

Access to Justice in Eastern Europe

Editor-in-Chief's Note

Iryna Izarova

Research Articles

Bohdan Karnaukh and Tetiana Tsuvina

Main Connecting Factor for Tort Claims
in the EU and Ukraine: Lessons from the CJEU Case Law
for Ukrainian Recodification

Marina Kamenecka-Usova, Laine Donāne and Elīna Greine

Between Autonomy and EU Law:
The European Sport Model in the Era of Lex Sportiva



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AJEE is an English-language journal offering a forum for the discussion of topical issues related to access to justice, judiciary reforms, and transitional justice. While AJEE focuses specifically on the evolution of legal traditions in Eastern European countries, we actively welcome submissions from a wider global community. By encouraging research from other regions across the globe, AJEE provides valuable comparative perspectives and insights into global legal trends. Preserving high academic standards, the journal allows its contributing authors, especially young legal professionals and practitioners, to present their articles on the most current issues shaping justice systems worldwide.

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Editorial

NAVIGATING NEW LEGAL REALITIES AND THE ROLE OF DOCTRINE IN CONTEMPORARY JUSTICE

Iryna Izarova

ABSTRACT

This Editor-in-Chief's Note introduces Issue 3 of the Access to Justice in Eastern Europe journal, providing an overview of the pivotal themes explored in this publication. The editorial highlights the increasingly transnational nature of contemporary legal challenges, focusing on the regulation of artificial intelligence, the extraterritorial impact of European Union law, the protection of digital rights, and the evolution of tort liability. Special attention is given to three notable scholarly contributions: a comparative analysis of cross-border tort claims in the context of Ukraine's European integration and civil law recodification (B. Karnaukh & T. Tsvina); a critical case note on judicial practice regarding the recognition of well-known trademarks and the limits of judicial decisions (K. Pilkov); and a comprehensive examination of the international legal framework for the security and dignified return of displaced persons under jus cogens norms (A. Sadigov & S. Rahimli). Furthermore, the Note underscores the indispensable role of judicial discretion and legal doctrine in addressing legislative gaps and adapting the law to new realities. The editorial concludes by acknowledging the vital contributions of the editorial board and peer reviewers in upholding the journal's commitment to academic excellence.

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This issue of our journal covers key topics that are highly relevant to contemporary jurisprudence. Specifically, these include the rapid development of artificial intelligence technologies, the protection of digital rights and personal data, the extraterritorial impact of European law, and the evolution of tort liability institutions in the face of new challenges.

These topics deeply concern scholars and practitioners across many countries and regions. Contemporary legal problems are becoming increasingly transnational, which is perfectly illustrated by the geographical scope of the research in this issue. For instance, we examine the impact of European legislation (in particular, the EU AI Act) on non-EU member states in the Western Balkans, and investigate how EU environmental requirements and AI rules influence the legal system of Vietnam. Alongside this, significant attention is given to the reception of European experience in Ukraine—ranging from the recodification of tort law in light of the CJEU case law to issues of constitutional identity as a guarantee of statehood. Furthermore, the pages of this issue address specific challenges in Asian and Middle Eastern countries: safeguarding the digital rights of labour migrants and the use of AI in the law enforcement system of Kazakhstan, objective liability in Jordan, and the practice of applying bankruptcy law in the courts of Saudi Arabia.

What is particularly crucial today is how the law responds to threats to the fundamental values and rights of the most vulnerable groups. The search for effective mechanisms to prevent psychological violence at work (Lithuania and Estonia), protect children's privacy in the digital environment, enforce mediation in labour disputes (Ukraine), and provide international legal protection for deported persons (Azerbaijan)—all remind us that the human being and access to justice must remain at the centre of any technological innovations or geopolitical transformations.

Following the tradition of my editorial notes I wish to highlight the most notable and landmark works of this issue. Having caught the keen attention of our editorial team and invited experts, these are the studies I want to personally recommend as you begin reading.

As Ukraine confidently advances toward EU membership, aligning its national private international law with the EU *acquis* has become not merely an ambitious goal but an urgent legislative task. This critical issue is the focus of the article by **Bohdan Karnaukh** and **Tetiana Tsvina**, "Main Connecting Factor for Tort Claims in the EU and Ukraine: Lessons from the CJEU Case Law for Ukrainian Recodification".

The authors focus on cross-border tort disputes, the resolution mechanisms of which in the European Union rely on two fundamental instruments: the Brussels I Recast Regulation (determining international jurisdiction) and the Rome II Regulation (determining applicable law). The authors provide a detailed analysis of how these regulations operate in practice through the prism of the Court of Justice of the European Union (CJEU) case law, paying special attention to complex issues such as the localisation of purely financial loss and the distinction between direct damage and indirect consequences.

Today, Ukraine is undergoing a large-scale recodification of its private law. In April 2026, a draft of the new Civil Code was presented, featuring a dedicated Book VIII on private international law. This study offers a timely 'audit' of these innovations. In particular, current Ukrainian legislation still relies on the *lex loci delicti commissi* principle (the place where the tort was committed), which structurally diverges from the *lex loci damni* approach (the place where the damage occurred) enshrined in Rome II. Although the drafters of the Civil Code have taken a significant step toward European standards by establishing *lex loci damni* as the primary connecting factor, the legislative text still requires refinement. The authors convincingly argue that the draft lacks a codified distinction between direct and indirect damage (a cornerstone of CJEU jurisprudence), omits a rule regarding safety and conduct equivalent to Article 17 of Rome II, and fails to introduce the principle of party autonomy for non-contractual obligations.

The article not only diagnoses conceptual gaps but also offers targeted, well-reasoned recommendations for the legislator. This is a must-read for scholars in the fields of civil and private international law, judges, practising lawyers handling cross-border disputes, and anyone interested in the process of adapting Ukrainian legislation to European Union standards.

Another publication that will undoubtedly draw readers' attention concerns a conceptual question: can a court simply "declare" a trademark well-known to everyone (*erga omnes*), or does such recognition only apply between the parties to a specific dispute (*inter partes*)? This issue was the subject of consideration by the Grand Chamber of the Supreme Court in the landmark "Citramon" case, brilliantly analysed by **Kostiantyn Pilkov** in his new publication for our journal.

Traditionally, in Ukraine, it was believed that an owner could have their trademark recognised as well-known through two equal avenues: an administrative procedure (the Appeals Chamber of the IP Office) or through the court. It was expected that a court decision would have universal effect. However, this approach created risks for legal certainty and the rights of other bona fide owners.

The author, a Supreme Court judge, thoroughly unpacks the logic of the Grand Chamber, which changed the rules of the game. The Court concluded that the appropriate and effective remedy is not a standalone claim for the recognition of a trademark as well-known, but rather a claim to invalidate the registration of a competing trademark. The recognition of the trademark as well-known should merely be a prerequisite (motivation) for such cancellation, meaning it forms part of the reasoning of the judgment.

This approach has enormous practical significance, as it limits the effect of the court decision strictly to the parties to the dispute (*inter partes*), without violating the general principles of commercial proceedings, and prevents the circumvention of limitation periods. Under the Paris Convention (Article 6bis), there are time limits for cancelling bona fide registered competing trademarks. If courts allowed separate recognition of the "well-known"

status, it would essentially "restart" the limitation periods and deprive bona fide competitors of their right to defence. This publication is an excellent example of how legal doctrine meets the real needs of judicial practice. I highly recommend it to all intellectual property lawyers, judges, and scholars interested in the effectiveness of legal remedies.

Taking this opportunity, I would like to emphasise that we deeply value research demonstrating the intrinsic link between theory and the challenges of legal application. The concept of an "ideal law" is an illusion, as no normative act can encompass the entire dynamics of social relations. That is precisely why the key role in ensuring the rule of law belongs to the judge. Doctrine and general principles of law serve as the essential toolkit that helps judicial discretion interpret the law not only by its letter but by its spirit, adapting it to the demands of the present day.

Of particular weight in contemporary academic discourse are publications devoted to the fundamental mechanisms of international law regarding the protection of the rights of displaced persons and state responsibility. Ensuring the security and dignified return of people affected by forced displacement is an extremely delicate issue that requires profound doctrinal reflection and the search for flawless legal instruments.

It is to this complex issue that the study by **Afsar Sadigov** and **Saftar Rahimli**, "The International Legal Framework for the Dignified Return and Security of Azerbaijanis Deported from the Present-Day Armenia", is dedicated.

In their work, the authors approach the issue of the forced displacement of the Western Azerbaijani population strictly through the rigorous lens of peremptory norms of international law (*jus cogens*), international humanitarian law (IHL), and international human rights law. Analysing the context of deportations across different historical periods, the researchers rely on a solid foundation of jurisprudence from key international bodies, including the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), and the International Criminal Tribunal for the former Yugoslavia (ICTY).

The main academic value of this article lies in its effort to fill the analytical gap concerning the practical realisation of rights. The authors propose a comprehensive, multi-layered framework of legal remedies. The researchers detail the mechanisms of international state responsibility, such as *restitutio in integrum* (restoration to the original state), financial compensation, rehabilitation, and legal guarantees of non-repetition, which are necessary to create conditions for a safe, sustainable, and dignified repatriation.

In closing, I extend my deepest appreciation to our editorial board and reviewers for their outstanding professionalism and impartial evaluations. As legal scholarship grows increasingly complex, their meticulous peer review remains the bedrock of our journal's quality. I believe our authors value this rigorous process, understanding that every piece of constructive feedback is a collaborative endeavour aimed at refining their research and enriching the broader legal debate. Together, we ensure that the insights shared in this

issue—spanning topics from adapting legal doctrines to new realities to resolving complex international disputes —provide a robust foundation for both theoretical progress and practical application. Through this mutual dedication to academic excellence, we continue to advance a profound understanding of justice in our interconnected world.

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ABOUT THIS ARTICLE

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Слово редактора

АДАПТАЦІЯ ДО НОВИХ ПРАВОВИХ РЕАЛІЙ ТА РОЛЬ ДОКТРИНИ В СУЧАСНОМУ ПРАВОСУДДІ

Ірина Ізарова

АНОТАЦІЯ

У цьому вступному слові головного редактора представлено третій номер журналу *Access to Justice in Eastern Europe* та здійснено огляд ключових тем випуску. Наголошується на транснаціональному характері сучасних правових викликів, серед яких: правове регулювання штучного інтелекту, екстериторіальний вплив права Європейського Союзу, захист цифрових прав та еволюція інститутів деліктної відповідальності. Окрему увагу приділено трьом знаковим публікаціям номера: порівняльному аналізу транскордонних деліктних спорів у контексті євроінтеграції та рекодифікації цивільного законодавства України (Б. Карнаух, Т. Цувіна); критичному огляду судової практики щодо визнання торговельних марок добре відомими та меж дії судового рішення (К. Пільков); а також дослідженню міжнародно-правових механізмів гідного повернення та безпеки примусово переміщених осіб крізь призму імперативних норм міжнародного права (А. Садигов, С. Рагімлі). Крім того, у вступному слові підкреслюється фундаментальна роль суддівської дискреції та правової доктрини у подоланні прогалів законодавства й адаптації права до нових реалій. На завершення висловлено подяку редакційній колегії та рецензентам за їхній внесок у підтримання високих академічних стандартів видання.

Ключові слова: додоступ до правосуддя, правова доктрина, транскордонні делікти, європейська інтеграція, право інтелектуальної власності, міжнародне публічне право, регулювання штучного інтелекту.

Research Article

CONSTITUTIONAL IDENTITY
AS A GUARANTEE OF STATEHOOD:
EUROPEAN EXPERIENCE
AND UKRAINIAN CHALLENGES
(BASED ON THE PRACTICE
OF CONSTITUTIONAL COURTS)

***Yevhenii Tkachenko*, Liubomyr Letnianchyn,
Viktoriia Dubas and Iryna Liashchenko***

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and Iryna Liashchenko

ABSTRACT

Background: *The article analyses the doctrine of constitutional identity in the context of both European and Ukrainian constitutionalism. It argues that constitutional identity is a relatively new category of constitutional theory, reflecting the fundamental and immutable values enshrined in the Constitution and serving to protect these values from external influences, particularly from supranational legal systems. Special attention is given to how this doctrine has developed in the jurisprudence of European constitutional courts (Germany, Poland, Hungary, Lithuania, Italy, France) and how it is being shaped in Ukraine in response to contemporary challenges, including the Russian Federation's military aggression and the need to safeguard the state language, sovereignty, and national unity.*

Method: *The study employs systemic-structural and comparative-legal methods to analyse the doctrine of constitutional identity, its constituent elements, and the legal positions of constitutional courts in different countries. The logical-legal method made it possible to trace the evolution of approaches to the relationship between constitutional identity, national sovereignty, and integration processes in Europe. The research is based on the analysis of constitutional texts, judicial practice, and scholarly sources.*

Results and Conclusions: *Constitutional identity is understood as a set of fundamental constitutional principles (sovereignty, human rights, rule of law, democratic form of government, state language) that constitute the “core” of the Constitution and cannot be altered, even by constitutional reforms. The practice of European constitutional courts (primarily the German Federal Constitutional Court) laid the foundation for the doctrine of constitutional identity as a tool for limiting the influence of supranational law on the fundamental bases of national constitutional systems. In Ukraine, this doctrine has been shaped through the prism of protecting the state language, national sovereignty, and societal consolidation, as reflected in the decisions of the Constitutional Court of Ukraine of 2018 and 2021, as well as legislative changes adopted between 2014 and 2025.*

1 INTRODUCTION

The concept of constitutional identity has become a key category in contemporary constitutional theory and practice in Ukraine, as demonstrated in prior research.¹ Alongside the doctrines of the rule of law² and the Law-Governed State,³ the doctrine of limited government,⁴ and the doctrine of constituent power,⁵ it occupies an important place both in modern constitutional scholarship and in the official constitutional doctrine of the state. The growing attention to this concept reflects the need to preserve the fundamental principles and values of the constitutional order amid democratic transformation, European integration, and the development of constitutional jurisprudence.

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- 1 Tetiana Slinko and Yevhenii Tkachenko, ‘Guaranteeing Constitutional National Identity by Bodies of Constitutional Review’ (2023) 7 Law of Ukraine 70, doi:10.33498/louu-2023-07-070 [in Ukrainian].
 - 2 Tetyana Slinko and others, ‘The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine’ (2022) 5(1) Access to Justice in Eastern Europe 165, doi:10.33327/AJEE-18- 5.1-n000099.
 - 3 Iurii Barabash and Mokhonchuk Bogdan, ‘The Principle of The Law-Governed State in the Constitutional Doctrine of Ukraine’ in Anatolii O Selivanov (ed), *A New Way to Law* (Logos 2021) 49 [in Ukrainian].
 - 4 Tetiana Slin’ko and others, ‘The Doctrine of Limited Government in the Legal Positions of the Constitutional Court of Ukraine’ (2025) 8(1) Access to Justice in Eastern Europe 41, doi:10.33327/AJEE-18-8.1-a000107.
 - 5 Hryhorii Berchenko, ‘Judicial Interpretation as Informal Constitutional Changes: Questions of Legitimacy in the Aspect of the Doctrine of Constituent Power’ (2024) 7(2) Access to Justice in Eastern Europe 39, doi:10.33327/AJEE-18-7.2-a000203.

In contemporary legal science, the category of constitutional identity occupies a special place among the fundamental concepts of constitutionalism. Unlike classical principles such as the rule of law, democracy, human rights, or the separation of powers, it emerged relatively recently yet has already become a key element of doctrinal and judicial debates. Constitutional identity is commonly understood in constitutional doctrine to reflect the distinctive features of a constitutional order. It relates to the fundamental constitutional principles and so-called “immutable provisions” that either cannot be amended at all or may be revised only through particularly rigid constitutional amendment procedures.⁶

At the same time, the concept of constitutional identity is ambiguous: scholars continue to debate its relationship with the notion of national identity, as well as its scope and limits of application. In constitutional scholarship, constitutional identity is often associated with the idea of the constitutional “core,” namely those fundamental constitutional provisions and principles regarded as unalterable. At the same time, it is also viewed as a mechanism for defining the limits of interaction between the national constitutional order and supranational legal systems, particularly within the framework of European integration.⁷ These approaches have been shaped by the case law of European constitutional courts, which, in response to processes of integration and globalisation, seek to strike a balance between preserving sovereignty and respecting supranational institutions.

Attention in this context is drawn to the decisions of the Federal Constitutional Court of Germany (*Lissabon-Urteil*), the Constitutional Tribunal of Poland (K 32/09), the Constitutional Court of Hungary, as well as the doctrine of *controlimiti* developed by the Constitutional Court of Italy. These decisions formed the foundation for understanding constitutional identity as a universal doctrine intended to protect the “immutable core” of national constitutions from excessive interference by external legal systems.

For Ukraine, the concept of constitutional identity has acquired particular relevance amid the Russian Federation’s aggression and the need to strengthen the constitutional foundations of statehood.⁸ In its decision of 14 July 2021, No. 1-r/2021, the Constitutional Court of Ukraine, for the first time, explicitly defined the state language as an element of constitutional identity, equating threats to the Ukrainian language with threats to national security and to the very existence of the state.⁹ This approach demonstrates a gradual transition from the declarative to the practical dimension of protecting constitutional identity in Ukrainian constitutionalism.

6 Olena Boryslavska, ‘State Language and Constitutional Identity of Ukraine: The Nature of Interconnections’ (2023) 3 Ukrainian Journal of Constitutional Law 3, doi:10.30970/jcl.3.2023.1 [in Ukrainian].

7 Olena Boryslavska, ‘The Concept of Constitutional Identity: Between the Challenges of War and the Requirements of European Integration’ (2025) 3 Ukrainian Journal of Constitutional Law 3, doi:10.30970/jcl.3.2025.1 [in Ukrainian].

8 *ibid* 5.

9 Case no 1-179/2019(4094/19) decision no 1-r/2021 (Constitutional Court of Ukraine, 14 July 2021) [2021] Official Gazette of Ukraine 63/3978.

Therefore, the study of constitutional identity enables tracing the evolution of modern approaches to the relationship between national and supranational law and understanding how states preserve their uniqueness and sovereignty in an increasingly integrated world.

This study is based on a combination of comparative-legal, systemic-structural, and logical-legal methods. The comparative-legal method made it possible to analyse the approaches of constitutional courts of different European states to the doctrine of constitutional identity and to identify common and distinctive features in their jurisprudence. The systemic-structural method was used to examine constitutional identity as a complex phenomenon interconnected with sovereignty, constituent power, national identity, and European integration. The logical-legal method enabled the author to trace the evolution of doctrinal approaches to constitutional identity and to assess its role in protecting the constitutional foundations of statehood in contemporary conditions.

2 THEORETICAL ASPECTS OF UNDERSTANDING CONSTITUTIONAL NATIONAL IDENTITY

Although constitutional identity is a comparatively recent concept in constitutional doctrine, it has already acquired an important place in modern constitutional theory when contrasted with classical categories such as human rights, democracy, and the separation of powers. At the same time, it has already become established in legal science. According to the main approaches of constitutional doctrine, constitutional identity reflects the peculiarity and uniqueness of the constitution, embedded in its so-called “immutable provisions.”¹⁰

At the same time, constitutional scholarship has not yet developed a uniform understanding of constitutional identity. Considerable debate continues regarding its nature, content, and relationship to national identity, leading to the emergence of different, sometimes conflicting, doctrinal approaches.¹¹

Thus, if we turn to the work *The Constitution of Freedom* by A. Sajó and R. Uitz, in their opinion, constitutional identity is what is non-negotiable in times of constitutional change, for example, sovereign rights that may or may not be transferred to international organisations.¹²

M. Granat, a retired Judge of the Constitutional Tribunal of the Republic of Poland, identifies several functions of constitutional identity. In his view, constitutional identity is connected, first, with the protection of the fundamental principles and values that form the “core” of the constitution, including basic constitutional principles and human rights

10 Boryslavska, ‘State Language (n 6) 9.

11 Boryslavska, ‘The Concept of Constitutional Identity (n 7) 6.

12 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 65.

guarantees. Secondly, it determines the limits of permissible constitutional amendments by safeguarding those elements of the constitutional order that cannot be fundamentally transformed. Thirdly, constitutional identity performs an external function by defining the relationship between national constitutional law and European Union law and by limiting the extent of supranational influence on the national constitutional order.¹³

Professor Yu. Barabash, referring to the analysis of K. Bernal's opinion, points out that the essence of this concept generally lies in the recognition that the Constitution contains fundamental values and principles that define its "identity of the Constitution," and that undermining their essence is unacceptable in a legal democratic state. Based on this, the court's task is to block all constitutional initiatives aimed at the aforementioned values and principles, thereby preventing the "replacement of the Constitution". Importantly in this context, according to the scholar, the Court may, when interpreting the provisions defining constitutional identity, refer to human rights, the rule of law, the separation of powers, and deliberative democracy. It should be recognised that such doctrines of "constitutional identity" are, in fact, a weapon used by courts that display activism in defending constitutional values in the formal absence of adequate tools.¹⁴

M. Savchyn considers the concept of national constitutional identity more broadly. In his opinion, it includes the following main elements: "a) national constitutional culture and doctrine; b) legal style of decision-making; c) system of judicial constitutional review; d) institutional design: horizontal and vertical separation of powers; e) elections and control over power."¹⁵

According to M. Polzin, constitutional identity is closely connected with the constitution of a particular state, which generally relates either to the constructed identity of the "self" in relation to the constitution or to the identity of the constitution itself.¹⁶ Accordingly, the researcher distinguishes five different and independent discourses on constitutional identity: 1. The one that emerged from the European legal discussion arising from Article 4(2) of the Lisbon Treaty: constitutional identity as a counter-limit to EU law and as a justification for violating it;¹⁷ 2. The one that concerns national constitutional values as

13 Myroslaw Granat, 'Constitutional Identity and Its Significance' (2021) 4 Ukrainian Journal of Constitutional Law 4, doi:10.30970/jcl.4.2021.1 [in Ukrainian].

14 Yuri H Barabash, 'The Role of Academic Thought in the Formation of the Official Constitution of the Doctrine' (Mutual Achievements of the European Commission "For Democracy through Law" and Bodies of Constitutional Justice and Problems of Interpretation in Constitutional Proceedings: International Online Conference, Kyiv, 25 June 2020) 40 [in Ukrainian].

15 Mykhailo Savchyn, *Comparative Constitutional Law* (VAITE 2020) 37 [in Ukrainian].

16 Monika Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 18(7) German Law Journal 1595, doi:10.1017/S2071832200022458.

17 Within European constitutional discourse, constitutional identity is frequently regarded as a counter-limit to European Union law.

It allows states to accept processes of legal harmonisation and integration while retaining the authority to reject supranational norms perceived as incompatible with the fundamental constitutional principles that form the basis of the national constitutional order. See, Boryslavska, 'The Concept of Constitutional Identity' (n 7).

constitutional identity and their interaction with international public law: whether these values can justify violations of international law and to what extent. Here, constitutional identity is understood as an indication of the degree to which international bodies, particularly international courts, should take into account important national constitutional norms and or values, i.e., as part of the theory of judicial self-restraint;

3. Understanding constitutional identity as the constitution's identity with itself, that is, a purely normative concept. This understanding is particularly widespread in Germany and received significant impetus in judicial practice since the famous Lisbon Decision (BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil)), which defined constitutional identity as a legal concept describing the core of the German constitution that cannot be amended;¹⁸

4. An abstract doctrine situated in the interrelation between national tradition and the constitution. Here, constitutional identity is understood as a special collective identity of the people or nation, which is also expressed, defined, or shaped by the constitution;

5. Connected with immigration, which affects the nation's self-identification.¹⁹

According to O. V. Shcherbanyuk, constitutional identity is a system of interpretative arguments used by constitutional courts to justify decisions taken in cases concerning the conformity of constitutional norms to national specificity. Naturally, this concerns categories of so-called “hard cases” for which a system of strong reasoning is required.²⁰

According to O. Boryslavska, national identity reflects a community's identity, whereas constitutional identity represents its expression within the constitution. In this sense, the constitution can be viewed as a reflection of society's shared values and principles. The scholar emphasises that constitutional identity embodies the community's identity as the bearer of constituent power, manifested in the constitutional text as well as in the fundamental values and principles underlying it. Although this community is political in nature, it is grounded in the national identity of the state-forming subject whose exercise of the right to self-determination enabled the establishment of a sovereign state and the functioning of its constitution.²¹

18 Constitutional identity, understood as the identity of the constitution itself, is interpreted differently depending on the understanding of the nature of a constitution. One approach, reflected in the jurisprudence of the Federal Constitutional Court of Germany, associates constitutional identity with the fundamental constitutional values and principles that form the inviolable “core” of the constitution, protected by the eternity clause of the Basic Law.

Other scholars emphasise the distinctive features that make a constitution unique compared with other constitutional systems. Constitutional court jurisprudence has also developed a broader understanding of constitutional identity by extending it to the constitutional order. In this regard, the Constitutional Court of the Czech Republic, referring to the “eternity clause” in Article 9 of the Constitution, stated that the constitutional order of the Czech Republic, especially its substantive core, must prevail over European Union law. See, Boryslavska, ‘The Concept of Constitutional Identity’ (n 7) 9.

19 Polzin (n 16) 1597-8.

20 Oksana Shcherbanyuk, ‘Constitutional Identity in the Argumentation of Constitutional Court Decisions’ (2020) 3 Constitutional and Legal Academic Studies 77, doi:10.24144/2663-5399.2020.3.08.

21 Boryslavska, ‘State Language’ (n 6) 10.

Polish researcher E. Krzysztofik notes that the principle of respect for constitutional identity is examined both at the national level and within the European Union as an essential component of the broader concept of national identity. According to the scholar, national identity encompasses the values a nation develops and preserves that distinguish it from other communities. Constitutional identity, however, represents a more specific dimension, as it relates primarily to constitutional traditions, legal culture, and the political ideas that have evolved through the historical development of a particular state. In this regard, both national and constitutional identity play important roles in shaping the state's and the nation's positions within the system of international relations. At the same time, the principle of respect for national identity is regarded as one of the European Union's fundamental constitutional principles.²²

V. Kolisnyk, H. Berchenko, and T. Slinko quite reasonably emphasise that constitutional identity is an embodiment of constituent power, since indeed the constitution, as the fundamental act of the people, not only reflects their will but also serves as a key source of the formation of constitutional identity and at the same time functions as a mechanism for controlling the exercise of power.²³

Researcher O. Nykorak emphasises the strong connection between constitutional identity and national identity. She interprets constitutional identity as a set of distinctive characteristics embedded in the constitutional system and fundamental values of a particular state. These characteristics, on the one hand, contribute to the consolidation of citizens into a unified political community, such as a people or a nation, and on the other hand, distinguish the state, its nation, and its population from other states as well as from international and regional organisations and the broader global community.²⁴

V. Kovalchuk examines the relationship between constitutional and national identity and argues that constitutional identity may be understood as a distinctive collective identity of a nation embodied in its constitution. In this context, it includes the fundamental and stable provisions that reflect the underlying principles and the "spirit" of the constitution. According to the scholar, limitations on certain constitutional amendments are intended to safeguard the nation's existing identity by preventing changes that could eliminate the

22 Edyta Krzysztofik, 'The Principle of Respect for the Member States' National Identity with Regard to the Rights and Obligations of Migrant Citizens of the European Union' (2018) 57(79) *Proceedings of the Faculty of Law in Niš* 157, doi:10.5937/zrpfni1879157K.

23 Viktor Kolisnyk, Hryhorii Berchenko and Tetyana Slinko, 'Constitutional Identity as an Embodiment of Constituent Power' (2022) 29 (3) *Visnyk of the National Academy of Legal Sciences of Ukraine* 72, doi:10.31359/jnalsu.29(3).2022.69-88 [in Ukrainian].

24 Olha Nykorak, 'Constitutional Identity as a Category of Constitutional Law' (PhD thesis, Ivan Franko National University of Lviv 2023) 24 [in Ukrainian].

features that distinguish it from other peoples. Such restrictions protect the core elements of constitutional identity and help preserve the nation's uniqueness and sovereignty.²⁵

In European Union law, the concept of identity is primarily connected with the category of “national identity” rather than constitutional identity. The origins of this approach may be traced to the Maastricht Treaty of 1992, which required the European Union to respect the national identities of Member States whose systems of government are founded on democratic principles.²⁶ In its current version, Article 4(2) of the Treaty on European Union provides that the Union shall respect the national identities of the Member States inherent in their fundamental political and constitutional structures. References to national identity are also contained in other sources of EU law, including the Charter of Fundamental Rights of the European Union and the Treaty establishing a Constitution for Europe.²⁷ At the same time, the concept of constitutional identity itself was developed primarily through the jurisprudence of constitutional courts, which relied on these Treaty provisions in defining the limits of supranational influence on national constitutional orders.²⁸

In contemporary constitutional scholarship, two principal approaches to constitutional identity are usually distinguished, which J.L. Martí describes as the “identity of the constitution” and the “identity of the people.” The first approach associates constitutional identity with the fundamental values and principles embodied in the constitution itself, which form its immutable “core”. In this sense, constitutional identity encompasses those essential constitutional foundations that cannot be abolished or fundamentally distorted even through formal constitutional amendments, since they determine the democratic and legal character of the state.²⁹ These foundations include, in particular, human rights, the rule of law, the separation of powers, and democratic mechanisms of citizen participation. A key role in protecting these fundamental principles from any attempts to undermine them belongs precisely to the bodies of constitutional review.

As regards the relationship between constitutional and national identity, constitutional identity may be understood as a constitutional expression of the political community's identity, which constitutes the source of constituent power. Since constituent power is realised through the constitution, elements of national identity, including language, culture, traditions, and national symbols, become incorporated into the constitutional order and

25 Viktoriia Kovalchuk, ‘Constitutional Identity and National Values in the Conditions of Permanent Threats to Ukraine’s Stateship’ (2024) 86-1 Scientific Bulletin of Uzhhorod National University, Series: Law 207, doi:10.24144/2307-3322.2024.86.1.30.

26 Treaty on European Union (adopted 7 February 1992) [1992] OJ C 191/1.

27 Charter of Fundamental Rights of the European Union (adopted 2 October 2000) [2012] OJ C 326/391; Treaty establishing a Constitution for Europe (adopted 18 June 2004) [2004] OJ C 310/1.

28 Boryslavska, ‘State Language’ (n 6) 12.

29 Jose Luis Martí, ‘Two Different Ideas of Constitutional Identity: Identity of the Constitution v Identity of the People’ in Carina Alcobarro Llivina and Alejandro Saiz Arnaiz (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 17.

form part of constitutional identity. In this sense, constitutional identity reflects the community's national identity, as embodied in the constitution.³⁰ In the context of globalisation and European integration, modern constitutional theory increasingly emphasises the coexistence of multiple layers of identity. As noted in the literature, "nested identities are lower- and higher-order identities such that the latter encompass the former. My identity as a resident in city 'a' is nested in my identity as a resident of region 'A', which is in turn nested in my identity as a resident of country 'Alpha', and so on".³¹ This concept demonstrates that national and supranational identities are not necessarily mutually exclusive.

Empirical research further confirms that these identities may coexist within the same political community. As Díez Medrano and Gutiérrez observe, "people who identify strongly with Spain or with their region also identify strongly with Europe," indicating the emergence of a so-called "hyphenated identity" in the European context.³² Such an approach allows European integration to be perceived not as a threat to national or constitutional identity, but rather as a process that can coexist with the preservation of the state's fundamental constitutional values.

In this context, scholars also emphasise that the formation of European identity can be explained through different theoretical approaches. As noted in the literature, two main approaches are particularly relevant for understanding this process: the instrumental and the cultural approach. The instrumental approach assumes that European identification is based on individuals' rational evaluation of the benefits or losses associated with "being European," including economic opportunities, freedom of movement, and participation in European programmes.³³ At the same time, the cultural approach highlights the role of shared history, traditions, and civilisational ties in shaping a sense of belonging to Europe. As empirical studies demonstrate, "cultural considerations such as perceptions of a common civilisation, history, or ancestry also contribute to the development of European identity."³⁴ Thus, European identity may emerge both from pragmatic interests and from a shared cultural and historical space, which allows it to coexist with national and constitutional identities. Within this framework, constitutional identity serves to preserve the fundamental principles and values of the national constitutional order in the context of European integration. As noted in Ukrainian constitutional scholarship, constitutional identity may be

30 Boryslavska, 'The Concept of Constitutional Identity' (n 7) 8.

31 Luis Díez Medrano and Paula Gutiérrez, 'Nested Identities: National and European Identity in Spain' (2001) 24(5) *Ethnic and Racial Studies* 756, doi:10.1080/01419870120063963.

32 *ibid* 772.

33 Natalia Waechter, 'Instrumental and Cultural Considerations in Constructing European Identity among Ethnic Minority Groups in Lithuania in a Generational Perspective' (2017) 45(4) *Nationalities Papers* 652, doi:10.1080/00905992.2016.1258048.

34 *ibid* 653.

understood as a safeguard protecting the core of the constitution and the fundamental values it embodies, even under conditions of increasing supranational legal influence.³⁵

The doctrinal approaches discussed above demonstrate that constitutional identity may be understood both as the identity of the constitution itself and as the constitutional expression of the political community's identity. For the purposes of this study, constitutional identity is understood as a combination of these two dimensions, with particular emphasis on the latter. In this regard, it is worth agreeing with O. Boryslavska's position that repeated references to national (political) culture as a determinant of constitutional identity are, in essence, references to national identity itself since such culture constitutes one of its elements and serves as a source of constitutional identity. Accordingly, constitutional identity encompasses, on the one hand, the fundamental constitutional principles that form the constitutional core and, on the other hand, the values and characteristics of the political community embodied in the constitution by constituent power.³⁶ National identity, as the identity of the community exercising constituent power, forms the foundation of constitutional identity. Through constituent power, elements of national identity, including language, culture, traditions, and symbols, become embodied in the constitution and transformed into components of constitutional identity.

