This extends along the data lifecycle to data collectors, processors, and users.

Product liability means AI vendors can face strict liability for defective products if faulty datasets render tools unsafe, as in discrimination lawsuits against biased algorithms. Contracts may shift risks, but courts increasingly hold vendors accountable. Under the EU AI Act, providers of high-risk judicial AI face fines for non-compliance with dataset quality requirements.

Liability often involves class actions for group harms, with remedies including damages, injunctions, or system reforms. Judicial ethics rules may also impose sanctions on judges using biased AI.

The correct operation of a corrected dataset must be iteratively tested through rigorous fairness audits and metrics, ensuring it no longer amplifies biases while maintaining accuracy, especially in the case of judicial AI, where pertinent data reorganise as case law evolves. Auditing and statistical methods should be used to detect inconsistencies, biases, or imbalances compared to hypothetical human decisions. Risk-based audits under the AI Act, with human oversight, including Data Protection Impact Assessments, must also be conducted and, if necessary, independent third-party certification for high-risk systems.

24 REASSESSING CASES JUDGED UNDER A FAULTY DATASET

Justice systems should reassess cases decided on faulty datasets to uphold due process, notably when biases led to prejudicial outcomes. Novel procedural provisions must be introduced to warrant mandatory reassessment when new evidence of faults emerges. Grounds for reassessment should include due-process violations arising when AI lacks transparency or when parties cannot challenge it, inverting the burden of proof. Retrospective audits can identify affected cases.

25 CANADIAN JUDICIAL COUNCIL GUIDELINES: A MODEL APPROACH

A good example of an appropriate policy to ensure judicial independence vis-à-vis AI challenges is the Guidelines drafted by the Canadian Judicial Council (CJC), the federal agency established under the Judges Act to supervise Canada's federally appointed judges and to maintain and improve the quality of judicial services in Canada's superior courts. The CJC recently released the first edition of its Guidelines on the Use of Artificial Intelligence in Canadian Courts, published in September 2024.²⁵

The Guidelines recognise that judges are exclusively responsible for their judicial decisions and that they are not permitted to delegate their decision-making authority, whether to a judicial assistant, an administrative assistant, or an artificial intelligence computer program, regardless of the abilities of the person or program. That said, the Guidelines also recognise that some judges have already adopted AI tools to improve efficiency and accuracy, while others may rely on them without even realising it.

The objective of the Guidelines is therefore to raise awareness of the risks associated with the use of any form of AI in court administration and judicial decision-making and to prevent the delegation of decision-making authority while encouraging the safe, effective and appropriate use of AI by the judiciary.

As for protecting the independence of the judiciary, the CJC considers that "many generative AI applications proposed for use in the courts, including case management systems and alternative dispute resolution, could erode judges' authority and independence. Too much reliance on private AI (whether commercial or publicly funded) could undermine the independence of the judiciary. It must be understood that the role of judges goes beyond resolving individual disputes: they have the crucial task of interpreting the law, changing it, and constituting a stable and distinct third branch of government. Even as governments advance laws governing AI use, the independence of the judiciary must be preserved."²⁶

The Guidelines emphasise that any review of judges' use of assistive AI technology must always be consistent with the core values of independence, integrity and respect; diligence and competence; equality and impartiality; fairness; transparency; accessibility; timeliness; and certainty.

The standardisation of rulings through algorithmic systems risks reducing the judiciary to a mechanistic process, stripping away the nuance and discretion essential to justice. Such

25 Martin Felsky and Karen Eltis, *Guidelines for the Use of Artificial Intelligence in Canadian Courts* (Canadian Judicial Council 2024) <<https://cjc-ccm.ca/en/resources-center/publications/guidelines-use-artificial-intelligence-canadian-courts>> accessed 10 March 2026.

26 *ibid* 6.

standardisation reflects broader political and managerial imperatives, efficiency, predictability, and control, at the expense of human-centred adjudication.

AI systems often present their outputs as objective and neutral, masking the value-laden choices embedded in their design.

This erosion of pluralism is particularly dangerous in legal contexts, where legitimacy depends on balancing competing values. A judiciary governed by algorithms risks becoming a technocratic apparatus, alienated from the social and ethical context it is meant to serve. This creates a crisis of justification, where judicial decisions may be procedurally sound but lack moral legitimacy.

Judges, administrators, and policymakers may support AI adoption not solely for its merits but because it aligns with institutional incentives, reducing caseloads, minimising accountability, and securing funding or political favour.

Judicial incentives mean AI can shield judges from criticism by outsourcing controversial decisions to "neutral" algorithms. In terms of bureaucratic expansion, agencies may promote AI to justify budget increases or expand their influence. In parallel, private tech firms may lobby for AI integration, shaping legal standards to suit proprietary interests.

This perspective challenges the assumption that AI adoption is purely rational or benevolent. Instead, it reveals how institutional actors may pursue AI for reasons that conflict with public interest or democratic accountability.