3 THE DOCTRINE OF CONSTITUTIONAL IDENTITY IN THE DECISIONS OF CONSTITUTIONAL COURTS OF EUROPEAN STATES

This section identifies the principal approaches developed in the jurisprudence of European constitutional courts concerning the doctrine of constitutional identity. The comparative analysis of constitutional case law demonstrates how national constitutional courts use constitutional identity both to protect the fundamental principles of the constitutional order and to define the limits of the primacy of European Union law within domestic legal systems. Against the background of deepening European integration, the question of the limits of the primacy of European Union law over national legal systems has attracted increasing scholarly and judicial attention. In response to the growing scope of EU competences, national constitutional courts have begun to invoke the concept of constitutional identity as an instrument to safeguard state sovereignty and protect the fundamental principles of national constitutional orders. In this regard, the practice of European constitutional courts demonstrates a growing recognition that the application of EU law within domestic legal systems may be subject to certain constitutional limitations.³⁷

35 Stanislav Shevchuk, 'Constitutional and European Identity in the Protection of Fundamental Rights: Ukrainian Dimension' (2025) 10 *Law of Ukraine* 49, doi:10.33498/louu-2025-10-048 [in Ukrainian].

36 Boryslavska, 'State Language' (n 6) 10.

37 Maksym Solokha, 'Protection of Constitutional Identity in the Context of Interaction between National Law and European Union Law' (2025) 3 *Pravo.ua* 43, doi:10.71404/LAW.UA.2025.3.7 [in Ukrainian].

First, attention should be paid to the legal positions of the Federal Constitutional Court of Germany, which was among the first to address the primacy of EU law over the German Basic Law. In its judgment of 29 May 1974 in the *Solange I* case, the Court did not recognise the automatic primacy of EU law over national constitutional law.³⁸ The Court noted that Article 24 of the Basic Law does indeed provide for the transfer of sovereign rights to supranational institutions, but it cannot be interpreted in an absolute sense, since “it does not open the way to altering the basic structure of the Basic Law, which forms the foundation of its identity, without formally amending the Basic Law.” In addition, the Court referred to the protection of fundamental rights, noting that the section of the Basic Law concerning fundamental rights is an inalienable, essential feature of the existing Basic Law of the Federal Republic of Germany and forms part of its constitutional structure. It therefore concluded that the German Constitution contains fundamental rights that can under no circumstances be restricted by EU law until legal certainty in this sphere is achieved at the EU level. Consequently, if the integration process has not been completed and the EU does not provide an adequate level of protection for these rights, in the event of conflicts between legal norms, Germany’s constitutional guarantees retain priority.

In its subsequent judgment of 22 October 1986 in the *Solange II* case, the Federal Constitutional Court of Germany somewhat softened its legal stance, recognising that human rights under EU law were already sufficiently protected.³⁹ Therefore, as long as the EU ensures effective protection of fundamental rights, the Court would no longer review European legal acts for compliance with the Basic Law.

One of the most important decisions in the context of the doctrine of constitutional identity, which significantly influenced the development of approaches of other national constitutional courts that began to apply the concept of constitutional identity more actively in their jurisprudence, was the judgment of the Federal Constitutional Court of Germany of 30 June 2009 in the *Lisbon* case.⁴⁰ In the Lisbon judgment, the Court supplemented the previously developed mechanisms for reviewing EU actions, the review of fundamental rights (*Solange I*) and the *ultra vires* control (*Maastricht*), with a new type of review: the control of EU legal acts for compliance with Germany’s constitutional identity.

First, the Court granted legal legitimacy to the concept of constitutional identity, formulating its content on the basis of the “eternity clause” of Article 79(3) of the Basic Law, which protects the fundamental elements of the constitutional order: the democratic and social character of the state, the principles of sovereignty, the rule of law, popular representation, social security, and human dignity (Articles 1 and 20 of the Basic Law). In particular, the Court clarified that Article 79(3) of the Basic Law defines the Constitution’s identity (para. 208). By means of the so-called eternity guarantee, the regulation of the

38 Case no 2 BvL 52/71 *Solange I* (Bundesverfassungsgericht, 29 May 1974) BVerfGE 37/271.

39 Case no 2 BvR 197/83 *Solange II* (Bundesverfassungsgericht, 22 November 1986) BVerfGE 73/339.

40 Case no 2 BvE 2/08 *Lissabon* (Bundesverfassungsgericht, 30 June 2009) BVerfGE 123/167.

identity of the free constitutional order is excluded from the powers of the legislature amending the Basic Law: “The Basic Law not only prescribes the sovereign statehood of Germany but also guarantees it” (para. 216). The Federal Constitutional Court of Germany interprets Article 4(2) of the Lisbon Treaty as obliging respect for the constitutional principles of the Member States, as well as for their constituent power (paras. 234, 235).

Second, the Court linked the concept of constitutional identity with the constituent power of the German people. In its view: “The constituent power of the Germans, who adopted the Basic Law for themselves, intended to establish an insurmountable boundary to any future political development. Amendments to the Basic Law that affect the principles set out in Articles 1 and 20 of the Basic Law are inadmissible (Article 79(3) of the Basic Law)”. The Court emphasised that the EU derives legitimacy only through the Member States as the “masters of the Treaties,” not through an abstract “European demos.”

Third, the Court established a procedural control mechanism: any citizen may file a constitutional complaint challenging EU actions that, in their view, contradict Germany’s constitutional identity. This made the Court the sole arbiter in the sphere of identity protection.

Fourth, the Court imposed obligations on the government and parliament to act within the limits defined by this doctrine. It established the requirement for parliamentary control over the use of the flexibility clause (Article 352 TFEU) and the “passerelle” clause (Article 48(7) TEU) to prevent the hidden or opaque expansion of EU competences without the approval of the German legislature.⁴¹

At the same time, the Court stressed that the protection of constitutional identity must not become an instrument of isolationism: review must be conducted in a spirit of openness towards European law and genuine cooperation. However, in the event of violations of these principles, whether through exceeding delegated powers (*ultra vires*) or encroachments upon identity, EU law is not applicable within the German legal order.

Thus, precisely through the safeguard of “eternity,” the Federal Constitutional Court of Germany developed the doctrine of constitutional identity.⁴² Such legal positions of the German constitutional review body laid the foundation for the further development of the doctrine of national constitutional identity on the European continent.

For instance, in its judgment of 24 November 2010 (K 32/09), the Constitutional Tribunal of Poland held that the identity of the Constitution of the Republic of Poland is defined by “non-transferable powers of state authorities,” which are determined by various provisions of this act.⁴³ The Tribunal further stated that “non-transferable powers” also stem from the sovereignty of the state, the normative expression of which is the Constitution of the

41 *ibid*

42 Kolisnyk, Berchenko and Slinko (n 23) 75, 79.

43 Case no K 32/09 (Constitutional Tribunal of Poland, 24 November 2010) [2010] DzU 229/1506.

Republic of Poland itself. The competences prohibited from transfer reflect the values on which the Polish Constitution is based. These competences correspond to the “hard core” (“the cardinal foundations of the system of government”). Thus, the Court’s reasoning shows that it leaned towards the category of state powers (those which can never be transferred to EU institutions). However, the Polish experience after 2021 demonstrated that the doctrine of constitutional identity may be transformed from a legitimate constitutional mechanism into an instrument used to justify anti-constitutional practices. In the context of the judicial reforms initiated in Poland, the Constitutional Tribunal increasingly relied on the concepts of sovereignty and constitutional identity to challenge the binding force of interim measures and judgments of the Court of Justice of the European Union concerning judicial independence. In this respect, references to the “non-transferable core” of sovereignty no longer served primarily to protect democratic constitutional values but were increasingly used to justify legislative measures aimed at expanding political control over the judiciary.

This situation revealed a significant risk inherent in the doctrine of constitutional identity: in the absence of an independent and legitimate constitutional court, constitutional identity may become a tool for weakening the rule of law rather than protecting the constitutional order. In this regard, it is worth supporting the position of O. Boryslavska that the plurality and indeterminacy of approaches to constitutional identity create risks of misuse of this doctrine in constitutional practice.⁴⁴ Unlike the approach of the Federal Constitutional Court of Germany, which traditionally maintained constitutional dialogue with the Court of Justice of the European Union through procedural cooperation, the Polish Constitutional Tribunal increasingly asserted the unconditional primacy of its own position without relying on mechanisms of judicial dialogue.

The reaction of European institutions to the developments in Poland was also of fundamental importance. In its judgments concerning Poland delivered in 2021 and subsequent years, the European Court of Human Rights emphasised that a body formed in violation of constitutional requirements could not be regarded as a “tribunal established by law.” Likewise, the Court of Justice of the European Union has repeatedly stressed that the principles of judicial independence, autonomy, and the primacy of EU law are binding on all Member States. This position was further reaffirmed in the judgment of the Court of Justice of the European Union of 18 December 2025 in *European Commission v Republic of Poland* (Case C-448/23), in which the Court emphasised that references to constitutional identity cannot justify disregard for the fundamental principles of the European Union legal order.⁴⁵ The Polish case, therefore, demonstrated that the doctrine of constitutional identity may serve either as a constitutional safeguard of democratic order or, conversely, as a mechanism for legitimising its erosion, depending on the institutional legitimacy and independence of the constitutional court applying it.

44 Boryslavska, ‘The Concept of Constitutional Identity’ (n 7) 5.

45 Case no C-448/23 *European Commission v Republic of Poland* (CJEU Grand Chamber, 18 December 2025) ECLI:EU:C:2025:975.

In its judgment of 30 November 2016 (22/2016. (XII. 5.) AB), the Constitutional Court of Hungary emphasised that the respect for and protection of the country's sovereignty and constitutional identity is an obligation of all state bodies, including the National Assembly and the government, which participate in the EU's decision-making mechanisms. According to Article 24(1) of the Basic Law, the Constitutional Court is the main body responsible for this protection.⁴⁶

The Court determined that constitutional identity is not a static or closed list of values, but its key elements include: human rights and freedoms, separation of powers, republican form of government, autonomy of public law, freedom of religion, lawful exercise of power, parliamentarism, equality of rights, recognition of the independence of the judiciary, and protection of national minorities. These principles reflect the heritage of the historical constitution, which underlies the Basic Law and the entire Hungarian legal system.⁴⁷

Relying on Article 4(2) TEU, the Constitutional Court ruled that national authorities may disregard EU acts if they infringe on the country's sovereignty or constitutional principles, thereby allowing a broad interpretation of Article 4(2) without necessarily making a preliminary reference to the CJEU. In its judgment of 5 December 2016, the Court clarified that, in exceptional cases and as a last resort, it may review whether human dignity, the essence of fundamental rights, the sovereignty of the country (including the scope of transferred competences), or constitutional identity has been violated. At the same time, the Court stressed the necessity of constitutional dialogue with EU institutions and other Member States' constitutional courts based on equality, mutual respect, and cooperation.

In addition to the already known review mechanisms, compliance with rights and freedoms and *ultra vires* review, the Hungarian Constitutional Court introduced two new mechanisms: sovereignty review and constitutional identity review. This underscores the Court's aspiration to strike a balance between protecting national interests and fulfilling obligations within the European Union.

Accordingly, the Constitutional Court of Hungary, beyond the existing mechanisms of review such as compliance with fundamental rights and *ultra vires* review, introduced two additional types: sovereignty review and constitutional identity review. The Court also developed its own interpretation of "constitutional identity," which it linked to Hungary's "historical constitution".

The Constitutional Court of Latvia remained sceptical of the concept of the inviolable core of the Satversme for quite a long time.⁴⁸ The concept of constitutional identity began to

46 Decision no 22/2016 (XII. 5.) AB (Constitutional Court of Hungary, 30 November 2016).

47 Petra Bárd, Nóra Chronowski and Zoltán Fleck, *Inventing Constitutional Identity in Hungary* (MTA Law Working Papers no 6, ELKH 2022) doi:10.2139/ssrn.4100075.

48 Artūrs Kučs and Jānis Pleps, 'Constitutional Identity Between Riga and Strasbourg: The Courts' Dialogue Developing Latvian Constitutional Law' (2024) 17 Journal of the University of Latvia, Law 193, doi:10.22364/jull.17.12.

appear in the Constitutional Court's practice only in 2015. Since that time, the Court has relied on this concept in several of its decisions, although its interpretation has not always aligned with the understanding initially proposed by the Constitutional Law Commission. Because of these differences in interpretation and application, the proper use of the concept of constitutional identity requires careful analysis of the Constitutional Court's relevant jurisprudence. In its recent case law, the Court has emphasised that every state possesses its own constitutional identity, which differentiates it from other states. The formation of such identity, including constitutional identity, does not occur instantly but develops gradually under the influence of historical circumstances and political evolution. For this reason, constitutional identity should not be perceived as a fixed or immutable concept. Rather, it represents a dynamic phenomenon that evolves together with the development of the state and its constitutional system. At the same time, constitutional identity encompasses two closely interconnected dimensions: the identity of the state itself and the identity of its constitutional order.

From this perspective, constitutional identity addresses not only the question of what a particular state is, but also what characterises its constitutional structure. In terms of statehood, identity reflects the classical elements recognised in international law: territory, population, and sovereign authority. However, when these elements are expressed in a constitution, they are interpreted through the broader context in which the state exists. As a result, the constitution also reflects factors that extend beyond strictly legal considerations, including the state's historical development, political traditions, and the society's national and cultural characteristics. These elements help shape the state's overall identity as expressed in its constitutional framework. At the same time, the identity of a particular constitutional order is defined primarily by the fundamental legal principles that organise and characterise that order. Consequently, constitutional identity should be understood as a complex and multidimensional concept comprising elements of various kinds, not all of which necessarily function as binding legal rules. Certain principles embedded in the constitutional framework play a central role in defining the character of the constitutional system. For example, overarching principles such as democracy, the rule of law, the nation-state, and the concept of a socially responsible state may determine the fundamental features of a state's constitutional order. In addition to these principles, constitutions often include references to other elements that help define the state's identity. Such references may include the historical development of the state and the nation, the traditions of the society, the circumstances surrounding the state's establishment, the purposes for which the state was created, and other factors that contribute to understanding the distinctive character of a particular political community. From a constitutional law perspective, these elements help identify and interpret the state's specific constitutional order. They give meaning to the constitutional framework and contribute to understanding the context in which constitutional principles operate. Thus, the elements that form constitutional identity include both legal principles that structure the constitutional system and broader value-based considerations that

influenced the historical development of that system. While some of these elements constitute binding legal norms, others serve as interpretative references that explain the evolution and foundations of the constitutional order. Together, they reflect the values, traditions, and historical experiences that have shaped the state's constitutional identity.⁴⁹

D. Žalimas, in his study *The Doctrine of Supra-Constitutionality and Lithuanian Constitutional Identity*, analyses the development of the concept of constitutional identity in the jurisprudence of the Constitutional Court of Lithuania. In this work, the author uses the notion of “constitutional identity” to describe the set of constitutional principles and norms that express the fundamental character of the constitutional order and constitute the constitution's protected core. According to Žalimas, these elements represent the essential foundations of the constitutional system and therefore require a higher level of protection within the constitutional framework. At the same time, the scholar stresses that the concept of constitutional identity should not be equated with the doctrine of supra-constitutionality. In his view, constitutional identity has a broader meaning. While the doctrine of supra-constitutionality focuses primarily on the unchangeable core of the constitution, constitutional identity also includes constitutional traditions and historically shaped constitutional values that have developed within a particular constitutional order. These traditions, together with the fundamental constitutional principles, play an important role in defining the specific character of the Lithuanian constitutional system. Žalimas also explains that the doctrine of supra-constitutionality itself rests on several assumptions. First, certain provisions forming the core of the constitution must be recognised as possessing a special status that places them above ordinary constitutional amendments. These provisions are considered to have a higher normative authority because they express the fundamental values and structural principles of the constitutional order. Second, these core provisions, together with the fundamental constitutional principles that cannot be amended, collectively determine Lithuania's constitutional identity and ensure the continuity and stability of its constitutional system.⁵⁰

Žalimas notes that the origins of the doctrine later described as supra-constitutionality can already be traced in the jurisprudence of the Constitutional Court of Lithuania, particularly in its rulings of 24 January 2014 (Case No. 22/2013) and 11 July 2014 (Case No. 16/2014-29/2014). According to the scholar, these decisions illustrate the early stage of the development of this doctrine, which was subsequently consolidated in the Court's official case law. In these rulings, the Court emphasised that the Constitution derives its legitimacy from the state community understood as a civic nation. In its ruling of 11 July 2014, the Constitutional Court underlined that such values as the inherent nature of human rights and freedoms, democracy, and state independence form the foundation of the Lithuanian constitutional

49 Case no 2020-39-02 (Constitutional Court of the Republic of Latvia, 4 June 2021) para 14.1 <<https://www.satv.tiesa.gov.lv/web/viewer.html>> accessed 25 December 2025.

50 Dainius Žalimas, “The Doctrine of Supra-Constitutionality and Lithuanian Constitutional Identity” (2022) 15 Journal of the University of Latvia, Law 5, doi:10.22364/jull.15.01.

order. These values constitute the essential basis of the Constitution; therefore, denying the constitutional provisions that embody them would mean denying the Constitution's very essence. Žalimas further observes that an important step in the development of this doctrine occurred in the ruling of 30 July 2020, which he describes as historic for Lithuanian constitutional jurisprudence. In this decision, the Constitutional Court explicitly acknowledged the doctrine of supra-constitutionality and recognised that certain fundamental constitutional acts possess a special normative status and form the core of constitutional identity. In particular, the Court considered that the fundamental values expressed in the 1918 Declaration of Independence, the 1990 Act on the Re-establishment of the Independent State of Lithuania, and other foundational acts represent principles of exceptional constitutional significance. These acts define the essential foundations of the Lithuanian state and therefore possess a higher normative authority within the constitutional order. Consequently, the Court concluded that such fundamental constitutional acts form part of the constitutional core and cannot be denied even during constitutional revision.⁵¹

Therefore, even though the Court did not explicitly mention the term "constitutional identity" in the 2020 ruling, it effectively acknowledged that Lithuania's constitutional identity rests on fundamental acts with supra-constitutional force, which cannot be annulled or amended, even by constitutional amendments. Accordingly, no constitutional modifications may contradict the immutable core that defines the identity of Lithuanian statehood: independence, democracy, and human rights.

Reference should also be made to the concept of counter-limits, or constitutional boundaries, which originated in Italian legal doctrine and was advanced by Paolo Barile. According to his approach, the legal effect of EU and UN law in the national legal system is limited, and the degree of integration of supranational norms depends on their conformity with the general principles of the country's constitutional order. These principles are recognised as a barrier (counter-limit), a kind of restriction on the effect of community norms.

The Constitutional Court of the Italian Republic was the first to introduce the idea of constitutional identity in its doctrine of "counter-limits" (*controlimiti*). In its judgment of 18 December 1973 in the *Frontini* case, the Court officially recognised the principle of primacy of EU law, but at the same time laid the foundation for the formation of the doctrine of *controlimiti*.⁵²

The Court held that, pursuant to Article 11 of the Constitution of Italy, the transfer of part of sovereignty is permitted solely for the purposes expressly defined in this article.

51 *ibid*

52 Case no 183/1973 *Frontini* (Italian Constitutional Court, 18 December 1973) <<https://www.cortecostituzionale.it/scheda-pronuncia/1973/183>> accessed 25 December 2025.

Therefore, the limitations of sovereignty envisaged by the Rome Treaty, concluded between states whose legal systems are based on the principles of the rule of law and which guarantee fundamental freedoms, cannot be interpreted as granting the institutions of the European Communities the authority to violate the fundamental principles of the constitutional order or the inalienable rights of individuals.

Accordingly, the Constitutional Court stressed that Italy may join international treaties and organisations that provide for limitations on sovereignty, but only insofar as they do not conflict with fundamental constitutional principles and fundamental human rights.

Furthermore, the Court expressly reserved to itself the right to exercise constitutional review of European treaties under Article 11 of the Constitution, emphasising that in the event of doubts as to their conformity with constitutional principles, “the guarantee of judicial review by this Court will always be ensured.”⁵³

Thus, even in the process of European integration, Italy retains the ability to protect its constitutional principles, if necessary, by limiting the application of EU law norms. This doctrine of *controlimiti* (often translated as the counter-limits doctrine) was later developed in the judgment of the Constitutional Court of Italy of 5 June 1984 in the *Granital* case.⁵⁴

The analysed jurisprudence demonstrates that European constitutional courts generally recognise constitutional identity as a constitutional limit to the primacy of European Union law. Although the courts acknowledge the importance of European integration and the binding nature of EU law, they simultaneously emphasise that supranational norms cannot prevail where they threaten the fundamental principles of the constitutional order, the constitutional core, or essential constitutional rights. At the same time, the approaches developed by constitutional courts differ significantly. While some courts, particularly the Federal Constitutional Court of Germany and the Constitutional Court of Italy, view constitutional identity primarily as an instrument of constitutional dialogue and balanced interaction with EU law, other courts have interpreted it more broadly as a mechanism for safeguarding sovereignty and restricting supranational influence. Thus, the doctrine of constitutional identity has become one of the key instruments through which European constitutional courts seek to reconcile participation in European integration with the preservation of national constitutional autonomy.

53 *ibid*

54 Case no 170/1984 *Granital* (Italian Constitutional Court, 5 June 1984) <<https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1984&numero=170>> accessed 25 December 2025.

4 GUARANTEEING CONSTITUTIONAL NATIONAL IDENTITY IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

When addressing this issue, it is necessary first to focus on the external aspect of constitutional identity, which found its expression in the amendments introduced to the preamble to the Constitution of Ukraine, namely: "...affirming the European identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course, ...". Thus, only in 2019 did Ukraine finally, at the level of its Basic Law, clearly declare its objective of acquiring membership in the European Union and NATO. As Yu. Barabash rightly observes that, in Ukraine, this issue was complicated by the political establishment's ongoing "flirtation" with Russia, a neighbour that openly maintained imperial ambitions, and by its reluctance to fully embrace the European path of development.⁵⁵ Even the basic step of enshrining a commitment to EU and NATO integration in the Constitution of Ukraine, along with establishing minimal mechanisms to protect national identity, provoked a severe response from the Kremlin.

The external aspect of constitutional identity enshrined in the preamble to the Basic Law necessitates harmonising national legislation with that of the European Union. Consequently, the issue of defining the scope of authority of the national body of constitutional jurisdiction in relation to possible constitutional review of acts of European Union institutions becomes particularly significant.

As was already noted in the first part of this article, the doctrine of constitutional identity is fundamentally shaped by its national aspect, that is, the national self-identification of a given political nation and state.⁵⁶ As scholars emphasise, constitutional identity is "revealed" through the reconstruction of the historical facts of a nation's life. Therefore, the foundation of national constitutional identity lies in the idea of a political nation as a stable community of people that historically emerged from a common language, territory, economic life, and psychological traits, which manifest in shared culture and statehood. It should be emphasised that a peculiarity of the Basic Law of Ukraine is that the concept of the nation is employed both in a political sense (as "the people") and in an ethno-cultural sense (as "the Ukrainian nation"). Reference to the Ukrainian nation is found in the Preamble, which states that the Constitution of Ukraine was adopted based on "the Ukrainian nation's, the entire Ukrainian people's exercise of the right to self-determination." Moreover, several provisions enshrine the following: "the state shall promote the consolidation and development of the Ukrainian nation" (Article 11); "land is the principal national wealth" (Article 14); "Ukraine's foreign policy activities shall be aimed at ensuring its national

55 Yuriy Barabash, 'Is It Possible to Preserve Statehood Without Protection of National Identity? (Some Lessons from Post-Soviet Constitutionalism Based on the Experience of Ukraine)' (2025) 18(6) *Baltic Journal of Law & Politics* 34, doi:10.2478/bjlp-2025-0004.

56 Granat (n 13) 4-5.

interests” (Article 18). According to Yu. H. Barabash, this position of the parliamentarians is explained by “their insufficient confidence that the ethnic factor, after the adoption of the Constitution, would not further intensify to the extent of encouraging separatist sentiments and the emergence of interethnic conflicts”.

This particular aspect of constitutional identity was first recognised by the Constitutional Court of Ukraine when it formulated the relevant concept in its ruling of 14 July 2021, No. 1-r/2021, in the case upon the constitutional petition of 51 Members of Parliament of Ukraine concerning the conformity of the Law of Ukraine “On Ensuring the Functioning of the Ukrainian Language as the State Language” with the Constitution of Ukraine:

“Taking into account the previous official interpretation of Article 10 of the Constitution of Ukraine and further developing it, the Constitutional Court of Ukraine notes that the legal status of the Ukrainian language as the state language, enshrined in parts one and two of Article 10 of the Constitution of Ukraine, constitutes a fundamental constitutional value, an inherent feature and a key factor of unity (sobornist) of the Ukrainian state, and an integral part of its constitutional identity.”⁵⁷

It should also be emphasised that the change in Ukraine’s state policy and this legal position of the Constitutional Court on the language issue were dictated by the large-scale invasion and occupation of Ukrainian territories by the aggressor state in 2014. One of the narratives of Russian propaganda on the eve of the occupation of Crimea was the decision of the Verkhovna Rada of Ukraine of 23 February, adopted in the midst of revolutionary events, to repeal the Law “On the Principles of State Language Policy,”⁵⁸ enacted under V. Yanukovych, which in practice had granted the Russian language the status of a second official language. Although Parliament voted to repeal this act, the then Acting President O. Turchynov did not sign it, being aware of the negative consequences of such a step. The problem was that the repeal of the law occurred without the adoption of a new normative act to regulate language, thereby creating a potential legal vacuum and providing grounds for further political manipulation.⁵⁹

The final point in this matter was made by the Constitutional Court of Ukraine, which, by its Decision of 28 February 2018, No. 2-r/2018, declared this law unconstitutional.⁶⁰

Another important stage in the transformation of language policy was the adoption on 25 April 2019 of the Law of Ukraine “On Ensuring the Functioning of the Ukrainian Language as the State Language,” which significantly strengthened the position of the

57 Case no 1-179/2019(4094/19) (n 9).

58 Law of Ukraine no 1190 ‘On the Recognition of the Law of Ukraine “On the Principles of State Language Policy” as Invalid’ (adopted 23 February 2014) <<https://www.rada.gov.ua/news/Povidomlennya/88068.html>> accessed 25 December 2025.

59 Barabash (n 55) 43.

60 Case no 1-1/2018 decision no 2-r/2018 (Constitutional Court of Ukraine, 28 February 2018) [2018] Official Gazette of Ukraine 37/ 1315.

Ukrainian language in public and state life.⁶¹ The Verkhovna Rada adopted this law to reinforce the state-building and integrative role of the Ukrainian language and to increase its importance in safeguarding the country's territorial integrity and national security. These measures are intended to promote the unity of Ukrainian society and to counter attempts to justify territorial expansion by invoking claims of "protecting" Russian-speaking populations. The consolidation of Ukrainian citizens in resisting Russian aggression and achieving victory over the invader may become an important element of collective historical memory that shapes the Ukrainian political nation as a multiethnic, multilingual and multiconfessional community. This understanding also guided the Verkhovna Rada when, on 13 December 2022, it adopted the Law of Ukraine "On the Basic Principles of State Policy for Affirming Ukrainian National and Civic Identity."⁶²

The Constitutional Court of Ukraine emphasised that threats to the Ukrainian language should be regarded as threats to national security, the existence of the Ukrainian nation, and the statehood of Ukraine. According to the Court, language represents not only a means of communication but also a unique code of the nation. If the Ukrainian language does not function fully across all spheres of public life throughout the territory of Ukraine, there is a risk that the Ukrainian nation may lose its role as the titular and state-forming nation, which, in turn, could jeopardise the continued existence of the Ukrainian state. In this context, the Court stated that the Ukrainian language constitutes an essential condition (*conditio sine qua non*) for Ukraine's statehood and territorial integrity. Ukraine is the only territory where the preservation, existence, and comprehensive development of the Ukrainian language, and, consequently, of the Ukrainian nation as a state-forming community, can be ensured. For this reason, any attempts to undermine the legal status of the Ukrainian language as the state language within Ukraine are inadmissible, since such actions would violate the constitutional order, threaten national security, and endanger the very existence of Ukrainian statehood (para. 4.1(6), section 4 of the reasoning part).⁶³

Furthermore, considering the current circumstances resulting from the military aggression of the Russian Federation and the use of the "language issue" as an instrument of geopolitical expansion, the Constitutional Court stressed that threats directed at the Ukrainian language must equally be considered threats to the national security of Ukraine (para. 13.9(1), section 13 of the reasoning part).⁶⁴

Thus, over the past decade, positive changes have occurred in Ukraine: the Ukrainian language, as the state language, has come to be perceived and understood as a symbol of the country and as one of the key factors in consolidating the multiethnic people of

61 Law of Ukraine no 2704-VIII 'On Ensuring the Functioning of the Ukrainian Language as the State Language' (adopted 25 April 2019) [2019] Official Gazette of Ukraine 41/1422.

62 Law of Ukraine no 2834-IX 'On the Basic Principles of State Policy for Affirming Ukrainian National and Civic Identity' (adopted 13 December 2022) [2023] Official Gazette of Ukraine 3/199.

63 Case no 1-179/2019(4094/19) (n 9).

64 *ibid*

Ukraine. As emphasised by the Constitutional Court of Ukraine, the Ukrainian language, alongside the State Flag, the State Emblem, and the State Anthem, is an inseparable attribute of the Ukrainian state. Therefore, any manifestations of disrespect toward it should be regarded as acts that disgrace the state itself and, consequently, are inadmissible. Public mockery of, or deliberate disparagement of, the Ukrainian language constitutes an encroachment upon the constitutional order of Ukraine and an insult to the national dignity of its citizens, which must be prosecuted under the law (decision of 14 July 2021, No. 1-r/2021). Hence, O. Boryslavska's assertion that the state language forms part of constitutional identity precisely because it is an essential component of national identity deserves agreement. Given the history of the Ukrainian language, not only difficult, marked by numerous attempts to prohibit, eradicate, or suppress it, but also often tragic—the provision designating it as the sole state language belongs to the category of constitutional norms that form the core of the Constitution, enjoy special protection, and constitute part of constitutional identity.⁶⁵

Analysis of this decision shows that the national body of constitutional review did not link constitutional identity directly to issues of European integration, but rather approached it through the prism of national self-identification, employing the concept to strengthen the argumentation for the constitutionality of the language law and to attribute to certain elements of the constitutional order (whether to all remains debatable) the characteristic of constitutional identity.⁶⁶

At the same time, an analysis of the Constitutional Court of Ukraine's decision indicates that this practice by constitutional review bodies is not unique. For example, the Lithuanian Constitutional Court addressed the issue of national identity in its ruling of 21 October 1999 (Case No. 14/98), concerning the spelling of names and surnames in passports. In particular, the Court noted that “The provisions of the Resolution, which stipulate that a person's name and surname in the passport shall be written in Lithuanian characters and according to the pronunciation of the name and surname, are applicable to all citizens without exception, irrespective of their nationality and other characteristics. The Court therefore ruled that the Resolution is not contrary to the Constitution”.⁶⁷ As E. Orbán observes, the Constitutional Court of Lithuania in its ruling of 21 October 1999 confirmed the legality of the practice of recording names and surnames in passports in accordance with Lithuanian language rules, notwithstanding objections raised by certain individuals and minority groups. This case demonstrates that national courts may reject a more liberal approach when it is necessary to protect linguistic standards or constitutional traditions

65 Boryslavska, ‘State Language’ (n 6) 13.

66 Hryhorii Berchenko, ‘Respect for the Constitutional Identity of the EU Member States: Prospects for Ukraine’ (Ukrainian Constitutionalism: Challenges Born of Freedom: International Scientific Conference, Kharkiv, 23 December 2022) 34 [in Ukrainian].

67 Case no 14/98 (Constitutional Court of the Republic of Lithuania, 21 October 1999) <<https://lrkt.lt/en/court-acts/search/170/ta1147/content>> accessed 25 December 2025.

connected to national identity.⁶⁸ In other words, this case demonstrates how national courts can prioritise the protection of linguistic norms and identity-related constitutional traditions over more permissive or flexible policies.

A similar approach can be observed in the Constitutional Court of Latvia's case law concerning the protection of the state language. In its judgment of 23 April 2019, the Court considered whether several legal provisions governing the proportion of state-language and minority-language use in primary education, as well as the transition to state-language education at the secondary level, were compatible with the Satversme. In this decision, the Court noted that "the Preamble to the Satversme reveals the values that are the basis for building an inclusive democratic society. The Latvian language is one of these values. It is an integral part of the constitutional identity of the Latvian state. The function of the state language to be the common language of society's communication and democratic participation follows from the constitutional status of the state language."⁶⁹ In its judgment of 15 February 2024, the Constitutional Court of Latvia examined a transitional provision of the Immigration Law that introduced new requirements for Russian citizens holding permanent residence permits, including the obligation to demonstrate a certain level of proficiency in the state language. In reviewing the constitutionality of this regulation, the Court addressed the relationship between language policy and the protection of the constitutional order. It emphasised that "...the Latvian language is an integral part of the constitutional identity. The national language is the common language of society's communication and democratic participation. Moreover, Latvia is the only place in the world where the existence and development of the Latvian language and thus the Latvian nation can be guaranteed. The state has an obligation to develop and defend the only state language, Latvian. The narrowing of the use of the Latvian language as the state language in the national territory can also be considered a threat to the democratic state system. Therefore, the restriction of fundamental rights, as contained in the contested norm, is aimed at strengthening the state language and protects a democratic state system. In addition, such regulation is also aimed at protecting the right of Latvian residents, including nationals, to use the national language. In other words, the restriction contained in the disputed norm is aimed at ensuring that persons who lead their daily lives in Latvia, form social ties, work, engage in daily communication with other people, should be able to use the Latvian language at least at a basic level, and thus it protects the right of individuals to use the national language in communication. Therefore, the limitation of fundamental rights contained in the contested norm in the aspect of strengthening the national language is aimed at protecting the democratic state system and the rights of other people."⁷⁰

68 Endre Orbán, 'Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union' (2022) 63(2) *Acta Juridica* 147, doi:10.1556/2052.2022.00374.

69 Case no 2018-12-01 (Constitutional Court of the Republic of Latvia, 23 April 2019) para 24.2 <<https://www.satv.tiesa.gov.lv/web/viewer.html>> accessed 25 December 2025.

70 Case no 2023-04-0106 (Constitutional Court of the Republic of Latvia, 15 February 2024) para 18.2 <<https://www.satv.tiesa.gov.lv/web/viewer.html>> accessed 25 December 2025.

In this respect, attention should also be drawn to the decisions of the French Constitutional Council concerning the protection of the French language. In its decision of 15 June 1999, the Council declared unconstitutional the provisions of the law ratifying the European Charter for Regional or Minority Languages that allowed the use of regional languages in public administration, education, information, and culture in areas inhabited by speakers of regional or minority languages. The Council referred to the principle that the French people are indivisible and that no part of it may claim to exercise national sovereignty, which itself has constitutional status. Within the framework of these fundamental principles, no collective rights may be recognised as belonging to any group sharing common origin, culture, language, or beliefs. Since these provisions, in the view of the constitutional jurisdiction, were incompatible with the Constitution of France (Articles 1 and 2) and could undermine the constitutional principles of the indivisibility of the Republic, equality before the law, and unity of the French people (para. 10 of the decision), they were declared unconstitutional. Moreover, these provisions of the Charter also conflicted with the first paragraph of Article 2 of the Constitution, inasmuch as they appeared to recognise a right to use a language other than French not only in “private life” but also in “public life”, a category which the ratification statute extended to judicial and administrative authorities and public services.⁷¹ In *Décision n° 2021-818 DC* of 21 May 2021, the Constitutional Council of France partially annulled the provisions of the law on the protection and promotion of regional languages, ruling in particular that “immersive teaching” of regional languages in public educational institutions contravenes Article 2 of the Constitution, which establishes French as the language of the Republic.⁷² Thus, the decision of the French constitutional jurisdiction also rested on the identity of the French political nation, whose key markers are recognised as the French language as the state language, the indivisibility of the French community, and its unity, all of which constitute fundamental constitutional values.

5 CONCLUSIONS

This study demonstrates that the doctrine of constitutional identity in contemporary constitutionalism serves not only an integrative but also a state-preserving function. While in the jurisprudence of many European constitutional courts, constitutional identity primarily developed as a counter-limit to supranational legal integration, the Ukrainian experience shows that under conditions of external aggression, constitutional identity also serves as an instrument for safeguarding statehood, constitutional continuity, and national unity.

71 Decision no 99-412 DC (Constitutional Council, 15 June 1999) <<https://www.conseil-constitutionnel.fr/en/decision/1999/99412DC.htm>> accessed 25 December 2025.

72 Decision no 2021-818 DC (Constitutional Council, 21 May 2021) <<https://www.conseil-constitutionnel.fr/decision/2021/2021818DC.htm>> accessed 25 December 2025.

A comparative analysis of the jurisprudence of European constitutional courts allows for the identification of two principal models of constitutional identity. The first, represented primarily by the Federal Constitutional Court of Germany and the Constitutional Court of Italy, focuses on protecting the constitutional “core” from excessive interference by supranational institutions and preserving the limits of delegated sovereignty within the European Union. The second, more characteristic of the constitutional practice of Lithuania, Latvia, and Ukraine, places particular emphasis on the protection of the political nation, state language, historical memory, and the constitutional foundations of the national community. In this respect, the Ukrainian approach demonstrates closer affinity with the Baltic constitutional tradition than with the classical German model.

The practice of the Constitutional Court of Ukraine demonstrates the gradual transformation of constitutional identity from a predominantly doctrinal concept into an operative constitutional mechanism. By recognising the Ukrainian language as an element of constitutional identity and linking it directly with national security and territorial integrity, the Constitutional Court effectively constitutionalised the protection of national identity as a component of the protection of statehood itself. This indicates that in contemporary Ukraine, constitutional identity functions not only as a constitutional limitation but also as a constitutional instrument of resistance against attempts to undermine the state's sovereignty and democratic constitutional order.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

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КОНСТИТУЦІЙНА ІДЕНТИЧНІСТЬ ЯК ГАРАНТІЯ ДЕРЖАВНОСТІ: ЄВРОПЕЙСЬКИЙ ДОСВІД ТА УКРАЇНСЬКІ ВИКЛИКИ (НА ОСНОВІ ПРАКТИКИ КОНСТИТУЦІЙНИХ СУДІВ)

Євгеній Ткаченко*, Любомир Летнянчин, Вікторія Дубас та Ірина Лященко

АНОТАЦІЯ

Вступ. У статті аналізується доктрина конституційної ідентичності в контексті як європейського, так і українського конституціоналізму. Стверджується, що конституційна ідентичність є відносно новою категорією конституційної теорії, яка відображає фундаментальні та незмінні цінності, закріплені в Конституції, та слугує для захисту цих цінностей від зовнішнього впливу, зокрема з боку наднаціональних правових систем. Особлива увага приділяється розвитку цієї доктрини в практиці європейських конституційних судів (Німеччина, Польща, Угорщина, Литва, Італія, Франція) та формуванню її в Україні у відповідь на сучасні виклики, зокрема військову агресію Російської Федерації та необхідність захисту державної мови, суверенітету та національної єдності.

Методи. У дослідженні використано системно-структурний та порівняльно-правовий методи для аналізу доктрини конституційної ідентичності, її складових елементів та правових позицій конституційних судів у різних країнах. Логіко-правовий метод дозволив простежити еволюцію підходів до взаємозв'язку між конституційною ідентичністю, національним суверенітетом та інтеграційними процесами в Європі. Дослідження ґрунтується на аналізі конституційних текстів, судової практики та наукових джерел.

Результати та висновки. Конституційна ідентичність розуміється як сукупність фундаментальних конституційних принципів (суверенітет, права людини, верховенство права, демократична форма правління, державна мова), що становлять «ядро» Конституції та не можуть бути змінені навіть конституційними реформами. Практика європейських конституційних судів (насамперед Федерального конституційного суду Німеччини) заклала основу для доктрини конституційної ідентичності як інструменту обмеження впливу наднаціонального права на фундаментальні основи національних конституційних систем. В Україні ця доктрина формувалася крізь призму захисту державної мови, національного суверенітету та консолідації суспільства, що відображено в рішеннях Конституційного Суду України 2018 та 2021 років, а також законодавчих змінах, ухвалених між 2014 та 2025 роками.

Ключові слова. Конституційна ідентичність, національна ідентичність, Конституційний Суд України, державна мова, верховенство права, суверенітет, європейська інтеграція, конституційні цінності, доктрина контрмеж.

Research Article

DOES THE SLOVAK REPUBLIC MEET THE EU MINIMUM RULES FOR SANCTIONS ENFORCEMENT UNDER DIRECTIVE 2024/1226 ON CRIMINAL OFFENCES AND PENALTIES FOR THE VIOLATION OF RESTRICTIVE MEASURES?

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ABSTRACT

Background: Directive (EU) 2024/1226 introduces a new phase in the development of European Union criminal law by establishing minimum rules for the criminalisation of violations of EU restrictive measures. This shift reflects a broader move from predominantly administrative enforcement towards the use of criminal law as a central instrument for ensuring compliance with EU sanctions. The Slovak Republic, which previously relied mainly on fragmented administrative mechanisms, was required to introduce a coherent criminal law framework addressing sanctions-related conduct. This article examines whether the Slovak implementation satisfies the requirements of the Directive and how it interacts with the existing doctrinal structure of Slovak criminal law.

Method: The article is based on doctrinal legal research methodology. It applies systematic interpretation and evaluation of primary legal sources, including Directive (EU) 2024/1226, its preparatory documents, the Slovak Criminal Code as amended by Act No. 157/2025 Coll., and Act No. 91/2016 Coll. on the criminal liability of legal persons. The analysis combines normative assessment with elements of comparative and evaluative reasoning, examining both formal compliance with EU law and the substantive coherence of the Slovak legislative response within the broader framework of national criminal law.

Results and Conclusions: The analysis demonstrates that Slovakia has achieved a high level of formal compliance by introducing a comprehensive set of sanctions-related criminal offences and by ensuring the availability of effective and dissuasive penalties for both natural and legal persons. At the same time, the implementation entails significant doctrinal innovations, most notably the introduction of serious negligence as a differentiated form of culpability limited to a specific offence. While these changes enhance the effectiveness of enforcement and align Slovak law with EU requirements, they also raise questions concerning the internal coherence and future development of national criminal law. Overall, the Slovak approach represents a conceptually integrated and largely successful transposition, combining compliance with EU obligations with a restrained adaptation of domestic doctrinal principles.

1 INTRODUCTION

European criminal law has undergone significant development over the past few decades. This development has been particularly intensified after the Treaty of Lisbon came into force, which significantly expanded the European Union's competences in criminal matters and reinforced mutual recognition as a central structural principle.¹ The enforcement of European Union restrictive measures has, over the past decade, become one of the EU's most visible and politically sensitive instruments of external action. In response to international crises, violations of international law, and threats to international peace and security, the EU has increasingly relied on sanctions to exert pressure on states, entities, and individuals. While these measures are adopted at the EU level and are binding in their entirety, their

1 Kai Ambos, *European Criminal Law* (CUP 2018) doi:10.1017/9781316348628; Kai Ambos (ed), *Europäisches Strafrecht post-Lissabon* (Göttinger Studien zu den Kriminalwissenschaften, Universitätsverlag Göttingen, 2011); Martin Böse (ed), *Europäisches Strafrecht* (2nd edn, Enzyklopädie Europarecht, Nomos, 2021); Bernd Hecker, *Europäisches Strafrecht* (7th edn, Springer, 2024); Lukas Huthmann, *Grundzüge eines EU-Strafverfassungsrechts* (Mohr Siebeck, 2023); Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016); Helmut Satzger, *Internationales und Europäisches Strafrecht* (11th edn, Nomos, 2025).

effectiveness ultimately depends on enforcement at the national level. It is precisely at this stage that long-standing structural weaknesses have become apparent.²

Traditionally, the enforcement of EU restrictive measures has been entrusted primarily to administrative and regulatory mechanisms within the Member States. This approach reflected the economic and technical nature of sanctions regimes, as well as a cautious attitude towards the use of criminal law in areas closely linked to economic regulation and foreign policy. Over time, however, it became evident that administrative enforcement alone was often insufficient to ensure effective compliance. Divergent national practices, low penalties in some jurisdictions, limited investigative powers, and the increasing sophistication of sanctions circumvention schemes contributed to an enforcement deficit that undermined both the uniform application of EU law and the credibility of sanctions as a policy tool.

Directive (EU) 2024/1226 on the definition of criminal offences and penalties for the violation of EU restrictive measures represents a decisive response to these challenges.³ By establishing minimum rules for defining criminal offences and imposing penalties for violations of EU restrictive measures, the Directive marks a qualitative shift in the EU's approach to sanctions enforcement. Criminal law is no longer conceived merely as a subsidiary or exceptional instrument, but as an integral component of an effective sanctions regime. This development places Member States before the task of integrating sanctions-related criminalisation into their national legal systems, often requiring adjustments that go beyond the mere introduction of new offences.

The Slovak Republic provides a particularly instructive case study in this regard. Prior to the adoption of Directive (EU) 2024/1226, Slovak law relied predominantly on

2 Peter Csonka and Lucia Zoli, 'The New Directive on the Violation of Union Restrictive Measures in the Context of the EPPO' (2024) 19(1) *Eucrim* 76, doi:10.30709/eucrim-2024-006; Michael Albrecht vom Kolke and others, 'EU Aims for Harmonized Sanctions Enforcement With Defined Criminal Offences and Penalties' (*Skadden, Arps, Slate, Meagher & Flom LLP Insights*, 15 November 2024) <<https://www.skadden.com/insights/publications/2024/11/eu-aims-for-harmonized-sanctions>> accessed 27 January 2026.

3 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the Definition of Criminal Offences and Penalties for the Violation of Union Restrictive Measures and amending Directive (EU) 2018/1673 [2024] OJ L 2024/1226 <<http://data.europa.eu/eli/dir/2024/1226/oj>> accessed 27 January 2026. See also, 'Criminal Offences and Penalties for the Violation of EU Restrictive Measures: Summary of Directive (EU) 2024/1226 Defining Criminal Offences and Penalties for the Violation of EU Restrictive Measures' (*EUR-Lex*, 17 October 2024) <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32024L1226>> accessed 27 January 2026; Proposal for a Directive of the European Parliament and of the Council on the Definition of Criminal Offences and Penalties for the Violation of Union Restrictive Measures (COM/2022/684 final, 2 December 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0684>> accessed 27 January 2026; Beatrix Immenkamp, *Directive on the Violation of Union Restrictive Measures* (EU Legislation in Progress, EPRS 2024) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751409/EPRS_BRI\(2023\)751409_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751409/EPRS_BRI(2023)751409_EN.pdf)> accessed 27 January 2026.

administrative liability regimes to address violations of restrictive measures, with criminal law playing only a marginal and indirect role. The transposition of the Directive through Act No. 157/2025 Coll.⁴ necessitated a substantial recalibration of Slovak criminal law in the Criminal Code No. 300/2005 Coll.⁵, including the introduction of autonomous sanctions-related offences, the development of a dedicated terminological framework, and a reconsideration of established doctrinal concepts such as fault.

This article examines how Slovak criminal law has responded to these challenges and assesses the extent to which the adopted legislative solutions satisfy the requirements of Directive (EU) 2024/1226. The analysis goes beyond a formal account of transposition and focuses on the substantive quality of implementation, the coherence of the new provisions within the existing criminal law framework, and their broader doctrinal implications. Particular attention is devoted to the introduction of serious negligence as a form of fault in a narrowly defined sanctions-related context, as well as to the role of corporate criminal liability in ensuring effective enforcement.

By situating the Slovak implementation within the broader trajectory of EU criminal law harmonisation, the article aims to contribute to the emerging scholarly debate on the criminalisation of sanctions violations. Given the novelty of the Directive and the absence of established case law or extensive academic commentary, the study seeks to provide an early doctrinal assessment that may serve as a reference point for future research and comparative analysis.

The article is based on a doctrinal legal research methodology, reflecting the analytical traditions of continental European legal scholarship. The primary method employed is the systematic interpretation and evaluation of normative legal texts. The analysis is centred on Directive (EU) 2024/1226 and its preparatory documents, including the explanatory memorandum accompanying the Commission's proposal, which provides essential insight into the objectives and rationale of the European Union legislature. At the national level, the study examines the Slovak Criminal Code No. 300/2005 Coll. as amended by Act No. 157/2025 Coll., as well as related legislation relevant to the enforcement of restrictive measures, in particular Act No. 91/2016 Coll. on the criminal liability of legal persons.⁶ These instruments are analysed both individually and in their mutual interaction, with the aim of assessing the overall coherence of the Slovak implementation framework.

4 Act of the Slovak Republic No 157/2025 Coll 'Amending and Supplementing Act No 300/2005 Coll the Criminal Code, as amended, and amending and supplementing certain other Acts' (adopted 3 June 2025) <<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2025/157/20250801.html>> accessed 27 January 2026.

5 Act of the Slovak Republic No 300/2005 Coll 'Criminal Code' of 20 May 2005 (amended 3 June 2025) <<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2005/300/20251227>> accessed 27 January 2026.

6 Act of the Slovak Republic No 91/2016 Coll 'On the Criminal Liability of Legal Persons' of 13 November 2015 (amended 3 June 2025) <<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2016/91/20251227>> accessed 27 January 2026.

In addition to textual interpretation, the article applies evaluative and comparative methods. The Slovak transposition is assessed against the minimum standards laid down by EU law, with particular regard to the scope of criminalisation, the treatment of fault, and the availability of effective sanctions. Where appropriate, the analysis draws on established principles and doctrinal constructions of Slovak criminal law to contextualise the newly introduced provisions and to identify potential points of tension or continuity.

The article's methodological approach is shaped by the novelty of its subject matter. At the time of writing, Directive (EU) 2024/1226 has only recently come into force, and its national implementation has not yet presented a substantial body of academic literature or judicial practice. Consequently, the research necessarily relies on primary legal sources and doctrinal reasoning grounded in systematisation. This is not a limitation of the study but rather an inherent feature of research on newly adopted legal instruments, in which doctrinal analysis precedes empirical evaluation and shapes subsequent scholarly and judicial discourse.

2 DIRECTIVE (EU) 2024/1226: OBJECTIVES, SCOPE AND CRIMINAL LAW LOGIC

2.1. An Overview

Directive (EU) 2024/1226 represents a qualitatively new step in the development of European criminal law, both in its subject matter and in its underlying regulatory logic.⁷ For the first time, the EU adopted a comprehensive criminal law framework specifically aimed at ensuring the effective enforcement of EU restrictive measures, commonly referred to as EU sanctions. This choice reflects a broader shift in the EU's approach to compliance and enforcement, where criminal law is no longer viewed merely as an ancillary or exceptional instrument, but as a necessary component of an effective and credible sanctions regime. This development builds upon the structural changes introduced by the Treaty of Lisbon, which significantly expanded the EU's competences in criminal matters and reinforced mutual recognition as a central organising principle of judicial cooperation.⁸

The primary objective of the Directive is to address the long-identified enforcement deficit in EU restrictive measures. Although sanctions are adopted at the EU level and are binding in their entirety, their practical enforcement has traditionally depended on national legal systems, predominantly through administrative or regulatory mechanisms.⁹ The Commission's preparatory work and the explanatory memorandum

7 Directive (EU) 2024/1226 (n 3); Csonka and Zoli (n 2); vom Kolke and others (n 2).

8 Ambos (n 1); Mitsilegas (n 1).

9 Indrè Isokaitè-Valužè and Haroldas Šinkūnas (eds), *The European Union 2004–2024: Twenty Years of Legal Experience, Challenges and Growth After Unprecedented EU Enlargement* (TMC Asser Press, 2026); Jannemieke Ouwerkerk and others, *The Boundaries of Criminalisation: Rethinking Public Goods and Legal Interests in Domestic and Transnational Criminal Law* (European Criminal Justice Series, Brill, 2026).

accompanying the proposal for the Directive explicitly pointed to significant disparities among Member States in terms of enforcement intensity, sanctioning practices, and deterrent effect. In some jurisdictions, violations of restrictive measures were subject to criminal penalties, while in others they remained within the sphere of administrative liability, often accompanied by comparatively low fines and limited investigative powers. This fragmentation undermined both the uniform application of EU law and the credibility of sanctions as a foreign policy instrument.

Against this background, the Directive pursues a dual objective. On the one hand, it seeks to ensure a minimum level of criminal law protection for the effectiveness of EU restrictive measures across all Member States. On the other hand, it aims to enhance the deterrent effect of sanctions by attaching serious legal consequences to their circumvention or violation. The recourse to criminal law is explicitly justified by reference to the gravity of the protected interest, namely the EU's external action, international peace and security, and respect for international law. In this sense, the Directive situates the criminalisation of sanctions violations within the broader logic of protecting fundamental interests of the EU, rather than merely safeguarding regulatory compliance.¹⁰

From a competence perspective, the Directive is based on Article 83(1) of the Treaty on the Functioning of the European Union,¹¹ which allows the EU to establish *minimum rules* concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension. While sanctions violations were not originally listed among the enumerated areas, the EU relied on the dynamic interpretation of Article 83(1), emphasising the cross-border nature of sanctions circumvention, its links to organised crime, and its capacity to undermine common EU policies. This approach confirms the continued expansion of EU criminal law into areas closely connected with economic activity and regulatory compliance, blurring the traditional distinction between “core” criminal law and administrative enforcement.

In terms of scope, Directive (EU) 2024/1226 adopts a broad material conception of sanctions-related criminality. It requires Member States to criminalise a range of conduct that directly or indirectly violates EU restrictive measures, including active circumvention and facilitation. The Directive does not limit itself to direct breaches, such as prohibited exports or financial transactions, but extends to conduct that enables or conceals such violations. This reflects an awareness of the increasingly sophisticated methods used to evade sanctions, often involving complex corporate structures, intermediaries, and cross-border financial flows. At the same time, the Directive confines itself to minimum harmonisation, leaving Member States discretion as regards the precise formulation of offences and their systematic placement within national criminal codes.

¹⁰ Ouwerkerk and others (n 9).

¹¹ Treaty on European Union (consolidated version) [2012] OJ C 326/1.

The criminal law logic of the Directive is characterised by a careful, albeit not unproblematic, balancing between effectiveness and respect for national criminal law traditions. The Directive sets out minimum requirements regarding the forms of conduct to be criminalised and the availability of effective, proportionate and dissuasive penalties. However, it refrains from imposing a uniform model of criminal liability, particularly about the internal structure of offences and the detailed conception of fault. This legislative restraint is consistent with the principle of subsidiarity and acknowledges the diversity of national doctrines of criminal responsibility. At the same time, it places a significant burden on Member States to integrate the Directive's requirements into their existing legal frameworks without undermining fundamental principles such as legality, culpability and proportionality.

A notable feature of the Directive is its explicit openness to criminal liability for non-intentional forms of fault in certain sanctions-related offences. While the Directive does not mandate a specific doctrinal concept, it clearly signals that limiting criminal liability exclusively to intentional conduct may be insufficient to achieve its enforcement objectives. This aspect of the Directive is particularly relevant for legal systems that traditionally reserve criminal liability for intentional conduct in economically sensitive areas. It illustrates the broader trend within EU criminal law towards functional effectiveness, even where this necessitates adjustments to established national concepts of fault.

The Directive's approach to penalties reinforces its enforcement-oriented logic. Member States are required to ensure that sanctions for criminal offences related to restrictive measures are not merely symbolic, but genuinely capable of deterring future violations. This includes the availability of custodial sentences, fines of sufficient magnitude, and, where appropriate, additional measures such as confiscation. While the Directive does not harmonise penalty levels in detail, it clearly signals that sanctions violations are to be treated as serious criminal conduct, rather than as peripheral regulatory offences.

2.2. Criminal Offences Under Directive (EU) 2024/1226

A central element of Directive (EU) 2024/1226 is its effort to delineate, at the European Union level, a minimum core of conduct that must be subject to criminal liability when it undermines the effectiveness of EU restrictive measures. Rather than introducing a single, abstract offence, the Directive adopts a functional approach, identifying several types of conduct that, taken together, capture the diverse ways in which sanctions may be violated or circumvented in practice. This approach reflects the complex and often indirect nature of sanctions-related wrongdoing, which rarely takes the form of a straightforward breach.¹²

The Directive requires Member States to criminalise the violation of EU restrictive measures as such, covering situations in which prohibited activities are carried out in direct

12 Csonka and Zoli (n 2); vom Kolke and others (n 2).

contravention of applicable sanctions regimes. These include breaches of asset freezes, prohibitions on making funds or economic resources available, trade and export restrictions, and other measures adopted under the European Union's common foreign and security policy. Importantly, the Directive does not confine criminal liability to primary perpetrators but extends it to conduct that facilitates or enables such violations. This includes acts of circumvention, concealment, or indirect participation, thereby addressing the reality that sanctions are frequently evaded through intermediaries, complex transaction chains, or the misuse of legal entities.

A notable feature of the Directive is its express inclusion of circumvention as a distinct category of criminally relevant conduct. Circumvention is broadly understood to encompass any intentional conduct designed to bypass restrictive measures, even where the underlying prohibited transaction is formally carried out by another person or entity. This reflects a clear policy choice to target not only the result, but also the strategies and mechanisms that undermine sanctions regimes. From a criminal law perspective, this significantly expands the material scope of liability, moving beyond traditional notions of direct perpetration and placing greater emphasis on the functional contribution of an individual's conduct to the prohibited outcome.

At the same time, the Directive leaves Member States some flexibility in structuring these offences within their national legal systems. It does not impose a uniform offence structure or terminology, nor does it require the creation of a separate chapter or autonomous offence category. Instead, it sets out the minimum conduct that must be covered by criminal law, allowing national legislators to decide whether to regulate it through specific sanctions-related offences or integrate it into existing offence frameworks. This design choice underscores the Directive's character as an instrument of minimum harmonisation, but it also raises questions as to the coherence of national transposition, particularly in legal systems with a strong emphasis on systematic clarity and conceptual precision.

Another important aspect concerns the mental element of the offences.

While intentional conduct clearly forms the core of criminal liability under the Directive, the text explicitly allows the inclusion of certain non-intentional forms of fault, provided this is necessary to ensure effective enforcement.¹³ Although the Directive refrains from defining these forms in detail, its wording makes clear that purely intentional liability may be insufficient in the context of sanctions enforcement, especially when professional actors operate in complex regulatory environments. This openness to broader fault concepts constitutes one of the most sensitive points of interaction between EU requirements and national criminal law doctrines.

Overall, the catalogue of offences under Directive (EU) 2024/1226 reflects an enforcement-oriented logic that prioritises effectiveness and deterrence over doctrinal

¹³ Lukáš Turay and others, *Trestný zákon: Komentár* (CH Beck, 2025).

minimalism. By capturing a wide range of sanctions-related conduct, including facilitation and circumvention, the Directive seeks to close enforcement gaps that had previously allowed violations to persist in practice.

2.3. Sanctions Under Directive (EU) 2024/1226: Natural and Legal Persons

The sanctioning framework established by Directive (EU) 2024/1226 is closely aligned with its broader enforcement objectives and reflects a deliberate shift towards treating sanctions violations as serious criminal conduct. Rather than prescribing uniform penalty levels, the Directive requires Member States to ensure that criminal sanctions are effective, proportionate and dissuasive, while providing guidance on the types of penalties that must be available in national law. This approach preserves a degree of national autonomy yet clearly signals that symbolic or purely nominal penalties are incompatible with the Directive's purpose.

With regard to natural persons, the Directive requires that sanctions-related criminal offences be punishable by criminal penalties that reflect their seriousness. While it does not mandate specific minimum or maximum terms of imprisonment across all offences, it requires Member States to make custodial sentences available at least for the most serious forms of conduct. This requirement marks an important normative statement: violations of EU restrictive measures are no longer to be treated as peripheral regulatory infringements, but as conduct warranting the full response of criminal law. In addition to imprisonment, the Directive emphasises the role of fines and ancillary penalties, such as confiscation of proceeds derived from sanctions violations, as essential components of an effective sanctioning regime.

The Directive places particular emphasis on the economic dimension of sanctions-related criminality, which is reflected in its approach to financial penalties. Fines imposed on natural persons must be capable of outweighing the economic benefits derived from the offence, thereby neutralising the incentives for sanctions evasion. This focus on economic deterrence is especially relevant in cases involving high-value transactions, international trade, or financial services, where the potential gains from non-compliance may far exceed the deterrent effect of traditional penalty levels.

The treatment of legal persons constitutes one of the most significant aspects of the Directive's sanctioning framework. Recognising that sanctions violations are frequently committed through corporate structures, the Directive requires Member States to ensure that legal persons can be held liable for sanctions-related offences committed for their benefit. This liability must be accompanied by sanctions that are tailored to the nature and economic capacity of legal entities. The Directive expressly refers to criminal or non-criminal fines, as well as other measures such as exclusion from public benefits,

withdrawal of licences, or judicial supervision. These measures are designed not only to address individual wrongdoing but also to address structural deficiencies in corporate compliance and governance.

Importantly, the Directive does not require Member States to adopt a specific model of corporate criminal liability. It allows national systems to rely on criminal, administrative or hybrid forms of liability, provided that the resulting sanctions meet the criteria of effectiveness, proportionality and dissuasiveness. This flexibility acknowledges the diversity of national approaches to corporate liability, while simultaneously imposing a substantive benchmark that must be met in practice. In doing so, the Directive reinforces the idea that legal persons play a central role in sanctions compliance and cannot be insulated from meaningful legal consequences.

Taken together, the sanctioning provisions of Directive (EU) 2024/1226 reinforce its enforcement-driven character. By insisting on robust penalties for both natural and legal persons, the Directive seeks to ensure that criminalisation is not merely formal, but capable of producing tangible deterrent effects. At the same time, the open-ended nature of the sanctioning framework places significant responsibility on Member States to calibrate penalties in line with their national criminal law systems. How this balance has been struck in Slovak law, and whether the resulting sanctions framework meets both EU requirements and domestic doctrinal standards, constitutes a key issue for the assessment that follows.

2.4. Implementation of the Directive (EU) 2024/1226

Directive (EU) 2024/1226 follows a relatively standard transposition timeline, reflecting both the urgency of its enforcement objectives and the complexity of its integration into national criminal law systems. Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 20 May 2025, and to notify the European Commission thereof. This deadline provided a limited, yet not exceptional, period for transposition, particularly given that the Directive necessitates substantive amendments to criminal legislation rather than purely procedural or administrative adjustments.

The chosen timeframe underscores the European Union's expectation of prompt and effective implementation, while at the same time leaving Member States responsible for resolving doctrinal and systematic questions arising from the incorporation of new sanctions-related offences and penalty frameworks into their domestic criminal law.

3 SLOVAK CRIMINAL LAW BEFORE THE IMPLEMENTATION OF DIRECTIVE (EU) 2024/1226: ABSENCE OF A COHERENT AND AUTONOMOUS FRAMEWORK OF EUROPEAN UNION RESTRICTIVE MEASURES

Prior to the adoption of Directive (EU) 2024/1226, Slovak national criminal law lacked a coherent and autonomous framework for the enforcement of EU restrictive measures. Although EU sanctions were binding and directly applicable as a matter of European Union law, their enforcement within the Slovak legal order relied predominantly on administrative and regulatory mechanisms, with only a marginal role for general criminal law provisions. This approach reflected a traditional understanding of sanctions compliance as a matter of regulatory oversight rather than criminal repression.

Violations of international restrictive measures were, as a rule, addressed through administrative liability regimes set out in sector-specific legislation rather than the Criminal Code. Enforcement was based on Act No. 289/2016 Coll. on the implementation of international sanctions,¹⁴ which established administrative offences and fines for breaches of binding restrictive measures adopted at the EU or international level. Further administrative liability arose under customs legislation, notably Act No. 199/2004 Coll., the Customs Act¹⁵, in cases involving prohibited or restricted imports and exports, as well as under legislation governing foreign trade and export control, especially where sanctions intersected with licensing obligations. In the financial sector, supervisory and sanctioning powers were exercised under financial market and anti-money laundering legislation, enabling administrative authorities to impose penalties for making funds or economic resources available in breach of asset-freeze measures. Taken together, these instruments formed a fragmented administrative enforcement framework, lacking the coherence and deterrent effect typically associated with criminal law intervention. On the one hand, these mechanisms allowed for the imposition of fines and other administrative measures, but they were characterised by limited investigative powers and, in many cases, relatively low maximum sanctions. On the other hand, enforcement practice was fragmented and often ill-suited to address complex or intentional sanctions evasion involving cross-border transactions, intermediaries, or corporate structures. From the perspective of criminal law, sanctions violations occupied a peripheral position and were not conceptualised as conduct threatening fundamental interests warranting penal intervention.

14 Act of the Slovak Republic No 289/2016 Coll 'On the Implementation of International Sanctions and on Amendments to Act No 566/2001 Coll on Securities and Investment Services and on Amendments to Certain Acts (Securities Act), as amended' of 11 October 2016 (amended 3 June 2025) <<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2016/289/20250801>> accessed 27 January 2026.

15 Act of the Slovak Republic No 199/2004 Coll 'Customs Act and on amendments to certain acts' of 10 March 2004 (amended 4 May 2021) <<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/199/20260101>> accessed 27 January 2026.

Within the Criminal Code No. 300/2005 Coll.¹⁶ itself, no offence was specifically tailored to the violation or circumvention of EU restrictive measures. Any potential criminal liability had to be derived indirectly, typically through general offences such as fraud, abuse of power, or breaches of obligations in economic relations, provided that the statutory elements were met. This indirect approach significantly limited the practical applicability of criminal law, as sanctions-related conduct often did not fit neatly within the existing offence definitions. The absence of explicit criminalisation thus created a structural gap between the binding nature of EU sanctions and the available enforcement tools under Slovak criminal law.

From a doctrinal perspective, the pre-implementation state of Slovak criminal law was also marked by a relatively rigid conception of fault in economically relevant offences. Criminal liability was traditionally centred on intentional conduct, with negligence playing a more limited role and lacking further differentiation within the statutory framework. This conceptual setting was not specifically designed to accommodate complex compliance failures or risk-taking behaviour in regulated economic sectors, which often fall short of intent but may nevertheless seriously undermine regulatory objectives.

The Slovak legal framework prior to implementation illustrates the broader enforcement challenges that the Directive sought to address at the European Union level. The reliance on administrative sanctions, the absence of tailored criminal offences, and the doctrinal limitations of existing criminal law concepts together explain why the transposition of Directive (EU) 2024/1226 required not merely technical amendments, but a substantive reassessment of the role of criminal law in the enforcement of EU restrictive measures.

4 SLOVAK IMPLEMENTATION OF DIRECTIVE (EU) 2024/1226

4.1. Legislative Framework and Transposition Technique

The Slovak Republic implemented Directive (EU) 2024/1226 through Act No. 157/2025 Coll., which amended and supplemented the Criminal Code (Act No. 300/2005 Coll.) and related legislation. Rather than adopting a separate sanctions-specific statute within criminal law, the Slovak legislature opted for an integrative approach, embedding the Directive's requirements directly into the Criminal Code.¹⁷ This choice reflects a preference for systemic coherence and continuity, while at the same time signalling a clear shift in the perception of sanctions-related conduct from a predominantly administrative matter to one of genuine criminal relevance.¹⁸

¹⁶ Act of the Slovak Republic No 157/2025 (n 4).

¹⁷ *ibid*; Act of the Slovak Republic No 300/2005 Coll 'Criminal Code' (n 5).