26 CONCLUSION: TOWARDS ALGORITHMIC SOVEREIGNTY

To safeguard judicial independence in the age of AI, justice systems must evolve towards a model of "algorithmic sovereignty." The challenge is not merely to protect judicial independence from AI, but to redefine it, expanding its scope to include autonomy from algorithmic and technological control.

This implies ensuring that courts retain control not only over legal reasoning but also over the digital infrastructures that mediate it. Concrete measures include: embedding 'human-in-command' principles in all AI-assisted decision systems; developing publicly owned, open-source judicial data infrastructures; enhancing algorithmic literacy among judges and court staff; establishing judicial ethics committees to oversee AI deployment; and embedding transparency-by-design requirements in all justice-related AI applications.

AI's integration into judicial systems presents a paradox. Properly governed, AI can enhance judicial quality and transparency; poorly managed, it risks hollowing out the very autonomy it promises to support. On the one hand, Artificial Intelligence promises to revolutionise

judicial systems by enhancing efficiency, consistency, and access to justice. Positively, AI can free judges from administrative burdens, allowing them to focus on core judicial reasoning.

The same technology that promises to enhance judicial efficiency simultaneously threatens the independence that legitimates judicial authority, since it introduces risks of "algorithmic bias," opacity in decision-making, and the potential delegation of judicial discretion to unaccountable private corporations. The central challenge is to harness AI's benefits while safeguarding judicial independence from technological erosion.

Judicial independence exists not for judges' benefit but for those who come before the courts seeking equal treatment under the law. In the algorithmic age, protecting that equality requires insisting that AI systems enter courtrooms only through institutional channels that ensure validation, standardisation, transparency, and accountability.

The alternative to an independent judiciary risks falling into randomness or arbitrariness. If we want to avoid fracturing the judicial system, AI in courts must not evolve into a tool individual judges can adopt at will, but rather into a systemic intervention requiring systematic control.

A balanced approach that combines human judgment with AI tools is necessary to enhance the efficiency of the justice system while preserving judicial independence and protecting human rights. The integration of artificial intelligence into judicial systems has sparked intense debate across legal, technological, and ethical domains.

The danger is not that AI will replace judges tomorrow, but that incremental adoption will gradually reconfigure the judicial role until independence becomes a hollow formalism. Judges may retain the aura and reputation of independent arbiters while losing the substantive capacity to reason, distinguish, and decide autonomously.

The future of judicial independence thus lies in legal systems' capacity to reconcile tradition with technological governance. The solution is not the rejection of AI but its constitutional containment. AI's emergence in judicial systems represents both a transformation and a test for the age-old principle of judicial independence. Judicial independence must be reimagined for the digital age, not as merely freedom from political interference, but as freedom from technological dependence.

As courts become data-driven institutions, independence must evolve to encompass control over digital processes, algorithms, and infrastructures. However, to prevent AI from becoming a threat to judicial independence, the role of the judge must fundamentally expand. This requires that judges themselves, through their representative bodies, assert control over AI adoption, training, and governance. Judges must become AI-literate managers and vigilant auditors of technology. Most critically, the judiciary as an institution must assert control over the implementation of AI and the development of the datasets that underpin it.

By imposing dataset governance responsibilities that judges are ill-equipped to handle, reframing precedent as statistical correlation, and transforming adjudicators into algorithmic supervisors, AI risks reducing judges from constitutional guardians to "mere editors" of machine outputs.

Appropriate judicial governance can ensure that AI will not become an unaccountable master that compromises the impartial and independent administration of the law. The challenge is not to reject AI, but to embed it within a judiciary that is pluralistic, accountable, and ethically grounded.

The preservation of judicial independence in the AI era requires proactive engagement, institutional adaptation, and a reimagined judicial identity that encompasses technological stewardship. By embracing AI literacy, asserting control over data and system design, and expanding their roles into governance, judges can ensure that AI enhances, rather than erodes, their independence and the legitimacy of the justice system as a whole.

The future of fair and impartial justice depends not on resisting technology, but on judges leading its ethical integration. AI will not replace judges, but judges who understand and shape AI will replace those who do not.

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Competing interests: The author is a Guest Editor of the Special Issue "AI and Law" and serves on the Editorial Board of Access to Justice in Eastern Europe. This publication was not peer-reviewed, and the editorial decision-making regarding this manuscript was made by the Editor-in-Chief of AJEE.

Disclaimer: The author declares that his opinion and views expressed in this manuscript are free of any impact of any organisations.