¹⁸ Peter Šamko, 'Ďalšia novela Trestného zákona, zavinenie z hrubej nedbanlivosti a ľahostajnosť k následku trestného činu' (*Právne Listy*, 22 November 2024) <<https://www.pravnelisty.sk/zakony/a1503-dalsia-novela-trestneho-zakona-zavinenie-z-hrubej-nedbanlivosti-a-lahostajnost-k-nasledku-trestneho-cinu>> accessed 27 January 2026; Tomáš Zábrenszki, 'Zavedenie pojmu "hrubá nedbanlivosť" do Trestného zákona' (2025) 77(10) *Justičná Revue* 965; Turay and others (n 13).

The implementation process was shaped by two partly competing considerations. On the one hand, Slovak law was required to ensure full compliance with the minimum standards set by EU law, particularly regarding the scope of criminalisation and the availability of effective sanctions. On the other hand, the transposition had to respect the internal logic of Slovak criminal law, including its traditional concepts of fault, legality and proportionality. The resulting legislative solution, therefore, combines relatively targeted amendments with several conceptually significant innovations.

From a legislative-technical perspective, as seen, Slovakia implemented the Directive by amending the Criminal Code, rather than by introducing an autonomous set of sanctions-related criminal provisions. This technique allowed the legislature to situate the new offences within the general system of criminal liability, thereby avoiding the creation of an isolated or exceptional regime. At the same time, it required careful adaptation of existing concepts and terminology to accommodate conduct that had previously fallen outside the core of criminal law.

Act No. 157/2025 Coll. introduced explicit references to violations of EU restrictive measures into the Criminal Code, thereby closing the structural gap between the binding nature of sanctions under European Union law and the absence of tailored criminal law enforcement tools at the national level. The amendments were accompanied by corresponding changes in related legislation, ensuring a degree of consistency between criminal and administrative enforcement mechanisms. This coordinated approach suggests that the Slovak legislature understood the implementation of the Directive not merely as a formal obligation, but as an opportunity to recalibrate the overall enforcement architecture for restrictive measures.

4.2. Introduction of New Criminal Offences into the Criminal Code

A central element of the Slovak transposition is the explicit criminalisation of conduct that violates or circumvents EU restrictive measures. Unlike the pre-implementation situation, in which criminal liability could arise only indirectly through general offences, the amended Criminal Code expressly addresses sanctions-related conduct as a distinct category of criminal wrongdoing.¹⁹ This marks a qualitative shift in the legal assessment of such behaviour, which is no longer treated as an ancillary regulatory infringement but as conduct capable of endangering fundamental interests protected by criminal law.

The newly introduced offences cover both direct violations of restrictive measures and conduct aimed at circumventing or facilitating them. This reflects the Directive's functional approach and acknowledges the practical realities of sanctions evasion, which often involves indirect methods, intermediaries or complex transactional arrangements. By extending

19 Act of the Slovak Republic No 157/2025 (n 4); Act of the Slovak Republic No 300/2005 Coll 'Criminal Code' (n 5).

criminal liability beyond straightforward breaches, Slovak law aligns itself with the Directive's emphasis on effectiveness and deterrence. For example, a situation may arise where a company formally conducts a transaction with a non-designated intermediary, while being aware that the economic benefit ultimately accrues to a designated person. Although the formal structure of the transaction may appear compliant, its economic substance could fall within the scope of prohibited conduct, thereby illustrating the practical relevance of the provision's broad formulation.

The Slovak legislature introduced a new set of sanctions-related criminal offences into the Criminal Code, specifically new Articles 417a to 417e. These provisions establish autonomous offences addressing various forms of violations of EU restrictive measures, collectively titled 'Breach of a Restrictive Measure' (Slovak: *Porušenie reštriktívneho opatrenia*).

The core offence is set out in Article 417a of the Criminal Code, which criminalises the violation of restrictive measures where the value involved exceeds EUR 10,000. The basic form of the offence is constructed as a result-oriented offence encompassing a wide range of alternative forms of conduct. These include making funds or economic resources available, directly or indirectly, to a designated person or for their benefit, as well as the failure to freeze funds or economic resources owned, held or controlled by such a person. The provision further extends to prohibited economic interactions with non-EU states or entities subject to restrictive measures, including the conclusion or continuation of transactions, public procurement or concession contracts, as well as trade-related activities such as the import, export, sale, purchase, transfer, transport or brokerage of goods and the provision of related services. In addition, the offence covers the provision of financial and other services in breach of restrictive measures, the concealment or transfer of frozen assets, the provision of false or misleading information intended to conceal the involvement of a designated person, and the breach of conditions laid down in authorisations issued by competent authorities. In its basic form, Article 417a thus establishes a broad material scope designed to capture the most typical modalities of sanctions violations.

At the same time, the breadth of the provision raises questions as to the appropriate limits of criminalisation. By encompassing a wide range of alternative forms of conduct, the offence risks blurring the distinction between genuinely criminal behaviour and regulatory non-compliance, particularly in complex economic contexts where obligations may be difficult to interpret or apply. From a doctrinal perspective, such an expansive formulation may place greater pressure on the principle of legal certainty and require careful judicial delimitation to prevent an overextension of criminal liability beyond its traditionally accepted boundaries.²⁰ More broadly, the expansion of EU criminal law in this area

20 Tullio Padovani, *Diritto penale* (14th edn, Lefebvre Giuffrè, 2025); Rudolf Rengier, *Strafrecht Allgemeiner Teil* (17th edn, CH Beck, 2025); Johannes Wessels, Werner Beulke and Helmut Satzger, *Strafrecht Allgemeiner Teil* (54th edn, CF Müller, 2024).

underscores the need to balance enforcement objectives with fundamental principles, such as legality and legal certainty, within a multi-level legal order.²¹

It could be argued that such a broad formulation is both justified and necessary, considering the complex and often indirect nature of sanctions circumvention, which frequently relies on sophisticated legal and financial structures. From this perspective, a narrower definition of the offence could create loopholes that undermine the effectiveness of EU restrictive measures. However, while this functional argument carries significant weight, it does not fully resolve the tension between enforcement effectiveness and the requirement of legal certainty, particularly in criminal law, where precision and foreseeability remain fundamental principles.²²

A more specific criminal offence is laid down in Article 417b of the Criminal Code.

This provision targets violations of restrictive measures on items listed in the EU Common Military List or the list of dual-use items. Unlike Article 417a, the basic offence under Article 417b expressly allows criminal liability even for serious negligence (as discussed in Section 4.3 below), reflecting the heightened risks associated with trade in sensitive goods. The offence covers conduct such as trading, importing, exporting, transferring, transporting, or providing intermediary services, technical assistance, or other services related to the listed items, provided that the value involved exceeds EUR 10,000. The basic statutory formulation thus focuses on protecting international security interests and on export control regimes closely linked to EU restrictive measures.

Another distinct form of sanctions-related criminality is addressed in Article 417c of the Criminal Code. This offence concerns the breach of information obligations towards competent authorities. In its basic form, it criminalises the failure to provide information concerning frozen funds or economic resources or concerning funds or resources belonging to a designated person that have not been frozen, where such information was obtained during professional activities. The provision also explicitly covers designated persons themselves, who fail to notify the competent authorities of funds or economic resources within the jurisdiction of a Member State that they own, hold or control. The offence thus reflects the importance of transparency and cooperation in the enforcement of asset-freeze measures and complements the material offences targeting active violations. For instance, a financial institution may identify assets linked to a designated person but fail to report this information to the competent authorities in a timely manner, even though it obtained it in the course of its professional activities. Such a scenario demonstrates how omissions, rather than active conduct, may significantly undermine the effectiveness of asset-freeze measures.

The personal dimension of restrictive measures is addressed in Article 417d of the Criminal Code. The basic offence consists of enabling the entry of a designated natural

21 Huthmann (n 1); Mitsilegas (n 1).

22 Padovani (n 20); Rengier (n 20).

person into the territory of a Member State of the European Union, or the transit of such a person through that territory, in breach of a prohibition arising from a restrictive measure. This provision gives criminal law effect to travel bans imposed under EU sanctions regimes and targets conduct that directly undermines their effectiveness by facilitating prohibited movement.

Finally, Article 417e of the Criminal Code establishes an explicit ground excluding criminal liability where the conduct otherwise falling under Articles 417a to 417d was carried out in accordance with an exception provided for in a restrictive measure or in legislation governing the implementation of international sanctions, or where such an exception was granted on the basis of those instruments. This provision plays an important corrective role, ensuring that criminal liability does not arise in cases where the conduct is authorised under EU or national sanctions law, and thereby safeguarding the principle of legality.

Taken together, the new offences introduced in Articles 417a to 417e of the Criminal Code constitute a comprehensive and internally structured response to the requirements of Directive (EU) 2024/1226. In their basic forms, they cover the essential modalities of sanctions violations identified at the EU level, while at the same time seeking to maintain sufficient specificity and legal certainty within the framework of Slovak criminal law.

4.3. Introduction of Serious Negligence into the Slovak Criminal Code in Relation to a Single Criminal Offence

The implementation of Directive (EU) 2024/1226 has resulted in a notable, albeit carefully circumscribed, modification of the concept of culpability (Slovak: *zavinenie*) in Slovak criminal law. While the traditional bipartite structure of culpability, distinguishing between intent (Slovak: *úmysel*) and negligence (Slovak: *nedbanlivosť*), has formally remained intact, the amendment introduced a further internal differentiation within negligence itself. This differentiation takes the form of the statutory recognition of serious negligence (Slovak: *hrubá nedbanlivosť*) as a distinct, legally relevant, new category of negligence.²³

Under the amended Criminal Code, serious negligence does not replace or supersede the existing concept of negligence, nor does it operate alongside intent as an autonomous third form of negligence. Rather, it functions as a qualified form of negligence, positioned between ordinary negligence and intent. In this sense, the fundamental architecture of Slovak criminal law remains unchanged: criminal liability continues to be based on intent or negligence. What has changed, however, is that negligence is no longer treated as a uniform category but is now internally stratified, allowing criminal liability to attach to particularly serious departures from the required standard of care.

23 Šamko (n 18); Zábrenszki (n 18).

This development is relevant in the context of Article 417b of the Criminal Code, which criminalises violations of restrictive measures on trade in military material and dual-use items. The legislature expressly limited the application of serious negligence to this single offence, thereby signalling that the introduction of the concept was not intended as a general recalibration of the fault doctrine, but as a targeted response to a specific regulatory and risk environment. As has been argued elsewhere, serious negligence may be characterised by a manifest and serious disregard of legally protected interests, reflecting conduct that goes beyond mere inadvertence or carelessness and approaches a state of conscious indifference to legal obligations.²⁴ A hypothetical example may involve a company engaged in the export of dual-use goods that fails to implement adequate internal compliance procedures, despite operating in a high-risk regulatory environment. Even in the absence of intent, such a manifest disregard of basic compliance obligations could qualify as serious negligence, thereby triggering criminal liability under Article 417b.

From a doctrinal perspective, the introduction of serious negligence has important implications for the internal coherence of Slovak criminal law. By differentiating within negligence, the legislature implicitly acknowledged that not all negligent conduct is of equal normative weight.²⁵ This move aligns Slovak law more closely with a functional understanding of fault, in which the intensity of the deviation from the required standard of care becomes a relevant criterion for criminalisation.²⁶ At the same time, the strict confinement of serious negligence to Article 417b mitigates the risk of uncontrolled expansion of criminal liability and preserves the intent-centred character of criminal law as a general rule.

Importantly, the statutory framework does not leave the concept of serious negligence entirely open-ended. Its application remains conditioned by objectively defined elements of the offence, including the material scope of prohibited conduct and a minimum value threshold. In this way, the legislature sought to prevent serious negligence from becoming a vague or residual category and instead anchored it in a clearly circumscribed normative context. This approach avoids the risk of a “silent generalisation” of serious negligence across the Criminal Code, while still meeting the enforcement expectations set at the EU level.²⁷

24 Massimo Donini, *Diritto penale: Parte generale*, vol 2 (Lefebvre Giuffrè 2026); Bernd Heinrich, *Strafrecht: Allgemeiner Teil* (8th edn, Kohlhammer, 2025); Johannes Kaspar, *Strafrecht: Allgemeiner Teil* (5th edn, Nomos, 2025); Maximilián Kiko and Daniel Richter, ‘Hrubá nedbanlivosť v trestnom práve ako základ budúcej rekodifikácie Trestného zákona?’ (2025) 108(6) Právny Obzor 579, doi:10.31577/pravnyobzor.2025.6.05; Libor Klimek, ‘Implementing EU Sanctions Through Criminal Law: Serious Negligence as a New Form of Culpability in the Slovak Republic’ (2026) 15(2) Laws 17, doi:10.3390/laws15020017; Padovani (n 20); Wessels, Beulke, and Satzger (n 20); Zábrenszki (n 18).

25 Donini (n 24); Heinrich (n 24); Jaroslav Ivor, Jozef Záhora, and Peter Polák, *Trestné právo hmotné I: Všeobecná časť* (3rd edn, Wolters Kluwer, 2025); Jaroslav Ivor, Jozef Záhora and Peter Polák, *Trestné právo hmotné I: Osobitná časť* (2nd edn, Wolters Kluwer, 2025); Klimek (n 24).

26 Klimek (n 24).

27 Kiko and Richter (n 24); Zábrenszki (n 18).

4.4. Introduction of a New Terminological Framework in the Criminal Code (Article 137b)

A distinctive feature of the Slovak transposition of Directive (EU) 2024/1226 is the introduction, through Article 137 b, of a specific sanctions-related terminological framework into the Criminal Code. This provision establishes a set of legal definitions that are directly relevant to the interpretation and application of the newly introduced criminal offences concerning EU restrictive measures.²⁸ By codifying these definitions in the general provisions, the legislature sought to enhance legal certainty and ensure terminological consistency with the underlying European Union law framework.

Pursuant to Article 137b(1) of the Criminal Code, the notion of a *restrictive measure* (Slovak: *reštriktívne opatrenie*) refers to binding measures adopted at the level of the European Union or under international law that impose prohibitions or obligations, in particular in the areas of financial transactions, economic activity, or the disposal of assets. This definition anchors criminal liability firmly in the existence of a valid and applicable sanctions regime, thereby preventing any autonomous or expansive interpretation detached from European Union law.

The provision further, by Article 137b (2), defines the concept of a *designated person* (Slovak: *označená osoba*), understood as a natural or legal person expressly identified in an EU restrictive measure as subject to sanctions. This definition is particularly important for offences related to asset freezes and prohibitions on making funds or economic resources available, as it clarifies the personal scope of protection afforded by criminal law.

In addition, Article 137b (3) and (4) introduces *definitions of funds* (Slovak: *finančné prostriedky*) and *economic resources* (Slovak: *hospodárske zdroje*). These terms are construed broadly and reflect their established meaning in EU sanctions regulations, encompassing not only money and financial assets, but also property of any kind, whether tangible or intangible, movable or immovable, that may be used to obtain funds, goods or services. The explicit inclusion of these concepts in the Criminal Code is essential to capture the economic substance of sanctions violations and avoid formalistic loopholes.

Finally, the provision clarifies the concept of the freezing of funds and freezing of economic resources (Slovak: *zaistenie finančných prostriedkov* and *zaistenie hospodárskych zdrojov*), which denotes the prohibition of any movement, transfer, alteration, use or access to such assets in a manner that would result in a change of their volume, amount, location, ownership or character. This definition directly supports the criminalisation of conduct aimed at circumventing asset-freeze measures and ensures alignment with EU sanctions terminology.

28 Kiko and Richter (n 24); Ingrid Mencerová and others, *Trestné právo hmotné: Osobitná časť* (3rd edn, Heuréka 2025); Ingrid Mencerová and others, *Trestné právo hmotné: Všeobecná časť* (3rd edn, Heuréka, 2021); Tomáš Strémy, Lucia Kurilovská, and Rastislav Remeta, *Trestný zákon: Praktický komentár* (Wolters Kluwer, 2025).

Taken together, the definitions set out in Article 137b of the Criminal Code form an indispensable interpretative framework for sanctions-related criminal offences. Although these concepts are derived from European Union law, their incorporation into national criminal legislation reinforces the principle of legality and facilitates predictable and uniform application by Slovak law enforcement authorities and courts. In this sense, Article 137b functions as a technical yet structurally significant bridge between EU restrictive measures and their enforcement through Slovak criminal law.

5 ASSESSMENT OF COMPLIANCE AND BROADER IMPLICATIONS FOR SLOVAK CRIMINAL LAW

5.1. Formal Compliance with Directive (EU) 2024/1226

The Slovak transposition of Directive (EU) 2024/1226 represents a substantial and, in many respects, successful effort to align national criminal law with newly articulated EU enforcement priorities. At the same time, the implementation raises several broader doctrinal and systemic questions that extend beyond the immediate context of sanctions-related offences. This section assesses Slovak compliance with the Directive at both the formal and substantive levels before turning to the wider implications of the adopted legislative solutions for Slovak criminal law.

From a formal compliance perspective, the Slovak Republic has fulfilled the core obligations imposed by Directive (EU) 2024/1226. The Criminal Code now contains explicit provisions criminalising violations and circumventions of EU restrictive measures, covering the principal forms of conduct identified at the European Union level. The introduction of Articles 417a to 417e ensures that sanctions-related conduct is no longer dependent on indirect or ancillary offence constructions, thereby closing a gap that had previously undermined effective enforcement. Similarly, the Slovak legislature complied with the Directive's requirements concerning sanctions. The amended Criminal Code provides for custodial sentences and other criminal penalties that are capable, at least in abstract terms, of meeting the criteria of effectiveness, proportionality and dissuasiveness. Liability of natural persons is complemented by mechanisms that address the role of legal persons through parallel legislation, ensuring that enforcement is not confined to individual actors. From a purely normative standpoint, Slovakia can, therefore, be regarded as having transposed the Directive in a timely and technically complete manner.

In addition to criminal liability of natural persons, Slovak law provides a separate statutory framework governing the criminal liability of legal persons, set out in Act No. 91/2016 Coll. on the criminal liability of legal persons.²⁹ This Act establishes an autonomous regime under

29 Act of the Slovak Republic No 91/2016 Coll (n 6).

which legal persons may be held criminally liable where a criminal offence is committed in their name, on their behalf, or for their benefit by a natural person whose conduct is imputable to the legal entity.³⁰ The Act regulates the substantive conditions of liability, the attribution of conduct, and the range of sanctions applicable to legal persons, thereby complementing the general criminal law framework set out in the Criminal Code.³¹ Corporate criminal liability under Slovak law is contingent upon the fulfilment of statutory attribution conditions and is limited to a taxative list of offences for which legal persons may be held liable.³² From the perspective of Directive (EU) 2024/1226, this regime is of particular relevance, given the Directive's explicit emphasis on the effective sanctioning of legal persons involved in violations of European Union restrictive measures. The Slovak approach does not integrate corporate liability directly into the Criminal Code provisions concerning sanctions-related offences, but instead relies on the general mechanism of corporate criminal liability provided by Act No. 91/2016 Coll. This legislative technique is formally compatible with the Directive, which does not prescribe a specific model of liability for legal persons and allows Member States to choose between criminal, administrative or hybrid systems, provided that the resulting sanctions are effective, proportionate and dissuasive. At the same time, the reliance on Act No. 91/2016 Coll. reveals a certain degree of structural separation between the newly introduced sanctions-related offences in Articles 417a to 417e of the Criminal Code and the liability of legal persons.

5.2. Substantive Compliance and Systemic Coherence

Beyond formal transposition, a more nuanced assessment concerns the substantive quality of compliance and its compatibility with the internal logic of Slovak criminal law. In this respect, the Slovak implementation demonstrates a conscious effort to embed EU-driven requirements within the existing doctrinal framework, rather than treating sanctions-related criminalisation as an exceptional or externally imposed anomaly.

The decision to integrate new offences directly into the Criminal Code, rather than adopting a separate sanctions-specific criminal statute, supports systemic coherence and legal certainty. The introduction of a dedicated terminological provision in Article 137b further strengthens this coherence by ensuring that key concepts derived from EU law are clearly defined for criminal law purposes.³³ These choices contribute positively to the predictability

30 Jozef Medelský, *Zákon o trestnej zodpovednosti právnických osôb: Veľký komentár* (Eurokódex, 2021); Jozef Záhora and Ivan Šimovček, *Zákon o trestnej zodpovednosti právnických osôb: Komentár* (2nd edn, Wolters Kluwer, 2019)

31 Eduard Burda and others, *Zákon o trestnej zodpovednosti právnických osôb: Komentár* (CH Beck, 2018); Medelský (n 30); Záhora and Šimovček (n 30).

32 Jozef Čentíš, Lýdia Tobiašová, and Yvetta Turayová, *Trestná zodpovednosť právnických osôb: Vybrané aspekty trestnej zodpovednosti právnických osôb v Slovenskej republike* (Wolters Kluwer, 2016); Jozef Medelský, *Trestná zodpovednosť právnických osôb* (Aleš Čeněk, 2016).

33 Šamko (n 18); Zábrenszki (n 18).

and accessibility of the law, both for law enforcement authorities and for potential addressees of criminal liability.

At the same time, the breadth of some offence definitions, particularly in Article 417a, raises legitimate concerns regarding over-inclusiveness. While the wide enumeration of alternative forms of conduct reflects the Directive's functional logic, it also increases the interpretative burden on courts and may blur the boundary between criminally relevant conduct and regulatory non-compliance. Substantive compliance with EU law has thus been achieved at the price of a more complex and potentially expansive criminal law framework, the practical limits of which will need to be clarified through judicial practice.

This development may also be viewed in the broader context of a gradual expansion of criminal law into areas traditionally governed by regulatory and administrative mechanisms. While such a shift is consistent with the Directive's enforcement-oriented logic, it simultaneously raises concerns regarding overcriminalisation and the potential erosion of the boundary between criminal law and regulatory compliance. In the absence of clear limiting criteria, there is a risk that criminal law may increasingly be used as a default enforcement tool, rather than as a measure of last resort.³⁴

5.3. Serious Negligence and the Principle of Culpability

One of the most sensitive aspects of substantive compliance concerns the introduction of serious negligence as a basis for criminal liability in Article 417b. From an EU perspective, this solution aligns with the Directive's openness to non-intentional forms of fault and addresses the enforcement risks associated with sanctions violations in sensitive economic sectors. From a national perspective, however, it represents a departure from the traditionally intent-centred orientation of Slovak criminal law.³⁵

The Slovak legislature mitigated this tension by strictly limiting the application of serious negligence to a single offence provision and by maintaining the overarching structure of intent and negligence as the fundamental forms of culpability. This restraint significantly reduces the risk of doctrinal spill-over and supports the argument that the implementation remains compatible with the principle of culpability. Nevertheless, the introduction of serious negligence may be seen as a departure from the traditionally intent-centred orientation of Slovak criminal law, with potential implications extending beyond the immediate context of sanctions enforcement. By recognising a qualitatively higher degree of negligence as a sufficient basis for criminal liability in a sensitive regulatory area, the legislature implicitly opens the door to a broader reconsideration of the role of fault in economic criminal law. This raises the question of whether the current

34 Ouwerkerk and others (n 9).

35 Jozef Čentéš and others, *Trestný zákon: Veľký komentár* (5th edn, Eurokódex, 2020); Ivor, Záhora and Polák (n 25); Jaroslav Klátik and others, *Trestné právo hmotné: Všeobecná časť* (Václav Klemm, 2025); Mencerová and others (n 28).

limitation of serious negligence to a single offence will remain stable in the long term, or whether it may gradually evolve into a more generalised concept under the influence of future EU-driven harmonisation efforts. In this sense, serious negligence operates not only as a technical adjustment, but also as a potential indicator of a broader shift towards a more risk-oriented model of criminal liability.³⁶

At the same time, it may be contended that the inclusion of serious negligence is a proportionate and necessary response to the specific risks associated with highly regulated sectors, such as trade in military material and dual-use items, where strict compliance standards are essential. In this view, limiting criminal liability to intentional conduct could leave significant enforcement gaps, particularly in cases involving professional actors operating in complex compliance environments. Nevertheless, this argument must be balanced against the systemic implications of extending criminal liability beyond intent, especially in legal systems traditionally structured around a more restrictive conception of culpability.

5.4. Broader Implications for Slovak Criminal Law

The transposition of Directive (EU) 2024/1226 has implications that extend beyond sanctions-related offences as such. Most notably, it illustrates the growing role of EU criminal law as a driver of structural change within national criminal law systems. The Slovak experience shows how minimum harmonisation at the EU level can prompt not only the introduction of new offences, but also adjustments to core doctrinal concepts, such as fault and the relationship between criminal and administrative enforcement.

At the same time, the Slovak implementation demonstrates a degree of resistance to uncritical expansion of criminal liability. By confining doctrinal innovations to narrowly defined contexts and by emphasising terminological clarity and systemic integration, the legislature sought to preserve the internal coherence of the Criminal Code. Whether this balance can be maintained in future rounds of EU-driven criminalisation remains an open question, particularly as the European Union continues to rely on criminal law as an enforcement tool across an increasingly diverse range of policy areas.

6 CONCLUSIONS

The analysis in this article demonstrates that the Slovak Republic has achieved a high level of compliance with Directive (EU) 2024/1226, not only in formal terms but also in substantive integration into the national criminal law system. The adopted legislative solution reflects a deliberate effort to reconcile the enforcement-oriented logic of EU criminal law with the doctrinal structure of Slovak criminal law, resulting in a framework that is both operationally effective and systemically coherent.

36 Donini (n 24); Heinrich (n 24).

At the same time, the Slovak implementation highlights a broader structural dynamic characteristic of contemporary European criminal law. Rather than merely requiring the introduction of new criminal offences, EU harmonisation increasingly influences the internal architecture of national criminal liability, including the differentiation of fault standards and the relationship between criminal and administrative enforcement. In this respect, the Slovak approach illustrates how minimum harmonisation may operate as a catalyst for doctrinal development, even where the formal scope of EU intervention remains limited.

The introduction of serious negligence as a qualified form of culpability represents the most significant doctrinal innovation arising from the transposition. While its application is currently confined to a narrowly defined regulatory context, it signals a potential shift towards a more differentiated and risk-sensitive model of criminal liability in economically regulated sectors. This development raises important questions regarding the long-term stability of the traditional intent-centred paradigm and the extent to which EU-driven criminalisation may reshape foundational concepts of national criminal law.

More broadly, the Slovak experience confirms that the criminalisation of sanctions violations cannot be assessed solely in terms of legislative completeness or formal compliance. Its significance lies in the interaction between effectiveness and principle, between enforcement objectives and the preservation of core guarantees such as legality, culpability and legal certainty. The Directive (EU) 2024/1226 thus exemplifies a wider trend within European criminal law: the gradual expansion of criminal law as an instrument of European Union policy, accompanied by increasing pressure on national systems to adapt their doctrinal frameworks.

From a comparative and forward-looking perspective, the Slovak implementation provides a useful reference point for evaluating future developments in EU criminal law harmonisation. It illustrates both the possibilities and the limits of integrating enforcement-driven requirements into a structured and conceptually grounded criminal law system. Whether this balance can be maintained will depend not only on future legislative developments at the EU level, but also on the interpretative practice of national courts and the evolving dialogue between national and supranational legal orders.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЧИ ВІДПОВІДАЄ СЛОВАЦЬКА РЕСПУБЛІКА МІНІМАЛЬНИМ ПРАВИЛАМ ЄС ЩОДО ВИКОНАННЯ САНКЦІЙ ЗГІДНО З ДИРЕКТИВОЮ 2024/1226 ПРО КРИМІНАЛЬНІ ПРАВОПОРУШЕННЯ ТА ПОКАРАННЯ ЗА ПОРУШЕННЯ ОБМЕЖУВАЛЬНИХ ЗАХОДІВ?

Ярослав Івор, Ярослав Клатік та Лібор Клімек*

АНОТАЦІЯ

Вступ. Директива (ЄС) 2024/1226 запроваджує новий етап у розвитку кримінального права Європейського Союзу, встановлюючи мінімальні правила криміналізації порушень обмежувальних заходів ЄС. Цей зсув відображає ширший перехід від переважно адміністративного правозастосування до використання кримінального права як центрального інструменту для забезпечення дотримання санкцій ЄС. Словачька Республіка, яка раніше покладалася переважно на фрагментовані адміністративні механізми, була зобов'язана запровадити узгоджену систему кримінального права, що стосується ситуацій, пов'язаних із санкціями. У цій статті розглядається, чи відповідає імплементація у Словаччині вимогам Директиви та як вона взаємодіє з наявною доктринальною структурою словацького кримінального права.

Методи. Стаття ґрунтується на методології доктринального правового дослідження. У ній було застосовано систематичне тлумачення та оцінку первинних правових джерел, зокрема Директиву (ЄС) 2024/1226, її підготовчі документи, Кримінальний кодекс Словаччини зі змінами, внесеними Законом № 157/2025 Зб., та Закон № 91/2016 Зб. про кримінальну відповідальність юридичних осіб. Аналіз поєднує нормативну оцінку з елементами порівняльного та оцінювального мислення, досліджуючи як формальну відповідність законодавству ЄС, так і змістовну узгодженість словацького законодавства в ширших межах національного кримінального права.

Результати та висновки. Аналіз демонструє, що Словаччина досягла високого рівня формального дотримання вимог, запровадивши комплексний перелік кримінальних правопорушень, пов'язаних із санкціями, та забезпечивши наявність ефективних та

переконливих покарань як для фізичних, так і для юридичних осіб. Водночас, впровадження передбачає значні доктринальні нововведення, зокрема запровадження серйозної недбалості як диференційованої форми вини, обмеженої конкретним правопорушенням. Хоча ці зміни підвищують ефективність правозастосування та узгоджують словацьке законодавство з вимогами ЄС, вони також викликають питання щодо внутрішньої узгодженості та майбутнього розвитку національного кримінального права. Загалом, словацький підхід є концептуально інтегрованою та значною мірою успішною транспозицією, що поєднує дотримання зобов'язань ЄС з поступовою адаптацією національних доктринальних принципів.

Ключові слова. Криміналізація, санкції ЄС, серйозна недбалість, відповідальність корпорацій, словацьке кримінальне право.

Research Article

MAIN CONNECTING FACTOR FOR TORT CLAIMS IN THE EU AND UKRAINE: LESSONS FROM THE CJEU CASE LAW FOR UKRAINIAN RECODIFICATION

Bohdan Karnaukh* and Tetiana Tsuvina

ABSTRACT

Background: As Ukraine advances toward EU membership, aligning its private international law with the EU *acquis* has become an urgent legislative task. Cross-border tort disputes in the EU are governed by two key instruments: Regulation (EU) No 1215/2012 (Brussels I Recast), which addresses international jurisdiction, and Regulation (EC) No 864/2007 (Rome II), which determines the applicable law. Their operation has been shaped by the jurisprudence of the Court of Justice of the European Union (CJEU). Ukraine is currently undergoing a comprehensive recodification of its private law, including the preparation of a new Civil Code containing a dedicated Book VIII on private international law (Draft Law No. 15150, April 2026). This reform presents a critical opportunity to align Ukrainian conflict-of-laws rules with European standards ahead of accession.

Method: The article employs doctrinal and comparative legal methodologies, addressing jurisdiction and applicable law as distinct yet interrelated dimensions of cross-border tort

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*disputes. The analysis begins by examining the two principal connecting factors conceivable in tort conflicts, *lex loci delicti commissi* and *lex loci damni*, and the policy rationale underlying each. It then turns to the EU framework, analysing how jurisdiction under Article 7(2) of the Brussels I Recast Regulation and applicable law under Article 4(1) of the Rome II Regulation are structured and interpreted, with particular attention to the CJEU's distinction between direct damage and indirect consequences. Special consideration is given to the localisation of purely financial loss, illustrated by a series of leading CJEU judgments. Against this doctrinal background, the article evaluates the current Ukrainian Law "On International Private Law" in respect of both jurisdiction and applicable law, identifying areas of divergence from the European model. Finally, it examines the proposed solutions in Book VIII of the Draft Civil Code of Ukraine, assessing the extent to which the ongoing recodification incorporates European standards and formulating recommendations for further legislative alignment.*

Results and Conclusions: *The analysis reveals significant divergences between Ukrainian law and the EU model. The current Ukrainian legislation relies on *lex loci delicti commissi* for applicable law, a structural departure from Rome II's *lex loci damni* approach, and provides excessively broad, conceptually ambiguous jurisdictional grounds. While the Draft Civil Code marks meaningful progress by adopting *lex loci damni* as the principal connecting factor, critical gaps remain: it lacks a codified distinction between direct damage and indirect consequences, a cornerstone of CJEU case law omits a rule equivalent to Article 17 of Rome II on safety and conduct, and fails to introduce party autonomy for non-contractual obligations. The article recommends targeted legislative adjustments to close these gaps and achieve genuine alignment with the European conflict-of-laws framework.*

1 INTRODUCTION

Private international law performs a quiet but decisive function in the architecture of cross-border economic activity. Determining which legal system governs transnational disputes reduces uncertainty, allocates regulatory authority, and shapes the incentives of private actors operating across jurisdictions. In an integrated market, predictable conflict-of-laws rules are not merely technical devices; they constitute economic infrastructure. Harmonised private international law lowers legal friction and facilitates the free movement of goods, services, capital, and persons, which are core objectives of the European Union.

The European experience demonstrates that unifying conflict-of-laws rules directly enhances market efficiency. Instruments such as the Rome Regulations replaced divergent national approaches with common connecting factors, ensuring that identical factual situations produce comparable legal outcomes regardless of the forum.¹ This predictability

1 See, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II) [2007] OJ L 199/40, recital (6). Peter Stone, *Stone on Private International Law in the European Union* (4th edn, Edward Elgar 2018) 4.

enhances mutual trust among national courts and strengthens judicial cooperation. From an economic perspective, harmonisation therefore functions as a mechanism of regulatory coordination: it reduces duplicative litigation, limits opportunistic forum selection, and improves enforcement prospects across borders.² Tort law illustrates these dynamics particularly clearly, as cross-border accidents, environmental harm, product liability, and online wrongdoing increasingly transcend territorial boundaries.

For Ukraine, the modernisation of private international law is not only a matter of doctrinal refinement but also a structural component of European integration. Ukraine's European aspirations entail progressive alignment with EU legal standards, including those governing judicial cooperation in civil matters. This alignment reflects both economic necessity and political commitment: integration into European markets requires legal predictability compatible with EU conflict-of-laws methodology.

A central policy framework guiding this process is the 'Rule of Law Roadmap', a comprehensive strategic document that defines reforms within the EU accession negotiation process under Chapters 23 ("Judiciary and Fundamental Rights") and 24 ("Justice, Freedom and Security").³ Among the measures envisaged is the development and adoption of a new law on private international law to align Ukrainian conflict-of-laws rules in civil, commercial, and family matters with contemporary approaches and harmonise them with relevant EU acts.

The question of reforming Ukrainian conflict-of-laws rules arises at a particularly opportune moment in the country's recodification of private law.⁴ In April 2026, the Draft of the Civil Code (Draft Law No. 15150)⁵ was registered in the Ukrainian parliament. The Draft proposes a structural reorganisation of Ukrainian private law and, notably,

2 Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford Private International Law Series, OUP 2010) doi:10.1093/law/9780199289684.001.0001; Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Rome II Regulation*, vol 3 (Otto Schmidt 2019) 6-9; Francisco J Garcimartín Alférez, 'The Rome II Regulation: On the Way Towards a European Private International Law Code' (2007) 3 *The European Legal Forum* 77.

3 'Rule of Law Roadmap' (Government Office for Coordination of European and Euro-Atlantic Integration, May 2018) [in Ukrainian] <https://eu-ua.kmu.gov.ua/wp-content/uploads/UA_Dorozhnya_karta_z_pytan_verhovenstva_prava_2.pdf> accessed 13 March 2026.

4 Anatoliy Dovgert, 'Recodification of the Civil Code of Ukraine: Driving Factors and Prerequisites for the Launch' (2019) 1 *Law of Ukraine* 27, doi:10.33498/louu-2019-01-027 [in Ukrainian]; Ernest Gramatskiy, 'Recodification of Civil Legislation of Ukraine and Private International Law: Concerning the Prospects' (2021) 1 *Law Review of Kyiv University of Law* 177, doi:10.36695/2219-5521.1.2021.33 [in Ukrainian]; Nataliia Kuznetsova (ed), *Recodification of Civil Legislation in Ukraine: Challenges of Our Time* (Helvetica 2021) [in Ukrainian]; Vasyl Tatsiy, 'Re-codification of the Civil Law of Ukraine: On the Way to European Integration' (2021) 10(1-2) *Global Journal of Comparative Law* 1, doi:10.1163/2211906X-10010001.

5 Draft of the Civil Code of Ukraine no 15150 of 9 April 2026 (*Verkhovna Rada of Ukraine: Bills*, 2026) [in Ukrainian] <<https://itd.rada.gov.ua/billinfo/Bills/Card/69837>> accessed 13 March 2026.

introduces Book VIII dedicated to private international law. Under this approach, conflict-of-laws provisions, currently contained in the separate Law “On International Private Law”⁶, would be incorporated directly into the Civil Code. Such a codification project creates a unique window for reconsidering the conceptual foundations of Ukrainian private international law.

2 METHODOLOGY

This article examines the main connecting factor for tort claims in EU private international law and evaluates how its underlying logic may inform the reform of Ukrainian law. Substantively, the analysis addresses two interconnected issues: jurisdiction in cross-border tort disputes and the determination of the law applicable to tort claims. In the EU legal order, these two dimensions are closely interrelated and operate through the combined framework of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)⁷ (hereinafter called ‘Brussels I Regulation (recast)’) and the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations⁸ (hereinafter called ‘Rome II Regulation’). The article examines both aspects in parallel to assess the extent to which Ukrainian private international law corresponds to the European model.

With regard to applicable law, the article focuses on the principal connecting factor under Article 4(1) of the Rome II Regulation, namely the law of the country where the damage occurs (*lex loci damni*). The analysis does not address the habitual residence clause (Article 4(2)) or the escape clause (Article 4(3)), nor does it examine the specific regimes applicable to particular categories of non-contractual obligations, such as product liability, environmental damage, or other special rules contained in the Regulation.

Within this framework, particular attention is given to the interpretation of the notion of “the place where the damage occurs”, as developed in the jurisprudence of the Court of Justice of the European Union (hereinafter called ‘the CJEU’). The analysis addresses, in particular, the distinction between direct damage and indirect consequences, which has become a central interpretative tool in determining the relevant connecting factor. Closely related to this issue is the problem of localising pure economic loss, which often

6 Law of Ukraine No 2709-IV of 23 June 2005 ‘On International Private Law’ (amended 31 October 2025) <<https://zakon.rada.gov.ua/laws/show/2709-15#Text>> accessed 13 March 2026.

7 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) [2012] OJ L 351/1.

8 Regulation (EC) No 864/2007 (n 1).

arises in cross-border financial and investment disputes and presents significant conceptual and practical difficulties.

The study proceeds in three stages. First, it analyses how the principal connecting factor of Article 4(1) of the Rome II Regulation is formulated in EU legislation and how its autonomous meaning has been clarified by CJEU case law. Second, it evaluates whether the current Ukrainian legal framework, primarily the Law of Ukraine “On International Private Law”, is aligned with the relevant EU *acquis*. Third, the article examines the solutions proposed in the Draft Civil Code of Ukraine (Book VIII on private international law) to determine whether the ongoing recodification of Ukrainian private law adequately incorporates European standards.

Based on this comparative analysis, the article formulates recommendations to adapt Ukrainian legislation so that it more closely reflects the approach embodied in EU instruments and the interpretative guidance provided by CJEU case law.

3 THE CONCEPT OF TORT LAW AND TWO CONCEIVABLE LINKING FACTORS

3.1. The Concept of Tort Law

Tort law may be broadly defined as the body of law governing non-contractual liability for damage. Its central function is to determine under what conditions a person who causes harm to another must compensate for that harm. Unlike contractual liability, which arises from obligations voluntarily assumed by the parties, tort liability arises independently of any prior agreement between them.

A distinctive feature of tort claims is that they often bind two legal strangers, individuals or entities who had no prior legal relationship before the harmful event occurred.⁹ A typical illustration is a traffic accident. A driver from one country may negligently collide with a vehicle driven by a tourist from another country while both are travelling abroad. The resulting claim for compensation arises not from any contract between the drivers but from the wrongful act that caused damage.

In EU private international law, the concept of tort or non-contractual liability is treated as an autonomous concept, independent of national legal classifications.¹⁰ The CJEU has repeatedly emphasised that the interpretation of conflict-of-laws instruments cannot depend on how national legal systems label a particular claim. In its judgment in *ERGO Insurance SE v If P&C Insurance AS; Gjensidige Baltic AAS v PZU Lietuva UAB DK*, the Court explained:

⁹ Christian von Bar, *The Common European Law of Torts*, vol 1 (OUP 1998) 3-5; Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997); Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006).

¹⁰ Magnus and Mankowski (n 2) 146.

“As regards the concept of ‘non-contractual obligation’, within the meaning of Article 1 of the Rome II Regulation, it must be recalled that the concept of ‘matters relating to tort, delict and quasi-delict’, within the meaning of Article 5(3) of the Brussels I Regulation, includes all actions which seek to establish the liability of a defendant and are not related to a ‘contract’ within the meaning of Article 5(1) thereof.”¹¹

This autonomous understanding ensures the uniform application of EU private international law across Member States and prevents divergent national classifications from undermining the system’s coherence.

3.2. Two Conceivable Linking Factors

In abstract, in cross-border tort disputes, two possible linking factors are conceivable.

The first is *lex loci delicti commissi*, the law of the place where the wrongful act was committed. Under this approach, the applicable law is that of the country in which the harmful conduct occurred. Historically, this connecting factor has played a central role in conflict-of-laws doctrine, reflecting the idea that liability should be governed by the law of the state where the wrongful conduct occurred.¹²

The second possible connecting factor is *lex loci damni*, the law of the place where the damage occurred. This approach focuses not on the location of the conduct but on the place where the harmful consequences materialise.

In many cases, these two places coincide. Consider a traffic accident occurring in Poland between two foreign tourists. The negligent act (the driver’s conduct) and the resulting damage (injury and property loss) occur in the same territory. In such circumstances, both connecting factors point to the same legal system, and the choice between them is irrelevant.

11 Case C-359/14 and C-475/14 “*ERGO Insurance*” SE v “*If P&C Insurance*” AS and “*Gjensidige Baltic*” AAS v “*PZU Lietuva*” UAB DK (CJEU, 21 January 2016) ECLI:EU:C:2016:40, para 45; Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* (CJEU, 28 July 2016) ECLI:EU:C:2016:612, para 37; Case C-147/12 *ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV* (CJEU, 18 July 2013) ECLI:EU:C:2013:490, para 32; Case 189/87 *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co and others* (CJEU, 27 September 1988) ECLI:EU:C:1988:459, para 17; Case C-261/90 *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG* (CJEU, 26 March 1992) ECLI:EU:C:1992:149, para 16; Case C-51/97 *Réunion européenne SA and Others v Spliethoff’s Bevrachtungskantoor BV and the Master of the vessel Alblasgracht V002* (CJEU, 27 October 1998) ECLI:EU:C:1998:509, para 22; Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* (CJEU, 17 September 2002) ECLI:EU:C:2002:499, para 21.

12 See, Hans-Jochem Lüer, ‘The Lex Loci Delicti in Single Contact Cases – A Comparative Study of Continental and American Law’ (1965) 12(2) *Nederlands Tijdschrift voor Internationaal Recht* 124, doi:10.1017/S0165070X00025821.

However, modern cross-border interactions often give rise to situations in which the place of the wrongful act and the place of damage are geographically distinct. In such cases, the choice of connecting factor becomes decisive.

An illustration is provided by the judgment of the Court of Justice in *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*.¹³ In that case, a French mining company discharged large quantities of saline waste into the Rhine River in France. The pollution travelled downstream and allegedly damaged horticultural crops belonging to a Dutch company in the Netherlands. The wrongful conduct occurred in France, whereas the economic damage manifested itself in the Netherlands.

Another illustration arises in cross-border defamation cases. In *Shevill v Presse Alliance SA*¹⁴, a newspaper article published in the United Kingdom allegedly harmed the claimant's reputation in several other countries where the publication circulated. The act giving rise to the harm, the publication, occurred in one state, while reputational damage was suffered in multiple jurisdictions.

More recent developments illustrate the same structural problem in the context of digital technologies.¹⁵ Online infringements often involve conduct performed in one state while the harm manifests in another, sometimes simultaneously across several jurisdictions. This was evident in *Bolagsupplysningen OÜ v Svensk Handel AB*¹⁶, where allegedly defamatory information about an Estonian company was published on a Swedish website and remained accessible throughout the European Union. The operator responsible for the content was based in Sweden, yet the claimant argued that the reputational and economic damage occurred primarily in Estonia, where the company conducted most of its business.

These examples demonstrate how the two connecting factors may lead to different applicable laws. Each connecting factor reflects a different policy intuition. The traditional preference for *lex loci delicti commissi* rested on the idea that individuals should be subject to the legal standards of the place where they act. This approach promotes foreseeability for potential tortfeasors and reflects the regulatory interests of the state where the conduct occurs.

13 Case 21-76 *Handelskwekerij GJ Bier BV contra Mines de potasse d'Alsace SA* (CJEU, 30 November 1976) ECLI:EU:C:1976:166.

14 Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* (CJEU, 7 March 1995) ECLI:EU:C:1995:61.

15 Lenka Karbanová, 'Lex Loci Damni Infecti – Applicability to Non-contractual Obligations in Cyberspace in the Jurisprudence of French Courts' (2011) 5(1) Masaryk University Journal of Law and Technology 47; Nataliia Filatova-Bilous and Tetiana Tsuvina, 'Online Accounts – Comparative and Private International Law Aspects' (2023/2024) 25 Yearbook of Private International Law 301, doi:10.9785/9783504389222-022.

16 Case C-194/16 *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB* (CJEU, 17 October 2017) ECLI:EU:C:2017:766.

In contrast, *lex loci damni* emphasises the protection of the victim and the legal environment in which the harmful consequences are felt.¹⁷ It may better reflect the social and economic interests affected by the damage. At the same time, reliance on the place of damage can generate complexity, particularly when harm spreads across several jurisdictions or manifests itself indirectly.

The tension between these two connecting factors has shaped the evolution of tort conflict-of-laws rules. Historically, many legal systems adhered to the *lex loci delicti commissi* as the traditional rule. Contemporary European private international law, however, has recalibrated this approach by prioritising the place of damage while preserving mechanisms that ensure the regulatory interests of the place of conduct are not entirely disregarded.

4 JURISDICTION AND APPLICABLE LAW: TWO DISTINCT QUESTIONS

In cross-border tort disputes, the analysis must distinguish between two closely related but conceptually distinct issues:

1. Jurisdiction: that is, the question of which court has the authority to hear a dispute concerning compensation for non-contractual damage containing a foreign element; and
2. applicable law: that is, the question of which substantive law the court must apply when deciding the merits of the tort claim.

Although these questions arise together in practice, they are governed in EU law by different legal instruments and different connecting factors.

Jurisdiction is governed by the Brussels I Regulation (Recast). The Regulation establishes that persons domiciled in a Member State must be sued in the courts of that Member State (Article 4). In addition, Article 7(2) introduces a special jurisdictional rule for tort claims. Under that provision, a person domiciled in a Member State may be sued in another Member State “in the courts for the place where the harmful event occurred or may occur.”

In contrast, the issue of applicable law is governed by the Rome II Regulation, which determines the substantive law governing non-contractual obligations. Article 4(1) of that Regulation establishes the general rule that tort claims are governed by “the law of the country in which the damage occurs.” The provision further clarifies that this rule applies “irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

17 Magnus and Mankowski (n 2) 42.

It is therefore important to note that the two regulations rely on different connecting factors. The Brussels I Regulation uses the formula “the place where the harmful event occurred or may occur,” whereas the Rome II Regulation refers to “the country in which the damage occurs.” Although these expressions may appear similar, they reflect different legal logics.

The CJEU has repeatedly emphasised that the interpretation of these connecting factors must remain autonomous within each regulatory framework. In its judgment in *Kainz v Pantherwerke AG*¹⁸, the Court explained that the objective of consistency between the two instruments does not justify interpreting the jurisdictional rules of the Brussels I Regulation in light of the conflict-of-laws rules of the Rome II Regulation.

In the context of jurisdiction, the expression “the place where the harmful event occurred or may occur” has acquired a specific meaning in the case law of the Court. According to settled jurisprudence¹⁹, where the place of the causal event and the place where damage occurs are not identical, the concept covers both locations. Thus, the claimant may choose to bring proceedings either before the courts of the place where the damage occurred or before the courts of the place where the event giving rise to the damage took place. This interpretation was reaffirmed, inter alia, in *Verein für Konsumenteninformation v Volkswagen AG*²⁰, where the Court reiterated that the phrase is

“intended to cover both the place where the damage occurred and the place of the event giving rise to it, with the result that the defendant may be sued, at the option of the applicant, in the courts for either of those places.”

The logic underlying this approach is primarily procedural. The jurisdictional rule seeks to ensure a close connection between the dispute and the court hearing the case, while also granting the claimant a certain degree of procedural flexibility. The CJEU has explained that special jurisdiction in matters relating to tort is justified “for reasons relating to the sound administration of justice and the efficacious conduct of proceedings”,²¹ since the court of the place where the harmful event occurred is normally best placed to adjudicate the dispute “on the grounds of proximity of the dispute and ease of taking evidence.”²²

18 Case C-45/13 *Andreas Kainz v Pantherwerke AG* (CJEU, 16 January 2014) ECLI:EU:C:2014:7, para 20.

19 Case C-189/08 *Zuid-Chemie BV v Philippon's Mineralenfabriek NV/SA* (CJEU, 16 July 2009) ECLI:EU:C:2009:475, para 23; Case C-451/18 *Tibor-Trans Fuvarozó és Kereskedelmi Kft v DAF TRUCKS NV* (CJEU, 29 July 2019) ECLI:EU:C:2019:635, para 25; Case C-375/13 *Harald Kolassa v Barclays Bank plc* (CJEU, 28 January 2015) ECLI:EU:C:2015:37, para 45; Case C-12/15 *Universal Music International Holding BV v Michael Tétéreault Schilling and Others* (CJEU, 16 June 2016) ECLI:EU:C:2016:449, para 28.

20 Case C-343/19 *Verein für Konsumenteninformation v Volkswagen AG* (CJEU, 9 July 2020) ECLI:EU:C:2020:534.

21 Case C-12/15 (n 19) para 26; Case C-360/12 *Coty Germany GmbH v First Note Perfumes NV* (CJEU, 21 November 2013) ECLI:EU:C:2014:1318, para 47; Case C-47/14 *Holterman Ferho Exploitatie BV and Others v FLF Spies von Bülsesheim* (CJEU, 10 September 2015) ECLI:EU:C:2015:574, para 73.

22 Case C-12/15 (n 19) para 27; Case C-47/14 (n 21) para 74; Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* (CJEU, 21 May 2015) ECLI:EU:C:2015:335, para 40.

The approach adopted by the Rome II Regulation is different. In determining the applicable law, Article 4(1) focuses exclusively on the place where the damage occurs, thereby establishing the classical conflict-of-laws connecting factor, the *lex loci damni*.²³ The rule explicitly disregards the location of the event that caused the damage and excludes consideration of places where only indirect consequences occur. In practical terms, this means that the governing law is the law of the country where the direct and immediate injury materialises, rather than the place where the wrongful conduct was performed or where secondary consequences later unfold.

This principle is illustrated by the recent judgment of the CJEU in *NM and OU v TE*.²⁴ The dispute arose from online gambling losses sustained by TE, an Austrian resident, who, between November 2019 and April 2020, played games of chance on the website of Titanium Brace Marketing Limited (TBM), a Maltese company operating without an Austrian licence. TE transferred funds from his Austrian bank account to a player account maintained by TBM in Malta and lost EUR 18,547.67. He brought a tort claim against NM and OU, the directors of TBM, before the Austrian courts, alleging personal liability for violations of Austrian gambling legislation. The defendants contested Austrian jurisdiction and argued that both the event giving rise to the damage and the damage itself occurred in Malta, making Maltese law applicable.

The Court rejected that reasoning. It held that the damage alleged by TE manifested itself in Austria, where he participated in the online games of chance offered in breach of a prohibition applicable in that Member State. Given the intangible nature of online gambling, the Court determined that the games must be regarded as having taken place where the player is habitually resident. In contrast, the conduct of TBM and its directors, operating from Malta, constituted merely the event giving rise to the damage and was therefore irrelevant for the purposes of Article 4(1) of the Rome II Regulation. Equally, the financial losses recorded on the player account in Malta or on TE's Austrian bank account were characterised as only indirect consequences of the damage and could not determine the applicable law. The Court, therefore, concluded that, in claims for damages arising from participation in online games of chance offered without the required licence, the damage must be deemed to have occurred in the Member State where the player is habitually resident, and the law of that state governs the non-contractual obligation.

The distinction between jurisdiction and applicable law means that the court hearing a case will not necessarily apply its own national law. In practice, the interaction between the Brussels I Regulation and the Rome II Regulation may lead to situations in which a dispute is heard by the courts of one state while being decided under the law of another.

23 Magnus and Mankowski (n 2) 41-2; Xandra E Kramer, 'The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European Private International Law Tradition Continued Introductory Observations, Scope, System, and General Rules' (2008) 4 *Nederlands Internationaal Privaatrecht (NIPR)* 421-2.

24 Case C-77/24 *NM and OU v TE* (CJEU, 15 January 2026) ECLI:EU:C:2026:1.

Suppose that a technology company established in Germany releases a software update that negligently contains malicious code, exposing users' personal data. An Italian user installs the update while residing in Italy, and as a result, their personal data is accessed and misused, causing financial loss and reputational harm in Italy. The negligent conduct, namely the development and release of the defective software, occurred in Germany, whereas the damage materialises in Italy, where the affected user experiences the consequences of the data breach.

Assume that the injured Italian user brings an action against the German software developer before a German court. Even though the case is heard in Germany, Article 4(1) of the Rome II Regulation requires the court to apply the law of the country where the damage occurred. Since the damage materialised in Italy, the German court would therefore have to determine the content of Italian tort law and apply it to resolve the dispute.

The result is a typical configuration of modern European private international law: a German court applying Italian tort law. This example illustrates how the jurisdictional rules of the Brussels I Regulation and the conflict-of-laws rules of the Rome II Regulation operate in tandem yet independently, each addressing a different aspect of the cross-border dispute.

5 DAMAGE VS. INDIRECT CONSEQUENCES

Although the Brussels I Regulation and the Rome II Regulation employ different connecting factors, they share an important conceptual premise. Both instruments rely on the distinction between direct damage and indirect consequences. Only the direct damage constitutes the relevant connecting factor. Indirect consequences, even if economically or emotionally significant, do not influence the localisation of the tort for the purposes of either jurisdiction or applicable law.

The CJEU has repeatedly reaffirmed this principle. In *ZK v BMA Braunschweigische Maschinenbauanstalt AG* the Court emphasised:

“The place where the direct damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of the harmful event.”²⁵

Likewise, in *Verein für Konsumenteninformation v Volkswagen AG*, the Court warned against an overly expansive understanding of damage:

“The concept of the ‘place where the harmful event occurred’ cannot be construed so extensively as to encompass every place where the adverse consequences of an event, which has already caused damage occurring elsewhere, can be felt. Consequently, that concept cannot be construed as including the place where the

25 Case C-498/20 *ZK v BMA Braunschweigische Maschinenbauanstalt AG* (CJEU, 10 March 2022) ECLI:EU:C:2022:173, para 58.

victim claims to have suffered financial damage following initial damage arising and suffered by him in another state.”²⁶

The importance of this distinction is illustrated by the decision in *Florin Lazar v Allianz SpA*.²⁷ The case arose from a tragic road traffic accident in Italy in which a young Romanian woman lost her life after being struck by an unidentified vehicle. Her father, Mr Lazar, who resided in Romania, brought proceedings seeking compensation for the material and non-material harm he personally suffered because of his daughter's death. The victim's mother and grandmother, Romanian nationals residing in Italy, also intervened in the proceedings with similar claims.

The referring Italian court faced a delicate question of private international law. Under Italian substantive law, the death of a close relative is treated as giving rise to a personal injury to the relatives themselves, meaning that the emotional and economic harm suffered by family members may qualify as direct damage. If this characterisation were accepted for the purposes of Article 4(1) of the Rome II Regulation, the relevant damage for the father's claim could be considered to have occurred in Romania, where he resided and experienced the consequences of the loss.

However, the Court of Justice rejected this approach. It held that, for the purposes of Rome II, the relevant damage was the initial physical injury leading to the victim's death, which occurred in Italy. The emotional and economic harm suffered by family members was therefore characterised as indirect consequences of the accident. As a result, the applicable law was Italian law, the law of the country where the direct damage occurred.

Another example is *MOL Magyar Olaj és Gázipari Nyrt. v Mercedes-Benz Group AG*²⁸ – the case where the dispute arose from the well-known “Trucks cartel” uncovered by the European Commission.²⁹

The applicant, MOL, is a Hungarian parent company that controls several subsidiaries established in different Member States, including Croatia, Italy, Austria, and Slovakia. During the period of the cartel infringement identified by the Commission (1997–2011), those subsidiaries purchased or leased seventy-one trucks from Mercedes-Benz. MOL subsequently brought an action for damages before the Budapest High Court in Hungary,

26 Case C-343/19 (n 20) para 26. See also, Case C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* (CJEU, 19 September 1995) ECLI:EU:C:1995:289, paras 14, 15; Case C-451/18 (n 19) para 28.

27 Case C-350/14 *Florin Lazar, représenté légalement par Luigi Erculeo v Allianz SpA* (CJEU, 10 December 2015) ECLI:EU:C:2015:802.

28 Case C-425/22 *MOL Magyar Olaj- és Gázipari Nyrt. v Mercedes-Benz Group AG* (CJEU, 4 July 2024) ECLI:EU:C:2024:578.

29 See, Summary of Commission Decision of 19 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 – Trucks) (notified under document C (2016) 4673) [2017] OJ C 108/6.

claiming compensation for the economic harm caused by the artificially inflated truck prices. The parent company argued that the Hungarian courts had jurisdiction under Article 7(2) of the Brussels I Recast Regulation because its registered office in Hungary constituted the centre of the group's economic interests and therefore the place where the "harmful event" occurred.

However, the trucks were not purchased by MOL itself but by its subsidiaries in several other Member States. MOL nevertheless maintained that, since competition law treats a parent company and its subsidiaries as forming a single economic unit, the place where the parent company is established should be regarded as the place where the damage occurred.

The Court rejected that reasoning. It emphasised that, for the purposes of Article 7(2), the concept of the place where the harmful event occurred cannot extend to locations where only secondary financial repercussions are felt. The direct harm in the case consisted of the overpayment for trucks purchased at cartel-inflated prices, and that harm was suffered by the subsidiaries that acquired the vehicles. Consequently, the relevant courts were those of the Member State where the subsidiary purchased or leased the affected trucks, or, where purchases occurred in several locations, the courts of the subsidiary's registered office.

In contrast, the financial loss claimed by MOL at the parent company level represented only a derivative economic impact arising from its subsidiaries' losses. Such consequences could not serve as a jurisdictional connecting factor. The Court therefore held that the registered office of the parent company does not constitute the "place where the harmful event occurred" where the direct damage was suffered exclusively by its subsidiaries.

The judgment in *MOL Magyar Olaj és Gázipari Nyrt. v Mercedes-Benz Group AG* should be contrasted with the earlier CJEU decision in *Verein für Konsumenteninformation v Volkswagen AG*.

The latter case arose out of the well-known "diesel emissions scandal",³⁰ involving the installation by Volkswagen AG of software designed to manipulate emissions data in vehicles equipped with the EA 189 engine. The software enabled the vehicles to pass regulatory emissions tests while emitting significantly higher levels of pollutants under normal driving conditions.

Proceedings were brought in Austria by the Austrian consumer association VKI, which had been assigned claims by 574 consumers who had purchased vehicles equipped with the manipulated engines. According to the claimants, the purchasers had suffered damage because, had they known about the manipulation, they would either not have bought the vehicles or would have paid a significantly lower price. The alleged loss, therefore, consisted

30 See, Mark Dziak, 'Volkswagen Emissions Scandal ("Dieselgate")' (*EBSCO Research Starters*, 2021) <<https://www.ebsco.com/research-starters/business-and-management/volkswagen-emissions-scandal-dieselgate>> accessed 13 March 2026; Marco Frigessi de Rattalma (ed), *The Dieselgate: A Legal Perspective* (Springer 2017) 218.

of the difference between the price actually paid and the vehicles' real value, which were defective from the outset.

The referring Austrian court expressed doubts as to whether the Austrian courts could assume jurisdiction under Article 7(2) of the Brussels I Recast Regulation. It questioned whether the alleged damage suffered by the consumers should be characterised merely as consequential financial loss, which, according to the Court's established case law, cannot determine the place where the harmful event occurred. The Court rejected that interpretation. It held that the relevant damage occurred when the vehicles were purchased for a price exceeding their actual value. Importantly, the Court emphasised that the harm at issue was not purely financial, even though it could be expressed in monetary terms. The defect affected a tangible asset, the vehicle itself, whose value was diminished by the presence of unlawful emissions-manipulation software. Consequently, the loss constituted initial damage rather than a secondary financial consequence.

As a result, the place where the damage occurred could be in the Member State where the consumers purchased and received the defective vehicles, in the case at hand, Austria, thereby enabling the Austrian courts to have jurisdiction.

Read together with *MOL*, this judgment further clarifies the Court's approach to the notion of damage in cross-border tort litigation. While derivative economic losses suffered by third parties (such as parent companies or other economically connected entities) are treated as indirect consequences, the reduction in value of a defective tangible asset acquired by the claimant constitutes direct damage capable of determining the relevant connecting factor under Article 7(2) of the Brussels I Recast Regulation.

6 LOCALISATION OF FINANCIAL LOSS

Identifying the place where damage occurs becomes significantly more complex when the harm takes the form of purely financial loss.³¹ Unlike bodily injury or damage to tangible property, economic loss lacks a physical manifestation that could anchor the analysis geographically. Lehmann famously describes the challenge as comparable to "nailing jelly to the wall": the legal system must identify a geographic location for something that has no inherent spatial dimension.³²

31 See, Laura van Bochove, 'Purely Economic Loss in Conflict of Laws: The Case of Tortious Interference with Contract' (2016) 3 *Nederlands Internationaal Privaatrecht* 456; Matthias Lehmann, 'A New Piece in the Puzzle of Locating Financial Loss: The Ruling in *VEB v BP* on Jurisdiction for Collective Actions Based on Deficient Investor Information' (2022) 18(1) *Journal of Private International Law* 1, doi:10.1080/17441048.2022.2060347; Matthias Lehmann, 'Where does Economic Loss Occur?' (2011) 7(3) *Journal of Private International Law* 527, doi:10.5235/jpil.v7n3.527.

32 Lehmann, 'Where does Economic Loss Occur?' (n 31).

This difficulty becomes particularly visible in several recurring categories of disputes. Examples include situations involving misleading financial information, false prospectuses or financial statements, mismanagement of invested assets, breaches of regulatory duties, or cases in which a person is induced to enter into an unfavourable contract with a third party.³³ In all these scenarios, the claimant's loss is monetary rather than physical, and the economic consequences may be felt in several places simultaneously, such as where the investor resides, where the investment account is maintained, or where the underlying transaction took place.

One particularly prominent illustration is the so-called prospectus liability problem.³⁴ When an issuer publishes misleading information in a prospectus, and investors subsequently acquire securities in secondary markets, the resulting losses may materialise in multiple jurisdictions. Investors may reside in different states, securities may be traded on foreign exchanges, and the financial instruments may be held through intermediated accounts located elsewhere. Since the Rome II Regulation contains no specific rule governing prospectus liability, courts must rely on the general rule of Article 4(1) and identify the place where the damage occurs, an exercise that can produce considerable uncertainty.

A leading illustration of the difficulties surrounding the localisation of purely financial loss is the CJEU's judgment in *Kronhofer v Maier*.³⁵

The dispute arose after an Austrian investor, Mr Kronhofer, was contacted by telephone by foreign brokers who persuaded him to invest in highly speculative call options linked to shares traded on the London Stock Exchange. The brokers allegedly failed to warn him about the risks associated with the transaction. Acting on their advice, Kronhofer transferred USD 82,500 from Austria to an investment account in Germany, from which the options were purchased. The investment performed poorly, and he recovered only part of the capital invested.

Kronhofer brought an action for damages before the Austrian courts, arguing that jurisdiction existed under Article 5(3) of the Brussels Convention because the financial loss had affected his assets at his place of domicile in Austria.

33 *ibid*

34 See, Danny Busch, Guido Ferrarini and Jan Paul Franx (eds), *Prospectus Regulation and Prospectus Liability* (Oxford EU Financial Regulation Series, OUP 2020) doi:10.1093/law/9780198846529.001.0001; Danny Busch and Matthias Lehmann, 'Uniform Prospectus Liability Rules for Europe' (2023) 14 (2) *Journal of European Tort Law* 113, doi:10.1515/jetl-2023-0009; Paola Lucantoni, 'Prospectus Liability in Europe: The Relevant Breach of Duties' (2023) 14(2) *Journal of European Tort Law* 156, doi:10.1515/jetl-2023-0011; Thomas Thiede and Steffen Lorscheider, 'International Jurisdiction for Investor Claims Based on Prospectus Liability following CJEU 12.9.2018, C-304/17, Löber/Barclays' (2021) 12(1) *Journal of European Tort Law* 65, doi:10.1515/jetl-2021-0001.

35 Case C-168/02 *Rudolf Kronhofer v Marianne Maier and Others* (CJEU, 10 June 2004) ECLI:EU:C:2004:364.

The CJEU reiterated that the concept of the place where the harmful event occurred cannot be interpreted so broadly as to include any place where the economic consequences of damage are felt. In the case at hand, both the event giving rise to the damage and the direct manifestation of the loss related to the investment transaction executed through the German account. The mere fact that the financial consequences were reflected in the claimant's assets in Austria was insufficient to establish jurisdiction there.

Allowing jurisdiction on that basis would render the connecting factor unpredictable and, in practice, lead to jurisdiction being systematically attributed to the claimant's domicile, contrary to the structure of the Brussels regime.

A related but structurally different situation was examined by the CJEU in *ZK v BMA Braunschweigische Maschinenbauanstalt AG*³⁶, which concerned collective financial losses suffered by creditors following a company's bankruptcy.

The dispute arose within a corporate group. A Dutch company, BMA NL, had received approximately EUR 38 million in financing from its German "grandparent" company, BMA AG, between 2004 and 2011. At the beginning of 2012, BMA AG abruptly terminated its financial support. Shortly thereafter, BMA NL entered bankruptcy proceedings, leaving numerous creditors unpaid. The liquidator brought a *Peeters-Gatzen* action, a collective tort claim under Dutch law, alleging that the parent company breached its duty of care toward the subsidiary's creditors by withdrawing financial support, thereby rendering bankruptcy inevitable.³⁷

The referring Dutch court faced a difficulty familiar in cases of economic loss: creditors affected by the bankruptcy were located in several countries, meaning the financial consequences of the insolvency were dispersed across multiple jurisdictions. It asked whether jurisdiction under Article 7(2) of the Brussels I bis Regulation should be determined by reference to the places where individual creditors suffered their losses.

The Court rejected that approach. Drawing on earlier case law, it held that the relevant connecting factor is the place most closely linked to the company whose insolvency caused the loss and its activities and financial situation. In the present case, that place was the state where the bankrupt company was established, since it was there that the company's financial deterioration materialised and where the alleged breach of the parent company's duty of care could be assessed most effectively.