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EDITORS

Managing editor – Mag. Yuliia Hartman. **English Editor** – Robert Reddin.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Popotas C, 'AI and Judicial Independence: A Critical Analysis' (2026) 9(2) Access to Justice in Eastern Europe 529-52 <<https://doi.org/10.33327/AJEE-18-9.2-o000195>>

DOI: <https://doi.org/10.33327/AJEE-18-9.2-o000195>

Summary: 1. Introduction. – 2. On Judicial Independence: Foundational Principles. – 3. Historical Evolution of Judicial Independence. – 4. Judicial Independence in the European Legal Landscape. – 5. The AI Act and Risks to Judicial Independence. – 6. Human Rights Implications of AI in Judicial Systems. – 7. Contemporary Issues: The UN Report on AI in Judicial Systems. – 8. AI in the Courtroom: Emerging Issues. – 9. The stress on Judicial Independence in the AI era. – 10. Balancing Independence and Evaluation. – 11. The Case for Institutional Control of AI in Justice. – 12. Redefining Independence for the Algorithmic Age. – 13. The Evolving Role of the Judge: From Adjudicator to Manager and Auditor. – 14. The Inequality Risk. – 15. Bias Amplification and the Erosion of Due Process. – 16. Psychological Dimensions: Overreliance on AI. – 17. The Rule of Law and Algorithmic Consistency. – 18. The Managerial Judge in the Digital Era. – 19. New Public Management: AI as a Managerial Reform Tool. – 20. Control Over AI Implementation: The Core of Independence. – 21. Dataset Development and Control: of Paramount Importance. – 22. Reworking Biased Datasets in Judicial AI Systems. – 23. Liability for Faulty Dataset. – 24. Reassessing Cases Judged Under a Faulty Dataset. – 25. Canadian Judicial Council Guidelines: A Model Approach. – 26. Conclusion: Towards Algorithmic Sovereignty.

Keywords: *Judicial independence; artificial intelligence; digital constitutionalism; courts; AI Act.*

DETAILS FOR PUBLICATION

Date of submission: 12 Mar 2026

Date of acceptance: 26 Mar 2026

Publication: 20 May 2026

Was the manuscript fast-tracked? - No

Number of reviewer reports submitted in the first round: No peer review

Number of revision rounds: No revision

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate

<https://www.turnitin.com/products/ithenticate/>

AI DISCLOSURE STATEMENT

The author regularly uses AI tools (ChatGPT, Claude, Deepseek, Kimi) to assess the originality of ideas and the absence of redundancy.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Післямова

та гостьова редакційна стаття до спеціального випуску «Штучний інтелект та право 2025»

ШТУЧНИЙ ІНТЕЛЕКТ ТА НЕЗАЛЕЖНІСТЬ СУДОВОЇ ВЛАДИ: КРИТИЧНИЙ АНАЛІЗ

Костас Попотас

АНОТАЦІЯ

Незалежність судової влади, яка довгий час вважалася наріжним каменем демократичного управління та верховенства права, стикається з новими концептуальними та практичними викликами в епоху штучного інтелекту. У цій науковій статті досліджується історія принципу незалежності судової влади, його впровадження в європейське та міжнародне право, а також сучасний вплив ШІ на судову дискрецію, інституційну автономію та легітимність. У роботі стверджується, що, хоча штучний інтелект пропонує безпрецедентні можливості для ефективності та послідовності судової практики та доступу до правосуддя, він також викликає занепокоєння щодо прозорості, підзвітності та руйнування судової автономії. Особливу увагу приділено необхідності формування у суддів належного рівня AI-компетентності, трансформації їхньої ролі від одноосібного розгляду справ до управління і, зокрема, контролю за впровадженням ШІ в судових системах та розробки відповідних наборів даних. У статті також обґрунтовується, що інтеграція штучного інтелекту в судові системи не буде однаковою в різних юрисдикціях і судах через відмінності у рівні технологічної грамотності суддів, інституційній спроможності та складності справ, які вони розглядають.

Ключові слова. Судова незалежність; штучний інтелект; цифровий конституціоналізм; суди; Закон про штучний інтелект

For further information, please contact

Access to Justice in Eastern Europe, Publishing House 'Academic Insights Press',
Emil-Bertalanffy-Weg 1, Unterach am Attersee, 4866, Austria
<https://academicinsightspress.com>

Postal information

Publishing House 'Academic Insights Press', Emil-Bertalanffy-Weg 1, Unterach am Attersee, 4866, Austria.

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Media identifier R30-00995

The print run of this issue is 200 copies

Офіційна назва зареєстрованого друкованого медіа - *Доступ до правосуддя в Східній Європі, Access to Justice in Eastern Europe*

Порядковий номер випуску друкованого медіа та дату його виходу у світ - № 2 за 2026 рік

Тираж випуску - 200 екз.

Ідентифікатор друкованого медіа у Реєстрі - R30-00995

Cover-list by **Alona Hrytsyk**

Publishing House 'Academic Insights Press'

Emil-Bertalanffy-Weg 1, Unterach am Attersee, 4866, Austria
<https://academicinsightspress.com>



ACCESS TO JUSTICE IN EASTERN EUROPE

AJEE

PEER-REVIEWED JOURNAL

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Access to Justice in Eastern Europe (AJEE) is an Open Access journal recognized and indexed by the well-known databases and directories. AJEE is indexed in Web of Science Core Collection, Emerging Source Citation Index (Q2 law) and in Scopus, Elsevier. Our Scimago ranking is Q2. AJEE is also listed in the Directory of Open Access Journals (DOAJ), ERIH Plus, UlrichWeb, HeinOnline.

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ISSN 2663-0575