The Court emphasised that the individual losses suffered by creditors in other states constitute only indirect damage and therefore cannot determine jurisdiction. Accordingly, it concluded that the courts of the Member State where the bankrupt company had its

36 Case C-498/20 (n 25).

37 See, *Peeters/Gatzen* (Hoge Raad, 14 januari 1983) ECLI:NL:HR:1983:AG4521; Case C-535/17 *NK v BNP Paribas Fortis NV* (CJEU, 6 February 2019) ECLI:EU:C:2019:96, paras 17-19, 31-32.

establishment have jurisdiction to hear a collective tort action brought by the liquidator against a third party alleged to have caused the creditors' losses.

Another important example arose in litigation connected to the 2010 disaster on the Deepwater Horizon oil drilling platform³⁸, one of the most notorious industrial accidents in recent history. The resulting securities litigation reached the CJEU in *Vereniging van Effectenbezitters v BP plc*.³⁹

Following the explosion on the Deepwater Horizon in the Gulf of Mexico, which caused deaths, injuries, and extensive environmental damage, the market value of shares in BP plc declined significantly. A Dutch investors' association, Vereniging van Effectenbezitters (VEB), brought a collective action before Dutch courts on behalf of investors who had bought, held, or sold BP shares between 2007 and 2010 through investment accounts maintained in the Netherlands. VEB argued that BP had disseminated misleading or incomplete information regarding the accident and its consequences, thereby artificially maintaining the share price until the true extent of the disaster became known. Once the information was corrected, the price fell, resulting in losses for investors.

The central jurisdictional question was whether the place where the financial loss was recorded in investors' securities accounts in the Netherlands could be regarded as the place where the damage occurred under Article 7(2) of the Brussels I bis Regulation. The claimant relied on earlier case law recognising that financial loss recorded in an investment account may, in certain circumstances, constitute the place of damage.

The Court adopted a restrictive approach. It reiterated that the concept of the place where the damage occurs cannot extend to every location where the financial consequences of an event are felt. While losses were indeed reflected in Dutch investment accounts, that factor alone was insufficient. The decisive consideration was whether the issuer of the securities could reasonably foresee being sued in that jurisdiction. For a listed company such as BP, foreseeability depends primarily on the jurisdictions in which it has complied with statutory disclosure obligations to list its securities on stock exchanges.

Because the mere presence of investors' accounts in the Netherlands did not establish such a connection, the Court held that the occurrence of purely financial losses in those accounts does not, in itself, confer jurisdiction on Dutch courts. Jurisdiction based on the place where damage occurs may instead arise in the Member States where the issuer fulfilled its listing-related disclosure obligations and could therefore reasonably anticipate potential liability.

38 See, Richard Pallardy, 'Deepwater Horizon Oil Spill' *Encyclopaedia Britannica* (updated 18 May 2026) <<https://www.britannica.com/event/Deepwater-Horizon-oil-spill>> accessed 13 March 2026.

39 Case C-709/19 *Vereniging van Effectenbezitters v BP plc* (CJEU, 12 May 2021) ECLI:EU:C:2021:377.

7 CURRENT UKRAINIAN LAW

The relevant jurisdictional and conflict-of-laws provisions are contained in the Law of Ukraine “On International Private Law”⁴⁰, which diverges in important respects from the system established in EU instruments and from the interpretative case law of the CJEU.

7.1. Jurisdiction

Jurisdiction in cases involving foreign elements is governed by Article 76 of the Law of Ukraine “On International Private Law”. Several provisions are relevant for tort claims. Ukrainian courts may assume jurisdiction, inter alia, where:

- (1) the defendant has a domicile, property, branch, or representative office in Ukraine (Art. 76(2));
- (2) the damage was caused on the territory of Ukraine (Art. 76(3));
- (3) in cases concerning compensation for damage, the claimant has a domicile in Ukraine or the defendant legal entity is domiciled in Ukraine (Art. 76(5));
- (4) the act or event giving rise to the claim occurred on the territory of Ukraine (Art. 76(7)).

This structure offers a broad range of alternative jurisdictional grounds. In particular, Ukrainian law allows jurisdiction based on the defendant’s domicile, the claimant’s domicile, the place where damage “was caused”, or the place where “the act or event giving rise to the claim occurred”. Such multiplicity of connecting factors contrasts with the more structured system of special jurisdiction established in the Brussels regime.

Such a model risks encouraging forum shopping and undermines the objective of legal certainty that underpins the Brussels system. The EU approach deliberately restricts the jurisdictional bases so that both the claimant and the defendant can reasonably foresee which courts may hear the dispute.

In addition, the wording of Article 76(3) of the Ukrainian law, referring to cases where damage “was caused on the territory of Ukraine”, is conceptually ambiguous. It is unclear whether this provision refers to the place where the damage occurs (*lex loci damni*) or to the place where the harmful act was committed (*lex loci delicti commissi*). Unlike the European framework, where the distinction between these two connecting factors has been carefully elaborated by the CJEU, Ukrainian courts have not developed a comparable body of jurisprudence clarifying the meaning of the provision. As a result, the localisation of damage under Ukrainian jurisdictional rules remains uncertain.

40 Law of Ukraine No 2709-IV (n 6).

7.2. Applicable Law

A further divergence arises regarding the determination of the applicable law. Article 49(1) of the Law of Ukraine “On International Private Law” provides that matters of torts are governed by “the law of the state in which the act or other circumstance giving rise to the claim for compensation occurred”. In other words, the Ukrainian rule relies on the connecting factor of *lex loci delicti commissi*, the law of the place where the harmful act occurred.⁴¹

This approach differs fundamentally from Article 4(1) of the Rome II Regulation, which establishes as a rule the application of the *lex loci damni*. The shift from the place of the act to the place of the damage reflects a deliberate policy choice within EU private international law. The rationale is that the place where the damage materialises usually represents the legal system most closely connected to the dispute and most affected by its harmful consequences. Moreover, focusing on the place of damage ensures that the applicable law corresponds to the location where the victim’s interests are directly impaired.

The Ukrainian reliance on *lex loci delicti commissi*, therefore, creates a structural divergence from the Rome II framework. In modern cross-border tort scenarios, particularly those involving financial loss, online activities, or complex chains of conduct, the place where the harmful act is committed may differ significantly from the place where the damage materialises. By prioritising the place of conduct, Article 49(1) risks applying the law of a jurisdiction that has only a limited connection to the actual harm suffered.

8 THE APPROACH OF THE DRAFT CIVIL CODE

The recodification of private law is currently ongoing in Ukraine. In April 2026, the Draft Civil Code of Ukraine (Draft Law No. 15150) was registered in the Ukrainian parliament. The Draft proposes a substantial structural reorganisation of Ukrainian private law and, notably, introduces Book VIII dedicated to private international law. This book is intended to replace the existing Law of Ukraine “On International Private Law” and to integrate conflict-of-laws rules directly into the Civil Code.

An important question, therefore, arises as to whether the approach embodied in the Draft brings Ukrainian private international law closer to the model established in the European Union and interpreted by the CJEU.

41 Yevhen M Bilousov and Ivan V Yakoviuk (eds), *Private International Law* (Pravo 2021) 152 [in Ukrainian].

8.1. Jurisdiction

Article 1903 of the Draft Civil Code establishes the bases for the jurisdiction of Ukrainian courts in cases involving a foreign element. In matters relating to compensation for damage, jurisdiction may arise, *inter alia*, where:

- The defendant has a domicile or property in Ukraine (Art. 1903(2)).
- The event that led to the damage occurred in Ukraine (Art. 1903(3)).
- The claimant, if a natural person, has a domicile in Ukraine (Art. 1903(5)).
- The act or event that gave rise to the claim took place in Ukraine (Art. 1903(7)).

Compared with the current Law “On International Private Law”, the Draft refines some of the connecting factors and clarifies their wording. Article 1903(3) explicitly refers to the “event that led to the damage”. This formulation clearly indicates a connecting factor based on *lex loci delicti commissi*. In this respect, the Draft is more precise than Article 76(3) of the current law, whose wording leaves open whether it refers to the place of the act or the place where the damage materialises.

However, despite these improvements in drafting, the overall structure of the jurisdictional rules remains unchanged. The Draft still provides a wide range of jurisdictional bases. This multiplicity of connecting factors diverges from the more restrained approach embodied in Article 7(2) of the Brussels I Regulation (recast). Importantly, the CJEU has consistently rejected attempts to expand jurisdiction to locations where the victim merely suffers the economic consequences of the damage. In particular, the Court held that the claimant’s domicile cannot serve as a connecting factor simply because financial loss is felt there.

Against this background, Article 1903(5) of the Draft, which grants jurisdiction based on the claimant’s domicile, remains problematic. Such a rule risks encouraging forum shopping and undermining the predictability of jurisdiction, two concerns central to the CJEU’s jurisprudence.

Furthermore, Article 1903(7) of the Draft reproduces almost verbatim the wording of Article 76(7) of the current law by referring to situations where “the act or event giving rise to the claim occurred in Ukraine.” This formulation remains conceptually vague. It is unclear whether it refers to the same connecting factor as Article 1903(3) or whether it introduces a separate ground of jurisdiction. Unlike the EU framework, where the distinction between the place of the causal event and the place of the damage has been carefully clarified in case law, the Draft leaves significant interpretative uncertainty.

In sum, although the Draft refines certain formulations, it preserves the broad, fragmented structure of jurisdictional connecting factors characteristic of current Ukrainian legislation.

8.2. Applicable Law

A more significant change appears in the rules governing the applicable law. Article 1859(1) of the Draft provides that obligations arising from inflicting damage are governed by the law of the country in which the damage occurs, regardless of the place where the legal fact giving rise to the damage took place. This provision clearly introduces the principle of *lex loci damni*, which constitutes the cornerstone of Article 4(1) of the Rome II Regulation. In this respect, the Draft represents an important step toward alignment with the European model.

At the same time, however, the Draft does not incorporate a crucial refinement developed in the CJEU's case law, namely, the distinction between direct damage and its indirect consequences.

The absence of such a distinction may create interpretative uncertainty, particularly in cases involving purely financial loss. Without clear guidance, courts might be tempted to treat the place where financial consequences are recorded, such as the claimant's bank account or domicile, as the place of damage. This could lead to an overly expansive application of the rule and undermine the predictability objective that underlies the Rome II framework.

A further divergence concerns the absence of a rule equivalent to Article 17 of the Rome II Regulation, which requires courts to consider the rules of safety and conduct in force at the place and time of the event giving rise to liability. This provision serves an important balancing function. Article 17 ensures that the assessment of the defendant's conduct considers the regulatory environment in which that conduct took place. In cross-border tort cases, this prevents the defendant from being judged solely by the standards of another legal system that may impose different or more stringent requirements. The rule thus strikes a balance between the interests of the claimant, whose damage occurred in a particular state, and the legitimate expectations of the defendant, who acted under the regulatory framework of another jurisdiction. The absence of a comparable provision in the Draft weakens this equilibrium and may produce outcomes that insufficiently reflect the regulatory context of the defendant's conduct.

Finally, Ukrainian law diverges from the European model regarding party autonomy in non-contractual obligations. Article 14 of the Rome II Regulation establishes a genuine principle of party autonomy for non-contractual obligations.

Ukrainian law departs significantly from this model. Current Law "On International Private Law" contains only a general provision on party autonomy, Article 5 of the current law, which allows the parties to choose the applicable law only "in cases provided by law." In Ukrainian legislation, such an enabling rule exists only for contracts (Article 43). No equivalent provision authorises a choice of law for non-contractual obligations.

The Draft Book VIII does not remedy this structural limitation. Although it refines the general clause on party autonomy, it retains the same restrictive formulation according to

which party autonomy operates only “in cases provided by law.” (Article 1801 of the Draft). In the absence of a specific rule allowing the choice of law for non-contractual obligations, the freedom of choice remains inoperative in this field.

9 CONCLUSIONS

Brussels I (Recast) and the Rome II Regulation will become directly applicable in Ukraine upon accession to the European Union. The ongoing recodification of Ukrainian private law, particularly the preparation of Book VIII of the Draft Civil Code, therefore, offers a timely opportunity to align Ukrainian rules on cross-border tort disputes with European standards already at the pre-accession stage. To achieve genuine alignment, Ukrainian legislators should consider not only the text of these instruments but also their interpretation in the CJEU’s case law.

Regarding international jurisdiction, Ukrainian legislators should narrow the range of available connecting factors. The current law provides an excessively broad and conceptually unclear set of jurisdictional bases, which reduces legal predictability and facilitates forum shopping, outcomes that the Brussels I system is specifically designed to prevent. The Draft Civil Code refines some of these formulations but preserves the same structural breadth, including jurisdiction grounded in the claimant's domicile. This ground should be reconsidered and, if retained, clearly delimited so as not to extend to cases where the claimant merely experiences the financial consequences of damage that occurred elsewhere.

Regarding applicable law, the Draft's introduction of *lex loci damni* as the principal connecting factor is a welcome and necessary step that Ukrainian legislators should maintain and build upon. However, the Draft should be supplemented in three important respects. First, it should expressly codify the distinction between direct damage and indirect consequences, which has proven central in CJEU case law and is essential to prevent courts from localising damage at the place where secondary financial repercussions are felt. Second, the Draft should incorporate a rule equivalent to Article 17 of the Rome II Regulation, requiring courts to consider the rules of safety and conduct in force at the place where the harmful act occurred. Without such a provision, defendants risk being assessed solely by the standards of a foreign legal system, upsetting the balance between the parties' interests. Third, Ukrainian legislators should introduce an explicit party autonomy clause for non-contractual obligations, modelled on Article 14 of Rome II. The current legislation permits choice of law only in cases expressly authorised by statute, and tort claims fall outside that category. The Draft does not remedy this gap. Addressing it would bring Ukrainian private international law into structural conformity with the Rome II framework and enhance legal certainty for parties engaged in cross-border transactions.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ГОЛОВНА КОЛІЗІЙНА ПРИВ'ЯЗКА ДЛЯ ДЕЛІКТНИХ ПОЗОВІВ У ЄС ТА УКРАЇНІ: УРОКИ ІЗ ПРАКТИКИ СУДУ СПРАВЕДЛИВОСТІ ЄС ДЛЯ УКРАЇНСЬКОЇ РЕКОДИФІКАЦІЇ

Богдан Карнаух* та Тетяна Цувіна

АНОТАЦІЯ

Вступ. У міру просування України до членства в ЄС узгодження її міжнародного приватного права з асписом ЄС стало нагальним законодавчим завданням. Транскордонні деліктні спори в ЄС регулюються двома ключовими інструментами: Регламентом (ЄС) № 1215/2012 («Брюссель I» у новій редакції), що стосується міжнародної юрисдикції, та Регламентом (ЄС) № 864/2007 («Рим II»), який визначає застосовне право. Практика їхнього застосування значною мірою визначається прецедентами Суду справедливості ЄС (CJEU). В Україні наразі триває комплексна рекодифікація приватного права, у рамках якої підготовано проект нового Цивільного кодексу, що містить окрему Книгу VIII, присвячену міжнародному приватному праву (Законопроект № 15150, квітень 2026 р.). Ця реформа створює важливу нагоду привести українські колізійні норми у відповідність до європейських стандартів перед вступом до ЄС.

Методи. У статті застосовується доктринальна та порівняльно-правова методологія, при цьому питання юрисдикції та застосовного права розглядаються як два окремі, але взаємопов'язані аспекти транскордонних деліктних спорів. Аналіз розпочинається з розгляду двох основних потенційно можливих колізійних прив'язок у деліктних спорах – *lex loci delicti commissi* та *lex loci damni* – а також міркувань правової політики, що лежать в основі кожної з них. Наступна частина дослідження присвячена правовій системі ЄС: тут аналізується, як структуровані, так як інтерпретуються правила юрисдикції за статтею 7(2) Регламенту Брюссель I та питання застосовного права за статтею 4(1) Регламенту Рим II, особливу увагу звернено на розмежування, підкреслюване Судом справедливості ЄС, між прямою шкодою та опосередкованими наслідками. Особлива увага приділяється проблемі локалізації чистих фінансових збитків, з ілюстраціями через провідні рішення Суду справедливості ЄС. На цьому доктринальному тлі здійснюється оцінка чинного Закону України «Про міжнародне приватне право» як у контексті питання юрисдикції, так і щодо питання застосовного права, визначаються розбіжності із європейською моделлю. Насамкінець, у статті аналізуються підходи, запропоновані у Книзі VIII Проекту Цивільного кодексу України, оцінюється, наскільки поточна рекодифікація враховує європейські стандарти, та формуються рекомендації щодо подальшого узгодження законодавства.

Результати та висновки. Дослідження виявляє суттєві розбіжності між українським законодавством та європейською моделлю. Чинне українське законодавство у контекст питання застосовного права бере за основу принцип *lex loci delicti commissi*, що є системним відхиленням від підходу *lex loci damni*, закріпленого в Регламенті Рим II, а також встановлює надмірно широкі та концептуально нечіткі підстави для визначення юрисдикції. Хоча проект Цивільного кодексу

свідчить про значний прогрес завдяки сприйняттю принципу *lex loci damni* як основної колізійної привязки, все ж залишається низка критичних прогалин: у Проєкті відсутнє кодифіковане розмежування між прямою шкодою та опосередкованими наслідками (наріжний камінь прецедентного права CJEU), відсутня норма, еквівалентна статті 17 Регламенту Рим II щодо стандартів безпечної поведінки, а також не визнається автономія сторін щодо позадоговірних зобов'язань. У статті рекомендуються цілеспрямовані законодавчі зміни для усунення цих прогалин та досягнення реалістичної узгодженості з європейською системою колізійного права.

Ключові слова: *недоговірна відповідальність, делікти, lex loci damni, lex loci delicti commissi, міжнародне приватне право ЄС, чисті економічні збитки, рекодифікація, адаптація до права ЄС.*

Research Article

THE EU ARTIFICIAL INTELLIGENCE ACT AND DATA PROTECTION CHALLENGES FOR NON-EU CITIZENS: COMPARATIVE INSIGHTS FROM THE WESTERN BALKANS

Fjorida Ballauri

ABSTRACT

Background: In the era of artificial intelligence, data protection and privacy rights have become critical components of the European Union's legal order. This study examines the interaction between the EU Artificial Intelligence Act of 2024 and the General Data Protection Regulation, focusing on their implications for non-EU countries, particularly Albania. The adoption of the EU Artificial Intelligence Act has reshaped the legal framework governing artificial intelligence and personal data protection in Europe. However, the practical implications of these instruments for non-EU citizens, particularly in Western Balkan countries as EU candidate countries, remain underexplored.

Methods: The study adopts a combined comparative legal and empirical methodology. It integrates a comparative legal analysis to evaluate the extent of alignment between domestic legislation and EU standards, a questionnaire-based survey of 178 respondents to assess public awareness and perceptions of

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privacy rights, and an analysis of attitudes towards the risks associated with artificial intelligence and personal data processing. It provides quantitative evidence that complements the legal analysis by illustrating how regulatory frameworks are perceived and experienced in practice. Based on the questionnaire data identifying Meta Platforms as the most widely used social media platform in Albania, the study includes a case study designed as an experimental rights-exercise test involving a data-access request submitted to the company, aimed at examining the cross-border enforceability of data-subject rights.

Results and Conclusions: The findings reveal a significant gap between formal legislative harmonisation with EU data-protection and AI standards and their effective implementation in Western Balkan candidate countries. Survey evidence from 178 Albanian respondents indicates limited awareness of personal data rights, low trust in institutional protection, and widespread uncertainty about AI-driven profiling and data use. The case study further demonstrates challenges in enforcing rights against foreign entities. Strengthening supervisory mechanisms and adopting the EU's risk-based approach to AI regulation are recommended to ensure effective protection of personal data in candidate countries. Effective data protection measures for non-EU citizens require strengthening supervisory cooperation, enhancing enforcement capacity, and adopting the EU AI Act's risk-based governance model in domestic law.

1 INTRODUCTION

The protection of personal data is a fundamental right guaranteed by Article 8(1) of the Charter of Fundamental Rights of the European Union¹ and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU).² The rapid evolution of technology has increased the risks to privacy and data integrity, requiring every state to strengthen guarantees for these rights, especially in the era of artificial intelligence (AI).

The development of technology is progressing rapidly, and everyday data management problems pose a risk to fundamental human rights in private life and across social and economic spheres. The protection of personal data is an obligation that every state must undertake in light of developments in the field of artificial intelligence. The EU has recently taken concrete measures to regulate the use of artificial intelligence in various applications, bringing guarantees for the fundamental rights of EU citizens. While the General Data Protection Regulation (GDPR)³ provides extensive protection for EU citizens, non-EU citizens remain vulnerable to profiling and cross-border data transfers. Few studies address how AI regulation affects these populations.

1 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

2 Treaty on the Functioning of the European Union (Consolidated versions) [2016] OJ C 202/47.

3 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.

European countries such as Albania, Kosovo, Montenegro, North Macedonia, Serbia, and Bosnia and Herzegovina are currently candidates for EU membership and, as such, have moved forward with the approximation of their legislation to EU standards. However, without becoming a member state, they cannot enjoy the protection that EU legislation and its law enforcement instruments provide. The article aims to address the research question: To what extent do national data protection frameworks in Western Balkan countries, especially in Albania, provide protection comparable to that under the GDPR and the AI Act?

The paper explores whether citizens in candidate countries enjoy effective protection comparable to that guaranteed by the GDPR and the AI Act.⁴ The EU's regulation on AI is expected to serve as a guide for other European countries that are not part of the EU. Under these conditions, other countries should implement regulatory and legal measures so that the privacy policies of companies that will use AI are assessed and monitored by responsible institutions before they are implemented for citizens.

2 METHODOLOGY AND SCOPE OF RESEARCH

The methodology of this study combines comparative legal analysis with empirical research, integrating doctrinal analysis, a questionnaire-based survey, and a case study. The comparative legal analysis evaluates the extent to which domestic legislation aligns with EU standards through textual, systematic, and teleological interpretation. The empirical component is based on a structured questionnaire administered to 178 respondents, in line with established survey research methodologies.⁵ The case study follows an experimental approach to assessing the enforceability of data-subject rights in practice, consistent with case study research design principles.⁶ This mixed-methods approach enables a comprehensive assessment of both legal norms and their practical implementation.⁷ Together, these methods enable a comprehensive examination of the gap between legislative harmonisation and its effective application in practice.

4 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L 2024/1689 <<http://data.europa.eu/eli/reg/2024/1689/oj>> accessed 25 January 2026.

5 Alan Bryman, *Social Research Methods* (5th edn, OUP 2016); Don A Dillman, Jolene D Smyth and Leah Melani Christian, *Internet, Phone, Mail, and Mixed-Mode Surveys: The Tailored Design Method* (4th edn, Wiley 2014).

6 Robert K Yin, *Case Study Research and Applications: Design and Methods* (6th edn, SAGE 2018).

7 Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010); John W Creswell and J David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (5th edn, SAGE 2018).

The realisation of this study was inspired by an article titled “Meta trains artificial intelligence on the data of Balkan citizens without warning”. In this article, it was stated that: *“Everything happened without notice or explanation and millions of users in the Western Balkans were not even informed about Meta’s new “Privacy Policy”, which was published on June 26, 2024. Users from the Western Balkans were not informed about the innovation, while citizens of the European Union, when entering the platforms, received a warning that the policy was changing and then had the option to withdraw data from the planned artificial intelligence training.”*⁸

In particular, this paper analyses EU legislation governing the protection of personal data in the context of the development and use of artificial intelligence in EU Member States. The analysis is conducted from a comparative perspective, focusing on Western Balkan countries and, more specifically, on Albania, for which a more detailed comparative assessment is provided. Although EU candidate countries, such as Albania and other Western Balkan countries, are harmonising their domestic legislation with EU law and regulations, the level of legal protection available to citizens of these non-EU countries, particularly in the practical implementation of the law and the exercise of supervisory powers by domestic authorities, remains questionable.

A comparative legal analysis was conducted between the EU framework and national legislation in Albania. Empirical data were collected through an online questionnaire⁹ of 178 respondents to assess awareness of personal data rights. The study applies a doctrinal and empirical approach and limits its scope to the interaction between GDPR principles¹⁰ and the Albanian Law No. 124/2024.¹¹ The questionnaire was designed, using the Google Forms platform, in which 178 Albanian citizens of different ages participated, with the aim of collecting their perceptions about the security of their personal data when using applications such as Facebook, Instagram, etc., as well as on their knowledge of rights, the guarantees offered by legislation, their assessment of the use of their personal data, and whether they had encountered the use of their personal data without their knowledge or consent. The survey was voluntary and anonymous. Participants were informed of the study’s purpose and their right to withdraw at any time, ensuring compliance with ethical standards for social research and the principles of informed consent. All participants

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- 8 Natallija Jovanoviç, ‘Meta trajnon pa paralajmërim inteligjencën artificiale mbi të dhënat e qytetarëve të Ballkanit’ (*Radio Evropa e Lirë*, 5 August 2024) <<https://www.evropaelire.org/a/meta-trajnon-paparalajmerim-inteligjencen-artificiale-mbi-te-dhenat-e-qytetareve-ballkanit-/33066127.html>> accessed 25 January 2026.
 - 9 Fjorida Ballauri, ‘The Questionnaire on the Awareness and Experience of Albanian Citizens Regarding the Protection of Personal Data and Privacy in the Digital Age’ (*Google Forms*, 2025) <<https://docs.google.com/forms/d/1rXEv9an-fZNGD79VSr5K52HUu2KDDLX0AF05DLFwVOQ/edit#responses>> accessed 25 January 2026.
 - 10 Regulation (EU) 2016/679 (n 3).
 - 11 Law of the Republic of Albania No 124/2024 ‘On Personal Data Protection’ (adopted 19 December 2024) [2025] Official Gazette 9.

provided informed consent prior to participation. The survey was conducted anonymously. The data were analysed in aggregate form to ensure confidentiality and compliance with ethical research standards. No personal identifiers were collected, and the results were analysed in aggregate form. Among the 178 respondents, 60.7% were women, 37.6% men, and 1.7% preferred not to disclose. The largest age group was aged 26–40 years (46%), followed by 41–60 years (30.3%), 18–25 years (11.2%), and under 18 years (5.6%).

The questionnaire included sections on basic information, awareness of the new legal framework (Law No. 124/2024), and understanding of key concepts such as personal data and individual rights. The respondents are asked about their own experiences with potential data misuse, combining predefined answers with open-ended questions to capture real-life situations. Further sections focused on awareness of complaint mechanisms, patterns of social media use, and perceptions of how personal data are used online, particularly in relation to profiling and targeted advertising. Finally, participants were asked how protected they felt and whether more public awareness is needed. Taken together, the questionnaire was designed to provide a clearer picture of how the legal framework operates in practice, highlighting the gap between formal rules and people's actual knowledge and experiences.

According to the data collected, more women (60.7% of the respondents) responded than men (37.6% of the respondents). Meanwhile, 1.7% (of the respondents preferred not to answer this question). The aim was to collect data on the information of different citizens regarding the protection of their personal data when using Facebook, Instagram, etc., as well as on their knowledge of rights, the guarantees offered by legislation, their assessment of the use of their personal data, and whether they had encountered the use of their personal data without their knowledge or consent. The collected data were analysed using descriptive statistical methods. The empirical findings are integrated with the doctrinal analysis of the Albanian legal framework and relevant EU standards. This combined approach allows for the identification of structural gaps between normative regulation and practical enforcement. In addition to the doctrinal and empirical components, this study incorporated an experimental element designed to test the practical enforceability of data subject rights under the newly adopted Albanian Law No. 124/2024 on personal data protection. The objective was to verify whether a non-EU citizen can effectively exercise rights analogous to those guaranteed under the GDPR, specifically the rights of access, information, and erasure when interacting with a major global platform.

On 12 July 2025, a formal request was submitted to the designated Meta Platforms data protection contact address (mydataprivacyrights@fb.com). The request sought:

1. A comprehensive summary of personal data collected prior to 2024 remains stored by the company.
2. The purposes for which this data continues to be processed.
3. The identity of any third party with whom the data has been shared before or after 2024.

4. Confirmation of whether the data had been included in automated processes, such as profiling or targeted advertising; and
5. The planned retention period for such data.

The request explicitly cited the 30-day response period established under Article 14 of Law No. 124/2024, mirroring Article 12(3) of the GDPR. Despite the formal submission and the expiration of the legal deadline, Meta Platforms has not responded.

This result illustrates a practical enforcement gap between the formal rights recognised by national law and their practical realisation, particularly where data controllers are established outside the supervisory authority's jurisdiction. The experiment thus provides empirical evidence for the paper's broader finding that legal harmonisation with EU standards does not automatically ensure effective protection for non-EU citizens in cross-border digital contexts.

Combining desk-based research, comparative assessment of EU legislation and the study of the results of the specific questionnaire designed by the author,¹² this study aims to provide a comprehensive and comparative analysis of the legal framework of the non-EU countries in the protection of personal data and the challenges when AI technology is used.

The study does not provide a full sociological analysis of attitudes but focuses on the legal and institutional dimensions of data protection.

3 LIMITATIONS OF THE STUDY

This study presents several limitations that should be acknowledged. The empirical component is based on a questionnaire conducted with 178 respondents, which, while sufficient to identify general trends, does not provide a fully representative sample of the Albanian population. The findings should, therefore, be interpreted as indicative rather than exhaustive.

The questionnaire primarily captures self-reported perceptions and levels of awareness, which may be influenced by subjective understanding or recall bias. Nevertheless, its inclusion provides valuable insight into the practical dimension of data protection, highlighting the gap between formal legal guarantees and citizens' real-world experiences. The case study is limited to a single platform, Meta Platforms, and to one experimental rights-exercise request. While this approach allows for a concrete assessment of cross-border enforceability, it does not fully capture the diversity of practices across different digital service providers.

12 Ballauri (n 9).

Despite these limitations, the combined use of doctrinal analysis, empirical data, and the case study provides a more practical view of the overall research design. The questionnaire contributes to the research field by providing rare empirical evidence on public awareness and perceptions in a non-EU context, an area underexplored in the existing literature.

4 LITERATURE REVIEW

Legal and practical discussions on the regulation of artificial intelligence (AI) and data protection have advanced rapidly since the adoption of the GDPR.¹³ However, important debates remain regarding governance, enforcement, and extraterritorial effects. The GDPR and the recently adopted EU Artificial Intelligence Act¹⁴ together form the normative framework against which national harmonisation efforts should be assessed. The GDPR establishes substantive rights and procedural safeguards concerning profiling and international data transfers (Arts. 20–50), while the EU AI Act introduces a risk-based regulatory model that distinguishes between unacceptable, high-risk, and low-risk AI systems. These instruments provide the legal benchmark commonly used in comparative literature to evaluate the level of protection in non-EU jurisdictions.

A growing body of legal scholarship examines the limits of existing anti-discrimination and data protection frameworks when applied to algorithmic decision-making. Philipp Hacker foregrounds the legal and practical challenges in teaching fairness to AI,¹⁵ arguing that normative prescriptions must be paired with procedural safeguards such as audits and impact assessments. Complementing this, Michael Veale and Frederik Zuiderveen Borgesius further demystify the AI Act by clarifying its interplay with existing EU data protection law and its likely enforcement challenges,¹⁶ concluding that national authorities will face significant burdens in ensuring consistent interpretation and accountability across Member States.

Empirical and technical perspectives also contribute to this debate. Studies on algorithmic harm spanning employment, advertising, and biometric systems, illustrate how biased training data and opaque models can produce discriminatory outcomes not easily redressed by classical anti-discrimination law¹⁷. At the same time, recent policy guidance has

13 Regulation (EU) 2016/679 (n 3).

14 Regulation (EU) 2024/1689 (n 4).

15 Philipp Hacker, 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law' (2018) 55(4) *Common Market Law Review* 1143, doi:10.54648/cola2018095.

16 Michael Veale and Frederik Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' (2021) 22(4) *Computer Law & Security Review* 97, doi:10.9785/crl-2021-220402.

17 Frederik Zuiderveen Borgesius, 'Strengthening Legal Protection against Discrimination by Algorithms and Artificial Intelligence' (2020) 24(10) *The International Journal of Human Rights* 1572, doi:10.1080/13642987.2020.1743976.

expanded the operational understanding of AI-related data protection. The European Data Protection Board issued its Guidelines on AI and Data Protection, which interpret how the principles of lawfulness, fairness, and transparency apply to AI systems under the GDPR and AI Act.¹⁸ The guidelines stress the importance of “data minimisation by design” and the use of impact assessments for all high-risk AI applications.

International and institutional reports bridge academic critique and regulatory practice. The European Parliament’s 2021 study on biometric recognition¹⁹ clarifies the ethical and human-rights rationale for restrictive measures on facial recognition and mass surveillance. The NIST AI Risk Management Framework²⁰ provides operational tools for assessing and mitigating AI risks, relevant even outside the United States. In parallel, the European Data Protection Board Annual Report for 2024 on Cross-Border AI Compliance identifies enforcement inconsistencies among Member States and highlights the limited oversight capacity in associated countries,²¹ including EU candidates, to monitor AI-related data transfers. Council of Europe instruments, most notably Convention 108+²² continue to provide a multilateral avenue for achieving interoperable standards that complement EU rules and reduce legal fragmentation. A distinct strand of literature addresses the extraterritorial implications of EU rules and the realpolitik of enforcement. Oscar J. Gstrein and Andrej Zwitter note that while the GDPR projects normative standards beyond EU borders, practical protection for non-EU citizens depends on the presence of supervisory cooperation and technical capacity.²³ Case studies from candidate states show that formal legislative transposition often coexists with weak enforcement and limited public awareness.²⁴

- 18 European Data Protection Supervisor, *Generative AI and the EUDPR: Orientations for ensuring data protection compliance when using Generative AI systems* (version 2, EDPS 2025) <https://www.edps.europa.eu/data-protection/our-work/publications/guidelines/2025-10-28-guidance-generative-ai-strengthening-data-protection-rapidly-changing-digital-era_en> accessed 25 January 2026.
- 19 Gloria González Fuster and Michalina Nadolna Peeters, *Person Identification, Human Rights and Ethical Principles: Rethinking Biometrics in the Era of Artificial Intelligence* (European Parliament EPRS 2021) doi:10.2861/384495.
- 20 National Institute of Standards and Technology, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* (NIST AI 100-1, US Department of Commerce 2023) <<https://www.nist.gov/itl/ai-risk-management-framework>> accessed 25 January 2026.
- 21 European Data Protection Board, *Annual Report 2024: Protecting Personal Data in a Changing Landscape* (EDPB 2024) <https://www.edpb.europa.eu/news/news/2025/edpb-annual-report-2024-protecting-personal-data-changing-landscape_en> accessed 25 January 2026.
- 22 Council of Europe, *Convention 108 +: Convention for the Protection of Individuals with Regard to the Processing of Personal Data* (CoE 2018) <<https://www.coe.int/en/web/data-protection/convention108-and-protocol>> accessed 25 January 2026.
- 23 Oskar J Gstrein and Andrej Zwitter, ‘Extraterritorial Application of the GDPR: Promoting European Values or Power?’ (2021) 10(3) Internet Policy Review, doi:10.14763/2021.3.1576.
- 24 See, European Commission, *Albania 2024 Report* (SWD(2024) 690 final, 30 October 2024) <<https://eur-lex.europa.eu/legal-content/BG/ALL/?uri=CELEX:52024SC0690>> accessed 25 January 2026; Information and Data Protection Commissioner, *Annual Report 2024* (IDPC 2025) <<https://idp.al/en/annual-reports/>> accessed 25 January 2026.

5 TRANSFER OF PERSONAL DATA AND ALIGNMENT OF ALBANIAN LEGISLATION WITH EU STANDARDS

Public security concerns and crime prevention policies, particularly in counter-terrorism, have led to the adoption of surveillance and monitoring measures at both the EU and national levels. These measures frequently involve the processing of personal data by law enforcement authorities, raising important questions regarding the balance between public security and the protection of fundamental rights.

The General Data Protection Regulation²⁵ and the Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data”²⁶ are the main EU documents to guarantee the protection of personal data, as a fundamental right. The protection and free movement of data processed by law enforcement authorities for the purposes of prevention, investigation, detection, prosecution of criminal offences, or the execution of criminal penalties are regulated by this directive, allowing member states a certain level of flexibility to incorporate it into their domestic law.

The Directive on data protection in the police and justice sectors aims to balance the objectives of personal data protection with the objectives of security policies and public interest. This directive provides that any processing of personal data must be lawful, fair and transparent in relation to the natural persons concerned, and may be processed only for specific purposes laid down by law. This, in itself, does not prevent the law-enforcement authorities from carrying out activities such as covert investigations or video surveillance. Such activities can be done for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, as long as they are laid down by law and constitute a necessary and proportionate measure in a democratic society with due regard for the legitimate interests of the natural person concerned. Natural persons should be made aware of the risks, rules, safeguards, and rights in relation to the processing of their personal data, and how to exercise their rights in this regard. In particular, the specific purposes for which the personal data are processed should be explicit, legitimate, and determined at the time of the collection. The personal data should be adequate and relevant for the purposes for which it is processed. It should be ensured that the personal data collected is not excessive and not kept longer than is necessary for the purpose for

25 Regulation (EU) 2016/679 (n 3).

26 Directive (EU) 2016/680 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 by Competent Authorities for the Purposes of the Prevention, Investigation, Detection, or Prosecution of Criminal Offences and on the Free Movement of Such Data (2016) OJ L 119/89.

which it is processed. Personal data should be processed only if the purpose of the processing cannot reasonably be fulfilled by other means.²⁷

Albania, North Macedonia, Serbia, Montenegro, Bosnia and Herzegovina, and Kosovo have made efforts to align with the GDPR by amending their personal data protection laws. In the framework of harmonisation, the legislation with the EU's *Acquis Communautaire*,²⁸ Albania has adopted a new law in 2024, no. 124 "On personal data protection",²⁹ aiming to be fully aligned with the GDPR, but with some shortcomings in practical implementation, which are addressed below.

This law aimed to be fully aligned with the *acquis* of the European Union and specifically the transposition of 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 Directive (EU) 2016/680 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 by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties and on the free movement of such data". The Personal Data Protection Authority in Albania, the Commissioner for Personal Data Protection, has been granted additional powers, but not on a level with EU authorities. Albanian law provides a greater scope for data processing without consent when carried out by state authorities, unlike the GDPR's narrow approach. On the other hand, there are no legal measures for data protection in the context of automatic profiling and artificial intelligence, which are important pillars of the GDPR and the subject of this paper's analysis. Comparing the provisions on international data transfer, it is found that the GDPR imposes very strict criteria for data transfers outside the EU, while Law 124/2024 treats them more generally and, in some cases, even allows data transfers if the data subject has given consent.

Serbia³⁰ and North Macedonia³¹ have incorporated many elements of the GDPR into their laws, but the supervisory authorities do not have the full capacity of the EU to monitor and provide citizens with the guarantees they need to protect their personal data. Kosovo³² has an improved law that attempts to align with the GDPR (2019), but implementation remains difficult due to the same problems in the supervisory mechanisms of the responsible authorities.

27 *ibid*, para 26.

28 See, European Commission, 'Chapters of the *acquis*' (*Enlargement and Eastern Neighbourhood*, 2012) <https://enlargement.ec.europa.eu/enlargement-policy/conditions-membership/chapters-acquis_en> accessed 25 January 2026.

29 Law of the Republic of Albania No 124/2024 (n 11).

30 Law of the Republic of Serbia 'On Personal Data Protection' [2018] Official Gazette 87.

31 Law of the Republic of North Macedonia 'On Personal Data Protection' [2019] Official Gazette 42/20 and 294/21.

32 Law of the Republic of Kosovo No 06/L-082 'On Protection of Personal Data' [2019] Official Gazette 6.

The Albanian Law 124/2024 on personal data protection is in line with and guarantees the implementation of the obligations in relation to public security and the provisions of Directive 2016/680 regarding the processing of data for the purposes of prevention, investigation, detection, prosecution of criminal offences or the execution of criminal penalties. In Chapter IV, this law contains provisions on the international transfer of data. The conditions for the legality of international transfer remain almost the same, however, an innovation brought by the law is the inclusion of cases for allowing the transfer of personal data without the authorization of the Commissioner, to countries with an insufficient level of data protection, also introducing, in this context, new instruments, aimed at guaranteeing appropriate safeguards for the rights and freedoms of data subjects, such as: “Standard data protection clauses” and “Binding rules of the group of commercial companies”.

However, practice has demonstrated that the use of Standard Contractual Clauses alone does not provide sufficient safeguards to ensure the adequate protection of data subjects. The case of Ireland³³ and the issue of data transfers under standard contractual clauses (SCCs) by Meta (Facebook, Instagram) show that this is a sensitive issue for EU countries as well. Meanwhile, for other countries outside the EU, this situation appears even more uncertain, despite the fact that the law may be complete, most companies that process data, such as Meta, etc., do not yet have a designated representative to comply with and provide the guarantees that the legislation in the field of data protection requires. The transfer of data in the absence of an adequacy decision constitutes an object of analysis of this paper, because it is directly related to the possibility of obtaining personal data from applications that use AI.

Albanian Law no. 124/2024 provides, among other things, in its Article 41, point 3, the possibility of transferring data, when there is no adequacy decision or appropriate safeguards. In such a case, the transfer of personal data to a third country or an international organisation will only take place if one of the following conditions applies:

- the data subject has given his or her informed and explicit consent to the proposed international data transfer, having been clearly informed of the risks of the transfer.
- the transfer is necessary for the performance of a contract between the data subject and the data controller, for the implementation of pre-contractual measures taken at the request of the data subject or the transfer is necessary for the conclusion, or performance, of a contract between the data controller and a third party in the interests of the data subject.

33 See, ‘1.2 billion Euro fine for Facebook as a Result of EDPB Binding Decision’ (*European Data Protection Board*, 22 May 2023) <https://www.edpb.europa.eu/news/news/2023/12-billion-euro-fine-facebook-result-edpb-binding-decision_en> accessed 25 January 2026. This fine, which is the largest GDPR fine ever, was imposed for Meta’s transfers of personal data to the U.S. on the basis of standard contractual clauses (SCCs) since 16 July 2020. Furthermore, Meta has been ordered to bring its data transfers into compliance with the GDPR.

- the processing is necessary to protect the vital interests of the data subject or of another
- natural person where the data subject is physically unable to give consent, or where the right to act has been withdrawn or restricted.
- the transfer is necessary for reasons of important public interest.
- processing is necessary for the establishment, exercise or defence of a right, obligation, or legitimate interest before a court or public authority.
- the transfer is made from a register which by law is open to consultation and provides
- information to the public, provided that the transfer only includes certain information
- and not entire sections of the register.

Albanian Law no. 124/2024 is almost fully aligned with the GDPR. Whereas Article 41 of this law, unlike the provisions of the GDPR, does not provide the same guarantees and conditions in the case of data transfers in the absence of an adequacy decision. Article 41, point 3 letter a) provides that “In the absence of an adequacy decision or of appropriate safeguards in accordance with point 1 of this article, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organisation shall only take place if one of the following conditions applies:

a) the data subject has given informed and explicit consent to the proposed international data transfer, having been clearly informed of the risks of the transfer.

The key issue concerns the adequacy of citizen protection when using online platforms and social media networks. The permission that this provision has given to the transfer of data in the absence of an adequacy decision, in the case of point a), i.e. when the data subject himself has given informed and explicit consent to the proposed international transfer of data, does not comply with the protection offered by the GDPR (see Article 46 of the GDPR). The information is clearly presumed to have been provided after being notified of the risks of the transfer, in this case, by the recipient or processor of the data. In online applications, this information is included in the terms of reference, which generally no one reads.³⁴

34 A 2017 study by Jonathan Obar and Anne Oeldorf-Hirsch found that only 1% of users read the terms of service in detail. See, David Berreby, 'Click to Agree with What? No One Reads Terms of Service, Studies Confirm' *The Guardian* (London, 3 March 2017) <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print?utm_source=chatgpt.com> accessed 25 January 2026.

Unlike this approach in Albanian legislation, the GDPR provides stronger criteria for data transfers in the absence of an adequacy decision. The problem becomes even more evident when, today, this clause, which leaves it to the subject to give consent, may increase the risk and reduce the protection of the personal data of Albanian citizens, given that users of social media networks do not read the terms of service. Users routinely provide consent without informed evaluation or assessment of the level of data that will be used, because they are in a hurry to use the requested application. A significant number of users are unaware of their rights regarding personal data, and some do not know that there is legislation for this purpose.

Similar dynamics are observed in other Western Balkan countries. Kosovo's 2019 legislation³⁵ on data protection reflects GDPR principles but lacks clear mechanisms for cross-border enforcement. North Macedonia's Data Protection Law³⁶ introduced GDPR-style rights, yet implementation has been hampered by low public awareness and insufficient technical capacity among data controllers. Serbia's Law on Personal Data Protection,³⁷ also modelled on the GDPR, has achieved high formal alignment but remains constrained by the limited resources of the Commissioner for Information of the public importance and personal data protection.³⁸ These patterns confirm that while legal texts in the region mirror EU instruments, functional equivalence in enforcement and citizen protection is still missing.

6 AUTOMATED PROFILING UNDER AI SYSTEMS: LEGAL RISKS AND INDIVIDUAL PROTECTION

The GDPR provides protection even when users knowingly disclose personal data on social media networks (e.g., photos, locations, private events). The companies that manage these networks (such as Meta/Facebook, TikTok, X/Twitter, Instagram, etc.) are not exempt from their legal obligations for data protection. When a user voluntarily publishes personal information, it remains personal data under the GDPR. The right to privacy and control over data is not lost, except in very limited cases. Even on a social media platform, data processing must be limited to what is necessary for the expressed purpose.³⁹

The conscious publication of user data on social media networks does not relieve platforms of their obligation to protect it. Companies that manage social media networks

35 Law of the Republic of Kosovo No 06/L-082 (n 32).

36 Law of the Republic of North Macedonia 'On Personal Data Protection' (n 31).

37 Law of the Republic of Serbia 'On Personal Data Protection' (n 30).

38 SIGMA and OECD, *Public Administration in the Western Balkans 2024: Regional Overview of Assessments against the Principles of Public Administration* (OECD Publishing 2022) doi:10.1787/9c2f22f8-en.

39 See, Regulation (EU) 2016/679 (n 3) art 5.

have a full legal obligation to respect the rights of individuals, process data carefully, provide transparency, and guarantee the security of information, even when this information is “self-posted” by users.

How protected are the personal data of social media network users, and how vulnerable are they to phenomena such as profiling in the future?

If we refer to the definition given in Albanian Law on Data Protection, “Profiling”⁴⁰ is any form of automated processing of personal data, which consists of using data to evaluate certain aspects relating to a natural person, in particular to analyse or predict aspects concerning his or her performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements. The risk that profiling poses in the daily use of computer systems is directly related to the violation of fundamental rights of citizens, such as equality, non-discrimination on grounds of gender, ethnicity, religion, education, economic status, social status, etc. Albanian law offers reasonable protection against profiling and the protection of sensitive personal data. Article 53 of Law no. 124/2024 provides for an absolute prohibition on profiling through automated decision-making when it results in discrimination against citizens based on sensitive data. However, despite the legal provisions adopted in accordance with the GDPR, the mechanisms, control instruments and capacities of the supervisory authority towards entities that use AI in their applications are limited in practice.⁴¹

Law no.124/2024 applies to the processing of personal data and to the data controller⁴² which is not located in the Republic of Albania, but the processing is related to:

- i. The provision of goods or services, irrespective of whether compensation of the data subject is required, to such data subjects in the Republic of Albania.
- ii. The monitoring of the data subjects ‘behaviour as far as it takes place within the Republic of Albania.

The legal changes, approved by Albanian Law no. 124/2024, have brought greater guarantees for the protection of personal data; however, in practice, concrete steps and mechanisms to implement them are lacking. The law came into force in February 2025, and Albania and other Western Balkan countries still do not have Meta (Facebook/Instagram, etc.) representatives appointed. In the absence of effective international cooperation mechanisms or binding agreements, the enforcement of data protection law against foreign companies remains structurally limited. Although data

40 See, Law of the Republic of Albania No 124/2024 (n 11) art 5, para 19.

41 See for more information: Information and Data Protection Commissioner, *Annual Report 2022* (IDPC 2023) <<https://idp.al/en/annual-reports/>> accessed 25 January 2026; Information and Data Protection Commissioner, *Annual Report 2023* (IDPC 2024) <<https://idp.al/en/annual-reports/>> accessed 25 January 2026; Information and Data Protection Commissioner, *Annual Report 2024* (n 24).

42 Law of the Republic of Albania No 124/2024 (n 11) art 4, para 1, b).

protection regimes such as the GDPR claim extraterritorial applicability, there is a persistent gap between legal norms and their practical enforcement, particularly where foreign entities do not recognise the authority of national supervisory bodies. In such cases, the supervisory role risks remain more formal rather than effective.⁴³

7 THE EU ARTIFICIAL INTELLIGENCE ACT AND ITS INTERACTION WITH DATA PROTECTION STANDARDS

In the era of digitalisation and the development of artificial intelligence, protecting personal data and the right to privacy will be the greatest challenge for individuals and states. The increasing use of AI across sectors such as social, cultural, and economic life, with effects and consequences for the protection of fundamental human rights, has highlighted the need for a regulatory framework. This framework should first prioritise human well-being. For this reason, the EU has approved Regulation (EU) 2024/1689 of the European Parliament and of the Council, adopted on June 13, 2024, the Artificial Intelligence Act, which entered into force in August 2025.⁴⁴

As a prerequisite, this act emphasises that AI should be a human-centric technology. It should serve as a tool for people, with the aim of increasing human well-being.⁴⁵ The focus of the regulation is to balance the development of AI with the protection of people from potential risks, ensuring the free cross-border movement of AI-enabled goods and services while preventing Member States from imposing unnecessary restrictions. The European Union has made regulations on artificial intelligence systems using a risk-based approach that establishes different obligations for providers and users of artificial intelligence systems depending on the level of risk.⁴⁶

The term “risk” is defined in Article 3 of the EU AI Act as: “the combination of the probability of an occurrence of harm and the severity of that harm.” If an AI system presents an “unacceptable” risk level, such as those used for social scoring or cognitive manipulation of vulnerable individuals, it will be prohibited. For example, real-time biometric identification systems, such as facial recognition, are prohibited. AI systems that pose a “high-risk”, for instance, to health, education, law enforcement, security, or fundamental

43 Christopher Kuner, ‘Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law’ (2015) 5(4) *International Data Privacy Law* 235, doi:10.1093/idpl/ipv019; Dan Jerker B Svantesson, *Solving the Internet Jurisdiction Puzzle* (OUP 2017); Michal Czerniawski and Dan Svantesson, ‘Challenges to the Extraterritorial Enforcement of Data Privacy Law – EU Case Study’ in *Dataskyddet 50 år – historia, aktuella problem och framtid* (Stiftelsen Juridisk Fakultetslitteratur 2024) 127, doi:10.53292/bd1fa11c.f5b3afbe.

44 Regulation (EU) 2024/1689 (n 4).

45 *ibid*, para (6).

46 Jeroen van der Heijden, ‘Risk as an Approach to Regulatory Governance: An Evidence Synthesis and Research Agenda’ (2021) 11(3) *SAGE Open* 21582440211, doi:10.1177/21582440211032202.

rights will require evaluation before being made available on the market and, afterwards, through post-market monitoring. For these cases, there will be stricter safety, traceability, and transparency obligations during their lifespan, as is the case for low-risk AI systems, *i.e.* those that interact with natural people (*e.g.*, chatbots), and that create or manipulate sounds, images, and videos (*e.g.*, deepfakes). Low-risk AI systems, on the other hand, place responsibility for personal risk assessment on the user, who can choose to use the tool at their own discretion. In this case, the user must have enough information about the risk and possibilities when using the tool.⁴⁷

The EU AI Act explicitly prohibits real-time biometric identification systems, such as facial recognition (Article 5(h)). Biometrics and AI potentially allow for the broad surveillance of individuals, the potential impact of which is not limited to one or more specific fundamental rights, but can affect democracy itself.⁴⁸ AI algorithms can be influenced by biased or poor-quality training data, leading to discriminatory or unfair outcomes.⁴⁹ This is because existing categories of EU anti-discrimination law are not easily applicable to algorithmic decision-making.⁵⁰

A study requested by the JURI and PETI committees of the European Parliament Biometric Recognition and Behavioural Detection Assessing the ethical aspects of biometric recognition and behavioural detection techniques with a focus on their current and future use in public spaces,⁵¹ as an important document before the adoption of the EU AI Act, where among other things, it was suggested to add total surveillance as an additional prohibited AI practice. The EU AI Act prohibits the use of biometric identification systems in publicly accessible spaces even for law enforcement, unless and insofar as such use is strictly necessary for one of the following objectives:⁵²

- (i) *the targeted search for specific victims of abduction, trafficking in human beings or sexual exploitation of human beings, as well as the search for missing people.*
- (ii) *the prevention of a specific, substantial and imminent threat to the life or physical safety of natural persons or a genuine and present or genuine and foreseeable threat of a terrorist attack.*

47 See, Regulation (EU) 2024/1689 (n 4) art 3.

48 Fuster and Peeters (n 19) 33.

49 The use of facial and voice recognition systems has raised concerns about gender and race biases. Google, for example, was found to display job advertisements with high salaries predominantly to male users, while female users were shown fewer ads for high-paying jobs. This highlights the gender-biased discrimination in these systems.

50 Hacker (n 15).

51 Christiane Wendehorst and Yannic Duller, *Biometric Recognition and Behavioral Detection: Assessing the Ethical Aspects of Biometric Recognition and Behavioral Detection Techniques with a Focus on Their Current and Future Use in Public Spaces* (European Union 2021).

52 See, Regulation (EU) 2024/1689 (n 4) art 5 (h).

- (iii) *the localisation or identification of a person suspected of having committed a criminal offence, for the purpose of conducting a criminal investigation or prosecution or executing a criminal penalty for offences referred to in Annex II and punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least four years.*

In line with the presumption of innocence, natural persons in the Union should always be judged on their actual behaviour. Natural persons should never be judged on AI-predicted behaviour based solely on their profiling, personality traits or characteristics, such as nationality, place of birth, place of residence, number of children, level of debt or type of car, without a reasonable suspicion of that person being involved in a criminal activity based on objective verifiable facts and without human assessment thereof.⁵³

On the other hand, the EU AI Act foresaw that, the placing on the market, the putting into service for that specific purpose, or the use of AI systems that create or expand facial recognition databases through the untargeted scraping of facial images from the Internet or CCTV footage, should be prohibited because that practice adds to the feeling of mass surveillance and can lead to gross violations of fundamental rights, including the right to privacy⁵⁴. Some chat message apps, like WhatsApp, etc., use a “high level of security” for their communications, including facial recognition.

Users grant permission for the use of facial recognition technologies through the privacy and security settings of digital devices and applications in exchange for enhanced security.

What about tomorrow? The question that arises here is how protected is the personal data that individuals share on social media networks today with their consent, for higher “security” in communications? For example, special initiatives like that of Denmark, which aims to legalise the individual’s right to patent their image and voice, essentially show concern and measures to prevent high-risk situations for the individual, such as identity theft and personal data misuse of technology and artificial intelligence.⁵⁵ The Danish government is to clamp down on the creation and dissemination of AI-generated deepfakes by changing copyright law to ensure that everybody has the right to their own body, facial features and voice. The Danish government said it would strengthen protection against digital imitations of people’s identities with what it believes to be the first law of its kind in Europe.⁵⁶

⁵³ *ibid*, para 42.

⁵⁴ *ibid*, para 43.

⁵⁵ See for more information, Miranda Bryant, ‘Denmark to tackle deepfakes by giving people copyright to their own features’ *The Guardian* (London, 27 June 2025) <<https://www.theguardian.com/technology/2025/jun/27/deepfakes-denmark-copyright-law-artificial-intelligence>> accessed 25 January 2026.

⁵⁶ *ibid*

There is a fear that AI could become a technology capable of “enslaving” human beings.⁵⁷ Open-AI CEO Sam Altman, who was among the signatories of the statement “*Mitigating the risk of extinction by AI should be a global priority along with other risks on a societal scale such as pandemics and nuclear wars*,”⁵⁸ expressed his concerns about the impact of AI applications on areas related to rights and social inequality assumptions.⁵⁹ In response to a question about the legal framework for AI, Altman says a legal or policy framework for AI is needed. He compares ChatGPT conversations with those made with doctors, lawyers, and therapists and opines that AI chatbots should be granted the same legal privileges.⁶⁰ Although Altman had pointed out that many people tell AI very personal details about their lives, which could have serious consequences in legal cases.

Individuals, day after day, are sharing personal data, due to the short time available, in return for a modest payment (today) for the performance of daily tasks by an intelligent computer, which in most cases is used as a ubiquitous personal agenda, and in many others as a place where they can search and find answers to questions for any possible interest, creating dependence on its use in everyday life and giving up without realizing it from the development of critical thinking and reason before making a decision. The latter is most worrying for today's society. This concern has been recently raised by the CEO of OPEN IA, one of the artificial intelligence platforms. People rely on ChatGPT too much. There are young people who say, “*I can't make any decision in my life without telling ChatGPT everything that's going on. It knows me, it knows my friends. I'm going to do whatever it says*”⁶¹ Altman expressed concern about over-reliance on ChatGPT for personal decision-making. It is worrying that young people consider AI to be the “final voice” on every issue in life. He expressed serious concern that many younger users are placing too much emotional trust in ChatGPT, treating it not just as a tool, but as a kind of life coach or operating system. Such trust may lead to passive decision-making and diminished personal judgment. Emphasising the benefits of artificial intelligence (AI) tools like ChatGPT, Altman said

57 ‘Statement on AI Risk Press Coverage’ (*Center for AI Safety*, 2025) <<https://aistatement.com/>> accessed 25 January 2026.

58 ‘Statement on AI Risk: AI Experts and Public Figures Express their Concern about AI Risk’ (*Center for AI Safety*, 29 July 2025) <<https://aistatement.com/>> accessed 25 January 2026.

59 *ibid.* The statement “*Mitigating the risk of extinction by AI should be a global priority along with other societal-scale risks such as pandemics and nuclear war*”.

60 Jibin Joseph, ‘Altman Warns that your ChatGPT Conversations Can (and Will) Be Used Against You in Court’ (*PC Mag*, 4 August 2025) <<https://www.pcmag.com/news/altman-anything-you-say-to-chatgpt-can-and-will-be-used-against-you-in>> accessed 25 January 2026.

61 During a speech at a Federal Reserve banking conference in late July 2025, he expressed serious concern that many younger users are placing too much emotional trust in ChatGPT—treating it not just as a tool, but as a kind of life coach or operating system. See, Henry Chandonnet, ‘Sam Altman is Worried Some Young People Have an Emotional Over Reliance on ChatGPT when Making Decisions’ (*Business Insider*, 23 July 2025) <<https://www.aol.com/sam-altman-worried-young-people-181115911.html>> accessed 25 January 2026.

society needs new guardrails to address these risks.⁶² The CEO of OPENAI, asked these questions: are we not late with the generation of young people who are living and being formed in this technological development that is progressing at a galloping pace? Should we see the consequences and damage before taking measures?

Every state must intervene by first undertaking awareness campaigns for young people and citizens, and secondly by reviewing domestic legislation on the protection of individual rights, as well as continuously monitoring the processing of citizens' data.

Also, given the risks⁶³ that accompany uncontrolled use of AI, especially in malicious use, such as bioterrorism, unleashing AI agents, persuasive AIs,⁶⁴ concentration of power, etc. It is more than urgent to have regulatory and controlling legislation for all countries. The EU AI Act, adopted by the European Parliament, constitutes an important step in protecting the personal data of EU citizens by defining areas of risk and imposing restrictions on the activities of various entities using AI systems. Today, the problem remains evident for the Western Balkan countries, which are not subject to the EU AI Act. These countries must take concrete measures, including amendments or improvements to domestic legislation, to provide the necessary protection for citizens and public safety against the misuse of AI. The Western Balkan countries and Albania already have an important roadmap, the EU AI Act, which is a good start on the path to the controlled use of AI. As emphasised in the preamble of this EU document, “*AI should be a human-centric technology*”, to serve the individual and be used for the benefit of public safety. The EU AI Act's risk-based approach introduces an important regulatory model that candidate countries could adopt. The distinction between unacceptable, high, and low-risk AI systems provides a structured method for balancing innovation with rights protection. However, without corresponding national instruments, such as risk assessment procedures or AI supervisory boards, Western Balkan states will continue to depend on EU-level norms without possessing equivalent internal mechanisms.

62 'Sam Altman Concerned by Young People's Over-Reliance on ChatGPT' *The Economic Times* (Mumbai, 26 July 2025) <<https://economictimes.indiatimes.com/tech/technology/sam-altman-concerned-by-young-peoples-over-reliance-on-chatgpt/articleshow/122920673.cms?from=mdr>> accessed 25 January 2026.

63 See for more information, 'An Overview of Catastrophic AI Risks' (*Center for AI Safety*, 2025) <<https://safe.ai/ai-risk>> accessed 25 January 2026.

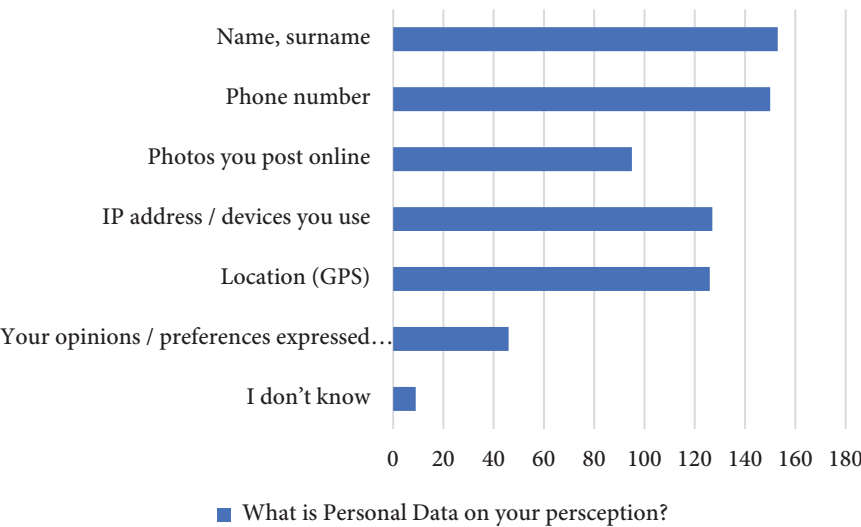
64 The concept of “Persuasive AIs” - AI could facilitate large-scale disinformation campaigns by tailoring arguments to individual users, potentially shaping public beliefs and destabilizing society. As people are already forming relationships with chatbots, powerful actors could leverage these AIs considered as “friends” for influence” -explained in the ‘An Overview of Catastrophic AI Risks’ (n 63).

8 EMPIRICAL INSIGHTS FROM THE SURVEY

The empirical findings⁶⁵ reveal a significant gap between the formal legal framework on personal data protection and the level of public awareness and practical enforcement in Albania. Although most respondents indicated some level of awareness of the existence of Law No. 124/2024, only a limited proportion demonstrated substantive knowledge of its content, while a considerable percentage reported no awareness at all. From the answers given, most respondents (52.8%) were aware that the new Albania law on the protection of personal data is in force, but they do not know its content well. 25.8% were unaware of the content of this law, and 21.3% were aware of it.

Half of the respondents reported no cases of unauthorised data use, while 20.8% confirmed such cases and 29.2% were unsure. Concerning complaints, 75.3% had never considered filing one, 12.4% had, and 12.4% were unaware of the competent authority.

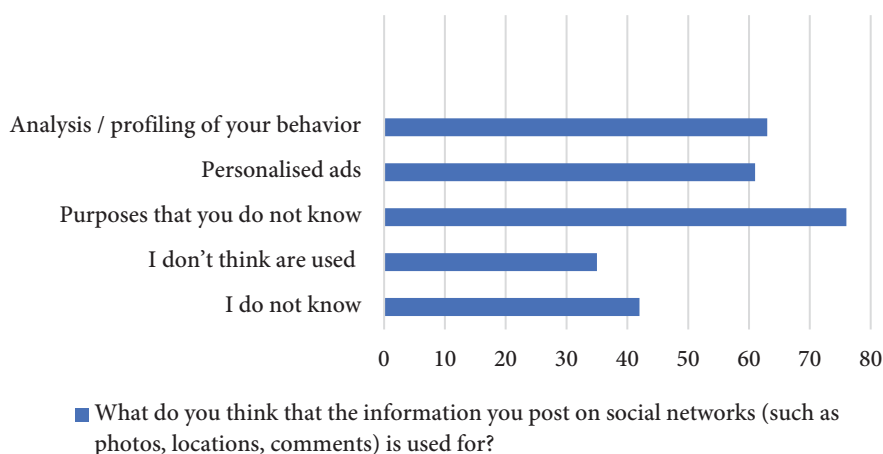
Respondents were also asked about their opinion of what personal data is, allowing them to choose several options. Below are the results of their perception of what personal data is in their opinion.⁶⁶



Graph 1. Perception of personal data categories

65 Ballauri (n 9).
66 The graphs were created by the author.

Meanwhile, regarding whether they had ever considered filing a complaint with the authorities for personal data breaches, 75.3% responded negatively, 12.4% responded positively, and 12.4% did not know that such an authority existed. When analysing the data from the next question, regarding the use of information they publish on social media networks, the results are presented in Graph 2. Most of the respondents (42.7 %) said that they didn't know the purpose of the processing of their data; 34.3 % believed they were used for personalised ads, and 35.4 % for analysis or profiling of their behaviour. Only 19.7% believed their data was not used, and 23.6% answered that they didn't know.



Graph 2. Acknowledgement about data processing

Regarding the data used by social media networks, 42.7% of respondents said they did not know the purpose, 34.3% believed data were used for targeted ads, 35.4% for profiling, and 19.7% thought their data were not used. When asked whether online behaviour could be analysed for digital profiling, 63.5% agreed, 12.4% disagreed, and 24.2% acknowledged hearing about it but did not fully understand.

The results indicate that Meta Platforms-owned platforms, particularly Instagram (78.1%) and Facebook (52.2%), are among the most frequently used social media networks among respondents. This widespread use highlights the central role of these platforms in users' daily digital activities in Albania. The findings provide empirical justification for selecting Meta Platforms as the focus of the case study, as these platforms represent the primary environment in which personal data are generated, processed, and potentially subject to AI-driven profiling. Consequently, any limitations in the enforcement of data protection rights on these platforms may significantly affect a large proportion of users.

Perceived protection of personal data in Albania is very low, with only 2% feeling protected. Nevertheless, 92.7% emphasized the need for more awareness campaigns on data protection and digital security.

The survey results underline a clear implementation gap between legal transposition and citizens' practical experience. Citizens' awareness of their rights remains limited, and most users do not know how their personal data is processed or how to file a complaint. This low level of awareness further weakens the practical enforceability of the law, since data protection regimes rely on active participation by informed data subjects. While Albania has aligned its legislation with EU standards, awareness and enforcement remain limited. This gap sets the stage for the following discussion, which examines the structural and institutional factors that explain why formal compliance has not yet translated into effective protection.

The questionnaire results provide a detailed picture of how personal data protection is perceived and experienced in practice. Although 52.8% of respondents stated they are aware of the new law, only 21.3% reported familiarity with its content, while 25.8% acknowledged only limited knowledge, indicating that awareness remains largely superficial. Regarding understanding personal data, most participants correctly identified basic elements such as names (86%) and phone numbers (84.3%), yet fewer recognised more complex categories, such as online preferences (25.8%), revealing gaps in conceptual understanding. Awareness of data protection rights also appears limited, with only 28.1% confirming knowledge of correction or deletion, while 54.5% remained uncertain.

A significant proportion of respondents reported exposure to potential data misuse: 20.8% indicated that their personal data had been used without consent, and an additional 50% were unsure, suggesting widespread uncertainty about data practices. However, despite these experiences, only 12.4% had considered filing a complaint, while 75.3% had not, often due to a lack of awareness of competent authorities. At the same time, perceptions of digital tracking are widespread: 63.5% reported frequently seeing advertisements linked to their searches or conversations, and an equal 63.5% acknowledged that online behaviour can be used to build digital profiles, even if understanding remains partial. Finally, perceptions of protection remain low, with 42.7% feeling only slightly protected and 35.4% sufficiently protected, while very few (14%) feel strongly protected.

Overall, these findings suggest that while individuals are increasingly aware of data-driven practices and their potential risks, there remains a substantial gap between legal protections and effective public understanding, trust, and engagement with available enforcement mechanisms.

The empirical findings reinforce the conclusions drawn from the legal analysis. The Albanian legal framework demonstrates a high level of formal alignment with EU standards, but the questionnaire results reveal limited public awareness and low

engagement with enforcement mechanisms. This disconnect suggests that legal harmonisation alone is insufficient to ensure effective protection of personal data. From a theoretical perspective, the findings support existing scholarship emphasising the importance of enforcement capacity and institutional effectiveness in data protection regimes. In practice, they highlight the need for stronger supervisory mechanisms, increased public awareness, and improved cross-border cooperation to ensure that legal rights are not merely formal but effectively exercisable.

9 CONCLUSIONS

The development of technology is progressing rapidly, and the use of IA in online applications could pose severe risks to users, especially when they are unaware of how their personal data is processed. The protection of personal data and privacy rights is an obligation that every state must undertake in light of developments in the field of artificial intelligence.

GDPR provides legal protection even when users knowingly disclose personal data on social media networks. The companies that manage these networks (such as Meta/Facebook, TikTok, X/Twitter, Instagram, etc.) are not exempt from their legal obligations for data protection. Even when a user voluntarily publishes personal information, it remains personal data under the GDPR.

The risk that profiling poses in the daily use of computer systems is directly related to the violation of fundamental rights of citizens, such as equality, non-discrimination on grounds of gender, ethnicity, religion, education, economic status, social status, etc. The new Albanian law on the protection of personal data offers reasonable protection from profiling and the protection of sensitive data. This law provides, among other things, the possibility of transferring data when there is no adequacy decision and when the data subject has given informed and explicit consent to the proposed international data transfer, having been clearly informed of the risks of the transfer. This legal permission to transfer data in the absence of an adequacy decision does not comply with the protection offered by Article 46 of the GDPR. This provision could create a practical gap and a serious risk for Albanian citizens' personal data when using social media networks and online applications.

The European Union has recently taken concrete measures to regulate the use of artificial intelligence in various applications, bringing guarantees for the fundamental rights of EU citizens. The AI Act, adopted recently by the European Parliament, is an important regulatory framework for artificial intelligence across various applications, providing guarantees for the fundamental rights of EU citizens. Uncontrolled use of AI carries serious risks, especially in malicious applications such as bioterrorism, the unleashing of AI agents, and the concentration of power.

The study concludes that Western Balkan countries, despite formal alignment with the GDPR, face structural challenges in implementing AI-related data protection safeguards. Albania's new Law No. 124/2024 still permits data transfers based solely on consent, a provision inconsistent with Article 46 of the GDPR. To ensure equivalence with EU protection standards, candidate states should strengthen their supervisory authorities and ensure their independence. Also, it is needed to establish binding adequacy mechanisms and adopt national strategies for AI risk management. The AI Act should serve as a guiding instrument for these reforms.

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Appendix A: Questionnaire on Data Protection Awareness in Albania

A.1 Structure of the Questionnaire

The questionnaire was designed to assess citizens' awareness, perceptions, and practical experience regarding personal data protection in the digital environment, with particular attention to artificial intelligence-related risks. It was administered online via Google Forms and structured into four main sections:

1. Demographic Data

Collection of basic respondent characteristics (age, gender).

2. Awareness of Legal Framework

Evaluation of knowledge regarding Law No. 124/2024 on personal data protection.

3. Understanding of Personal Data and Rights

Assessment of respondents' conceptual understanding of personal data and related rights.

4. Experience and Perceptions of Data Use

Examination of real-life experiences, perceptions of data processing practices, and awareness of profiling and digital risks.

A.2 Questionnaire Items (Reconstructed from Survey Instrument)

Section 1: Demographic Data

1. What is your age group?

- ☐ Under 18
- ☐ 18–25
- ☐ 26–40
- ☐ 41–60
- ☐ Over 60

2. What is your gender?

- ☐ Female
- ☐ Male
- ☐ Prefer not to say

Section 2: Awareness of Legal Framework

3. Are you aware that Law No. 124/2024 on personal data protection of has entered into force in Albania?
- ☐ Yes, and I am familiar with its content
 - ☐ Yes, but I do not know its content well
 - ☐ No

Section 3: Understanding of Personal Data

4. In your opinion, which of the following constitute personal data? *(multiple answers possible)*
- ☐ Name and surname
 - ☐ Phone number
 - ☐ Photos posted online
 - ☐ IP address / devices used
 - ☐ Location (GPS)
 - ☐ Online opinions / preferences
 - ☐ I do not know

Section 4: Awareness of Rights

5. Are you aware of your rights regarding personal data (e.g., access, correction, deletion)?
- ☐ Yes
 - ☐ No
 - ☐ Not sure

Section 5: Experience with Data Use

6. Have you ever experienced or suspected that your personal data was used without your consent?
- ☐ Yes
 - ☐ No
 - ☐ Not sure

7. If yes how did this happen?
8. Have you ever considered filing a complaint with the competent authority for personal data protection?
 - ☐ Yes
 - ☐ No
 - ☐ I did not know such a possibility existed
9. Which social media network do you use the most?
 - ☐ Facebook
 - ☐ Instagram
 - ☐ TikTok
 - ☐ YouTube
 - ☐ LinkedIn
 - ☐ Others

Section 6: Perception of Data Processing

10. Have you ever felt that your privacy has been violated using social media networks
 - ☐ Yes
 - ☐ No
 - ☐ Not sure
11. Do you think that the information you post on social media networks (such as photos, locations, comments) is used for? (*multiple answers possible*)
 - ☐ Personalized ads
 - ☐ Analysis / profiling of your behaviour
 - ☐ Purposes you don't know
 - ☐ I don't think they are used
 - ☐ I don't know

12. Do you believe that your online behaviour can be analysed to create a digital profile?

- ☐ Yes
- ☐ No
- ☐ I have heard about it but do not fully understand

Section 7: Perceived Level of Protection

13. How protected do you feel regarding your personal data when using online platforms?

- ☐ Very protected
- ☐ Moderately protected
- ☐ Slightly protected
- ☐ Not protected

Section 8: Need for Awareness

14. Do you believe there is a need for increased public awareness on data protection and digital security?

- ☐ Yes
- ☐ No
- ☐ Maybe

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

АКТ ЄС ПРО ШТУЧНИЙ ІНТЕЛЕКТ
ТА ПРОБЛЕМИ ЗАХИСТУ ДАНИХ ДЛЯ ГРОМАДЯН КРАЇН,
ЩО НЕ ВХОДЯТЬ ДО ЄС: ПОРІВНЯЛЬНИЙ ДОСВІД ЗАХІДНИХ БАЛКАН

Фйорида Баллаурі

АНОТАЦІЯ

Вступ. В епоху штучного інтелекту захист даних та права на приватність стали критично важливими компонентами правового порядку Європейського Союзу. Це дослідження розглядає взаємодію між Актом ЄС про штучний інтелект 2024 року та Загальним регламентом про захист даних, зосереджуючись на їхньому впливі на країни, що не входять до ЄС, зокрема Албанію. Ухвалення Акту ЄС про штучний інтелект змінило правову базу, що регулює III та захист персональних даних у Європі. Однак

практичні наслідки цих інструментів для громадян країн, що не входять до ЄС, особливо країн Західних Балкан як країн-кандидатів на вступ до ЄС, залишаються недостатньо вивченими.

Методи. У дослідженні використано комбіновану порівняльно-правову та емпіричну методологію. Воно поєднує порівняльно-правовий аналіз для оцінки ступеня узгодженості національного законодавства зі стандартами ЄС, анкетне опитування 178 респондентів для оцінки обізнаності громадськості та сприйняття прав на приватність, а також аналіз ставлення до ризиків, пов'язаних зі штучним інтелектом та обробкою персональних даних. Воно надає кількісні докази, що доповнюють правовий аналіз, ілюструючи, як регуляторні межі сприймаються та використовуються на практиці. На основі даних анкети, які визначають Meta Platforms як найпоширенішу платформу соціальних мереж в Албанії, у статті було проведено тематичне дослідження, розроблене як експериментальний тест на здійснення прав, що містить запит на доступ до даних, поданий компанії, з метою вивчення транскордонної можливості забезпечення виконання прав суб'єктів даних.

Результати та висновки. Результати дослідження виявляють значний розрив між формальною гармонізацією законодавства зі стандартами ЄС щодо захисту даних та штучного інтелекту та їх ефективним впровадженням у країнах-кандидатах Західних Балкан. Дані опитування 178 албанських респондентів свідчать про обмежену обізнаність щодо прав на персональні дані, низьку довіру до інституційного захисту та широку невизначеність щодо профілювання та використання даних на основі штучного інтелекту. Тематичне дослідження також демонструє проблеми, що пов'язані з дотриманням прав щодо іноземних організацій. Для забезпечення ефективного захисту персональних даних у країнах-кандидатах рекомендується посилення механізмів нагляду та впровадження ризик-орієнтованого підходу ЄС до регулювання ШІ. Ефективні заходи захисту даних для громадян країн, що не входять до ЄС, вимагають посилення співпраці у сфері нагляду, посилення правоохоронних можливостей та впровадження ризик-орієнтованої моделі управління Акт ЄС про ШІ у внутрішньому законодавстві.

Ключові слова. Штучний інтелект, законодавство ЄС, права на захист даних, ризик, конфіденційність.

Research Article

LEGAL CULTURE, INSTITUTIONAL TRUST, AND CIVIC PARTICIPATION IN POST-SOCIALIST LEGAL SYSTEMS: A COMPARATIVE ANALYSIS OF KAZAKHSTAN AND EASTERN EUROPE

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ABSTRACT

Background: In contemporary post-socialist legal systems, including Kazakhstan and several Eastern European states, the sustainability of civic participation depends not only on the formal existence of rights and procedures, but also on the broader socio-legal environment in which these rights operate. Of particular importance are legal consciousness, legal culture, legal literacy, institutional trust, and the quality of the rule-of-law environment. These factors shape whether citizens perceive law as a legitimate, intelligible, and effective framework for action, and whether formal channels of participation are used as meaningful instruments of engagement rather than as merely symbolic mechanisms. Although each of these dimensions has been addressed in the literature, their interaction remains insufficiently examined in comparative research on Kazakhstan and Eastern Europe. The article therefore analyses civic participation not as an isolated democratic outcome, but as a product of interrelated legal, institutional, and cultural conditions.

Method: *The study employs a mixed comparative legal design that combines doctrinal legal analysis, directed content analysis of official documents from 2020 to 2025, index-based modelling, and correlation-regression testing. The comparative sample includes Kazakhstan, Poland, Lithuania, Ukraine, and Hungary. To ensure analytical consistency, the study constructs and applies the Legal Consciousness Index, Legal Literacy Index, Institutional Trust Index, Civic Participation Index, Legal Nihilism Index, and Rule of Law Environment Index, as well as the composite Civic-Legal Participation Index. This framework is used as a structured comparative tool rather than as a causal explanatory model; it helps organise documentary evidence and compare the formal and operational dimensions of civic-legal embeddedness across the selected post-socialist legal systems.*

Results and Conclusions: *The findings suggest that legal consciousness and institutional trust are most consistently associated with civic participation in the comparative sample, whereas legal literacy appears to be a necessary but insufficient condition when considered in isolation. The study identifies several distinct models of civic-legal embeddedness across the selected countries, ranging from balanced and institutionally reinforced participation to compensatory and structurally imbalanced forms. Kazakhstan demonstrates meaningful growth potential due to its comparatively developed legal and procedural accessibility, yet further progress depends on stronger institutional trust and reduced legal nihilism. The article proposes a comparative legal model for analysing civic participation by examining the interaction among legal culture, institutional trust, and procedural accessibility. It concludes that stable civic participation requires more than formal legal modernisation: it depends on the extent to which law is experienced as fair, predictable, and socially credible. These findings may support policies aimed at strengthening legal education, improving legal enforcement, and deepening state-citizen interaction in Kazakhstan.*

1 INTRODUCTION

In contemporary legal systems, legality depends not only on the quality of norms and institutions but also on whether law is perceived as legitimate, intelligible, and practically meaningful. Legal consciousness and legal culture, therefore, mediate the relationship between legal norms, public institutions, and social action. They influence citizens' readiness to use legal mechanisms, seek remedies, participate in public life, and perceive the state as a framework for fair and predictable interaction rather than solely as a coercive authority.¹

- 1 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; Pablo Carvacho, 'Access to Justice in Prisons or the Limitations of Prison Defense' (2023) 79(5) Crime, Law and Social Change 531, doi:10.1007/s10611-023-10082-1; Mihaela Serban, 'Law and liberation: Legal consciousness and legal mobilization in post-communist Europe' in Steven A Boutcher, Corey S Shdaimah, and Michael W Yarbrough (eds), *Research Handbook on Law, Movements and Social Change* (Edward Elgar Publishing 2023) 102, doi:10.2139/ssrn.4244978.

The relevance of this issue became especially visible in 2020–2025. In post-socialist states, debates on the rule of law increasingly moved beyond courts and anti-corruption measures toward legal trust, civic participation, and legal literacy. For Kazakhstan, this shift is particularly significant, since official reforms promoting the rule of law, legal education, and access to justice still coexist with weaknesses in accountability, access to law, and enforcement. This reveals a persistent gap between formal regulation and citizens' lived legal experience.²

The post-socialist and Eastern European context gives this problem a clear comparative dimension. These states share related historical and legal transformations, yet differ in institutional quality, public trust, and forms of civic engagement. European Commission materials confirm continuing differences in justice quality, anti-corruption mechanisms, checks and balances, and civic participation, which makes comparative analysis methodologically justified.³

The problem is further intensified by the broader crisis of institutional trust. OECD findings show that trust depends on openness in decision-making, evidence-based governance, institutional integrity, and perceptions of fairness. These factors are closely connected with legal consciousness: when citizens do not view law as effective and equally applicable, their participation in institutional forms of public life becomes less stable.⁴

Contemporary scholarship no longer reduces legal culture to knowledge of statutes or abstract respect for law. Legal consciousness is understood as the way individuals interpret law, relate it to their interests, and decide whether legal action is meaningful. It functions as an active link between the legal order and social practice. Research on post-communist Europe shows that legal culture becomes evident in legal mobilisation, everyday recourse to law, and perceptions of legal accessibility.⁵

Against this background, the central problem of the study is that comparative legal scholarship still fails to explain how legal consciousness shapes civic participation in post-socialist societies. This gap is especially relevant for Kazakhstan, which is rarely examined alongside Eastern European states within a shared comparative framework. The divide between doctrinal legal analysis and socio-legal interpretation, therefore, remains unresolved.

2 Bakirov and others (n 1); World Justice Project, *Rule of Law Index 2024* (WJP 2025) <<https://worldjusticeproject.org/rule-of-law-index/global/2024>> accessed 10 April 2026.

3 European Commission, *2024 Rule of Law Report* (EC 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 April 2026; Agnieszka Kubal, 'Judicial Relational Legal Consciousness: Authoritarian Backsliding as a Catalyst of Change' (2024) 51(s1) *Journal of Law and Society* S45, doi:10.1111/jols.12497.

4 OECD, *OECD Survey on Drivers of Trust in Public Institutions – 2024 Results: Building Trust in a Complex Policy Environment* (OECD Publishing 2024) doi:10.1787/9a20554b-en.

5 Kubal (n 3); Şerban (n 1).

The aim of this study is to determine how legal consciousness and legal culture influence civic participation in Kazakhstan and Eastern European countries and to identify institutional and educational mechanisms that can strengthen this relationship in contemporary legal policy.

H1. A higher level of legal consciousness and legal culture increases the likelihood of stable civic participation in institutional and legal forms. This assumption is based on the view that legal knowledge, trust in procedures, and confidence in institutional effectiveness strengthen citizens' readiness to use legal channels and participate in public life through normatively structured forms.⁶

H2. Differences in civic participation between Kazakhstan and Eastern European countries are shaped not only by formal legal norms but also by the quality of enforcement, institutional accountability, and public trust. Normative modernisation does not strengthen legal culture unless it is supported by predictable legal practice and a credible public experience of justice.⁷

H3. Strengthening legal education, legal literacy, and civic-legal learning helps reduce legal nihilism and reinforce civil society. This hypothesis rests on the view that legal culture develops not only through institutional reform, but also through long-term socialisation, public legal communication, and access to legal information.⁸

The scientific novelty of the study lies in treating legal consciousness not as an abstract category of legal theory, but as an applied indicator of citizens' institutional embeddedness within the legal order. Unlike studies that are limited to general descriptions of legal culture or to isolated aspects of legal education, this article combines comparative legal analysis, socio-legal interpretation, and an institutional approach. It shows that civic participation does not arise automatically from formal rights and freedoms, but depends on the interaction of legal intelligibility, trust in institutions, and real procedural accessibility. This perspective links the theoretical discussion of legal culture with practical implications for legal policy and enforcement.

The article's contribution is primarily conceptual and comparative. The index-based component is used to operationalise the main socio-legal dimensions and to make the cross-country comparison more transparent. It should not be read as a stand-alone econometric explanation of civic participation or as evidence of strict causal effects. Rather, the indices provide a structured analytical lens through which differences between Kazakhstan and the selected Eastern European countries can be interpreted.

6 OECD (n 4); Şerban (n 1).

7 European Commission (n 3); World Justice Project (n 2).

8 Bakirov and others (n 1); Council of Europe, *Shaping Europe's Democratic Future: Building a European Space for Citizenship Education* (CoE 2024) <<https://rm.coe.int/policy-brief-06-10/1680b6694b>> accessed 10 April 2026.

2 LITERATURE REVIEW

The literature on legal culture, institutional trust, and civic participation can be organised around three interconnected research directions. The first concerns legal culture and legal consciousness as conditions under which law becomes socially meaningful rather than merely formally valid. In this view, law influences civic behaviour only when citizens recognise it as understandable, legitimate, and practically usable.⁹ Earlier studies on legal culture in Kazakhstan emphasise the role of legal awareness, respect for law, and civic responsibility in strengthening the legal order and limiting corrupt or informal practices.¹⁰ More recent research builds on this argument by linking legal culture to access to rights-protection mechanisms and to everyday legal experience.¹¹ In the broader post-socialist context, legal consciousness is also treated as a dynamic form of legal mobilisation: citizens turn to law when they perceive legal procedures as accessible and capable of producing meaningful outcomes.¹²

The second direction focuses on the rule of law, institutional quality, and legal backsliding. Studies of Central and Eastern Europe show that formal constitutional guarantees do not automatically secure the practical authority of law. The weakening of judicial independence, anti-corruption mechanisms, checks and balances, and civic space may reduce the credibility of legal institutions even where legal procedures remain formally available.¹³ This

- 9 Yonathan A Arbel, 'The Readability of Contracts: Big Data Analysis' (2024) 21(4) *Journal of Empirical Legal Studies* 927, doi:10.1111/jels.12400.
- 10 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; 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; 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.
- 11 Bakirov and others (n 1).
- 12 Kubal (n 3); Şerban (n 1).
- 13 Petra Bárd, 'The Rule of Law and Academic Freedom or the Lack of it in Hungary' (2020) 19(1) *European Political Science* 87, doi:10.1057/s41304-018-0171-x; Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union: Measuring the Rule of Law' (2022) 14 *Hague Journal on the Rule of Law* 139, doi:10.1007/s40803-022-00171-z; Lukasz Bojarski, 'Civil Society Organisations for and with the Courts and Judges – Struggle for the Rule of Law and Judicial Independence: The Case of Poland 1976–2020' (2021) 22(7) *German Law Journal* 1344, doi:10.1017/glj.2021.72; Olga Ceran, 'The Democratic Justification of Academic Freedom in EU Law: Article 13 of the EU Charter, the Rule of Law Toolbox, and the Scope for EU Action' (2025) 21(2) *European Constitutional Law Review* 300, doi:10.1017/S1574019625000136; Barbara Grabowska-Moroz and others, 'Reconciling Theory and Practice of the Rule of Law in the European Union' (2022) 14(2-3) *Hague Journal on the Rule of Law* 101, doi:10.1007/s40803-022-00183-9; Hans Petter Graver and Petra Gyöngyi, 'Hidden Rule of Law Discontinuities: A Theoretical Framework for Studying Rule of Law Backsliding' (2024) 20(2) *International Journal of Law in Context* 117,

literature is important for the present study because it demonstrates that legal culture cannot be separated from the institutional environment in which citizens encounter law. At the same time, much of this scholarship remains concentrated on courts, supranational mechanisms, and constitutional standards, while the link between institutional quality and everyday civic participation is less fully examined.

The third direction addresses institutional trust, legal literacy, and participation. Trust is increasingly understood not as a general attitude toward the state, but as a multidimensional relationship shaped by predictability, impartiality, accountability, and procedural fairness.¹⁴ Legal literacy and access to justice also matter because citizens cannot use legal channels if they do not understand their rights or lack procedural support. However, legal knowledge alone is insufficient. It produces sustained civic participation only when supported by credible institutions and procedures that citizens experience as fair and effective. This is especially relevant for post-socialist systems, where formal legal modernisation may coexist with distrust, legal scepticism, or reliance on informal strategies.

Recent work on digital civics and algorithmic governance adds a further dimension to this debate. Digital state platforms, online petitions, e-justice tools, and algorithmic decision-making increasingly mediate the relationship between citizens and legal institutions.¹⁵ These developments expand access to legal and administrative procedures, but they also raise questions of transparency, accountability, and digital inequality. For

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- doi:10.1017/S1744552324000077; Carlos J Moreiro González, 'Implementing the Rule of Law in the European Union: How Long Trapped in Penelope's Spinning Wheel from Article 2 of the TEU?' (2024) 25 Cambridge Yearbook of European Legal Studies 161, doi:10.1017/cel.2023.17; Pieter-Augustin Van Malleghem, 'Legalism and the European Union's Rule of Law Crisis' (2024) 3(1) European Law Open 50, doi:10.1017/elo.2024.5.
- 14 Kee Hoon Chung and Hyeok Yong Kwon, 'Trust, Institutional Quality, and the Protection of Property Rights: A Cross-Regional Study of East Asia and Western Countries' (2024) 105(2) Social Science Quarterly 267, doi:10.1111/ssqu.13340; Louisa Estadieu and others, 'Institutional Trust in Crisis? Conceptual and Methodological Challenges in Measuring Institutional Trust' (2025) 19(6) Sociology Compass e70073, doi:10.1111/soc4.70073; Andrea FM Martinangeli and others, 'Institutional Quality Causes Generalized Trust: Experimental Evidence on Trusting under the Shadow of Doubt' (2024) 68(3) American Journal of Political Science 972, doi:10.1111/ajps.12780; Koen Verhoest and others, 'How Trust Matters for the Performance and Legitimacy of Regulatory Regimes: The Differential Impact of Watchful Trust and Good-Faith Trust' (2025) 19(1) Regulation & Governance 3, doi:10.1111/rego.12596.
- 15 Frida Elek-BenMoshe and Sheizaf Rafaeli, 'Readability of Online Government Information about Welfare Rights and Benefits: The Israeli Case' (2025) 24(2) Universal Access in the Information Society 1659, doi:10.1007/s10209-024-01167-2; M Taha Kasim and others, 'Can a Legal Literacy Campaign Build Citizen Trust? A Randomized Controlled Trial in the Tribal Areas of Pakistan' (2025) 53(2) Oxford Development Studies 159, doi:10.1080/13600818.2025.2487708; Antonios Kouroutakis, 'Rule of Law in the AI Era: Addressing Accountability, and the Digital Divide' (2024) 4 Discover Artificial Intelligence 115, doi:10.1007/s44163-024-00191-8; Federico Tomasello, 'Digital Civics and Algorithmic Citizenship in a Global Scenario' (2023) 36(2) Philosophy & Technology 39, doi:10.1007/s13347-023-00638-3.

Kazakhstan, where public services and channels of appeal have become increasingly digitalised, this dimension is particularly relevant.

Overall, the literature confirms that legal culture, institutional trust, legal literacy, and civic participation are closely connected, but they are often studied separately. Rule-of-law scholarship tends to privilege macro-institutional analysis, while studies of legal literacy and civic education often focus on applied mechanisms without integrating them into a broader theory of civic-legal embeddedness. Comparative research that places Kazakhstan and Eastern European countries within one analytical framework remains limited. The present study addresses this gap by examining how legal consciousness, legal literacy, institutional trust, legal nihilism, and the rule-of-law environment jointly shape civic participation in post-socialist legal systems.

3 METHODOLOGY

3.1. Research Design and Analytical Logic

The study employs a mixed comparative legal design to examine how legal consciousness, legal culture, legal literacy, institutional trust, and the rule-of-law environment are associated with civic participation. The design combines doctrinal legal analysis, directed content analysis of official documents, index-based modelling, and statistical testing. This combination was selected because the research problem cannot be addressed through formal legal analysis alone: the study requires both interpretation of legal and institutional materials and a comparable measurement of socio-legal patterns across countries.

The quantitative component has an interpretive and comparative function. It is intended to systematise documentary evidence, identify relative differences between countries, and support hypothesis-oriented interpretation. Given the limited number of country cases and the aggregated character of the data, the index-based and statistical procedures are not designed to establish causal effects in a strict econometric sense.

3.2. Comparative Scope and Empirical Base

The comparative sample includes Kazakhstan, Poland, Lithuania, Ukraine, and Hungary. These countries share a post-socialist legal legacy but differ in institutional development, civic space, public trust, and the practical operation of legal procedures. Kazakhstan is treated as the central case, while the Eastern European cases provide the comparative framework. The period of analysis covers 2020–2025.

The empirical base comprises three groups of sources: national legal and policy documents, international and supranational assessment materials, and scholarly publications on legal culture, institutional trust, legal literacy, civic participation, and the rule of law. In the

qualitative part of the study, the unit of analysis is a document or report. In the quantitative part, the unit of observation is the country-year.

3.3. Research Procedure

The research was conducted in five stages. First, the literature was reviewed to identify the key dimensions linking legal culture and civic participation. Second, doctrinal legal analysis was used to examine the formal legal and institutional context of each country. Third, directed content analysis was applied to official documents using a predefined coding matrix. Fourth, the coded values were transformed into sub-indices and a composite index. Fifth, the relationships between the indices were tested through Spearman's rank correlation and regression modelling.

3.4. Variables and Measurement

The study uses six sub-indices and one composite indicator. The Legal Consciousness Index (LCI) captures the extent to which documents reflect legal subjectivity, procedural justice, and orientation toward law as a legitimate means of action. The Legal Literacy Index (LLI) measures legal education, accessibility of legal information, and procedural navigation. The Institutional Trust Index (ITI) reflects accountability, impartiality, predictability, and responsiveness. The Civic Participation Index (CPI) measures legally structured participation, including consultation, complaint, appeal, and mediation-related mechanisms. The Legal Nihilism Index (LNI) captures distrust in legal mechanisms, orientation toward extra-legal strategies, and weak procedural motivation. The Rule of Law Environment Index (RLEI) reflects the external institutional context, including judicial guarantees, checks and balances, and access to rights protection. The Composite Civic-Legal Participation Index (CLPI) integrates these dimensions into a single comparative measure.

All indicators were coded on a three-point scale:

- 0 – the feature is absent or expressed only declaratively;
- 1 – the feature is present partially;
- 2 – the feature is clearly expressed and supported both normatively and procedurally.

This format was chosen because it allows comparison of heterogeneous documents without introducing artificial precision while supporting the reproducibility of the results. To improve reliability, the coding matrix was first tested on a pilot sub-corpus, after which the main coding procedure was carried out (Table 1).

Table 1. Operational structure of variables and analytical procedures¹⁶

Component	Analytical meaning	Measurement and function in the study
LCI — Legal Consciousness Index	Reflects legal subjectivity, procedural justice, and orientation toward lawful recourse.	Positive index used to assess how legal consciousness is associated with civic participation.
LLI — Legal Literacy Index	Captures legal education, accessibility of legal information, procedural navigation, and legal aid.	Positive index used to evaluate whether legal literacy supports participation and reduces legal nihilism.
ITI — Institutional Trust Index	Measures accountability, impartiality, responsiveness, predictability, and institutional openness.	Positive index used to determine the trust-based capacity of the legal environment.
CPI — Civic Participation Index	Reflects consultation, complaint and appeal channels, mediation, and other structured forms of participation.	Dependent variable in the main regression model and the key outcome indicator of civic participation.
LNI — Legal Nihilism Index	Captures distrust in law, orientation toward extra-legal strategies, and weak procedural motivation.	Negative index used to assess constraints on civic-legal embeddedness.
RLEI — Rule of Law Environment Index	Reflects judicial guarantees, checks, and balances, anti-corruption capacity, and access to rights protection.	External contextual indicator used to compare the broader legal environment across countries.
CLPI — Composite Civic-Legal Participation Index	Integrates LCI, LLI, ITI, CPI, RLEI, and the reverse value of LNI.	Composite indicator used to compare the overall level of civic-legal embeddedness.
GAP coefficient	Compares internal legal preparedness with actual civic participation.	Diagnostic coefficient used to identify balanced, under-realised, or compensatory participation patterns.

¹⁶ Source: Compiled by the authors.

Component	Analytical meaning	Measurement and function in the study
Spearman's rank correlation	Measures associations between the main indices.	Used to test H1 and H3 because the data combine ordinal and normalised values.
Regression model	Examines how CPI is associated with LCI, ITI, RLEI, and LNI within the aggregated comparative dataset.	Exploratory procedure used to support the comparative interpretation of H2, not to establish causal effects.

Note. All document-based indicators were coded on a three-point scale and then normalised to a 0–1 scale. Positive indicators increase the level of civic-legal embeddedness, while LNI is treated as a negative component.

3.5. Hypothesis Testing Strategy

The hypotheses were tested through correlation and regression procedures. H1 was tested by examining the relationship between LCI and CPI. H2 was tested using a regression model with CPI as the dependent variable and LCI, ITI, RLEI, and LNI as predictors. H3 was tested through the relationship between LLI and LNI, using both Spearman's rank correlation and an additional regression model with LNI as the dependent variable. Spearman's rank correlation was selected because the dataset combines ordinal and normalised indicators and is of moderate size.

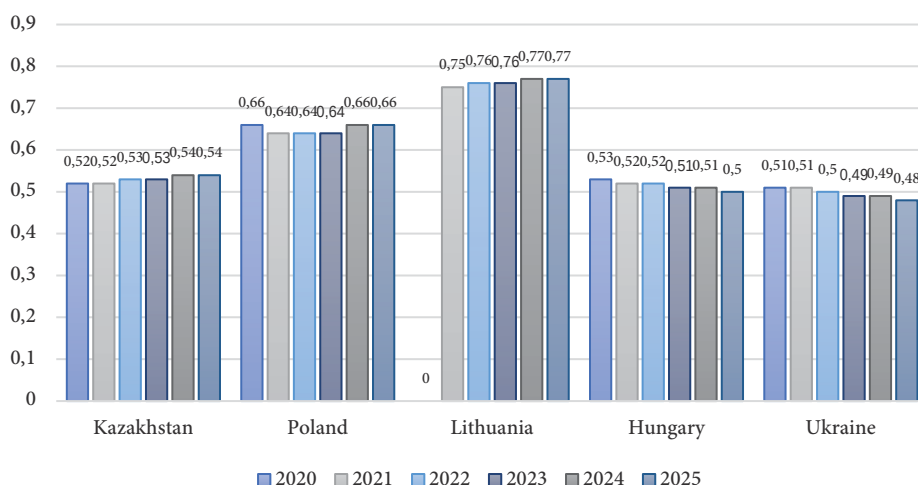
3.6. Methodological Limitations

The study has several limitations typical of comparative legal research. The documents differ across countries, legal languages, and institutional contexts, which may affect the comparability of some indicators. These limitations were mitigated through a unified coding matrix, comparable source categories, value normalisation, and triangulation among doctrinal analysis, document coding, index construction, and statistical testing. The methodology, therefore, does not claim to measure legal culture exhaustively. Its purpose is to provide a consistent comparative framework for identifying how legal consciousness, institutional trust, legal literacy, and legal nihilism shape civic participation across post-socialist legal systems.

4 RESULTS - COMPARATIVE PATTERNS AND EMPIRICAL OUTCOMES OF CIVIC-LEGAL EMBEDDEDNESS

The initial institutional background indicates that the legal environments of Kazakhstan, Poland, Lithuania, Ukraine, and Hungary developed unevenly in 2020–2025. Despite their shared post-socialist legal legacy, these countries differ in rule-of-law dynamics, institutional resilience, procedural quality, and anti-corruption capacity. For comparative consistency, the study uses the World Justice Project Rule of Law Index as the baseline indicator, as it uses a uniform scale and allows cross-country changes to be tracked over time.

The index is suitable for this analysis because it covers not only the judiciary, but also constraints on government powers, corruption control, open government, fundamental rights, regulatory enforcement, and civil and criminal justice. It therefore provides a coherent basis for assessing how the broader legal environment shapes legal consciousness, legal literacy, institutional trust, and civic participation (Figure 1).



Note. Values range from 0 to 1, with higher scores indicating a stronger rule-of-law environment. Lithuania was not included in the WJP 2020 edition. Values marked ~ for 2023 were reconstructed from the official 2024 data and the annual percentage change.

Figure 1. Dynamics of the overall rule-of-law indicator (WJP Rule of Law Index) in Kazakhstan and Eastern European countries, 2020–2025¹⁷

17 Source: Compiled by the authors from the WJP Rule of Law Index (2020, 2021, 2022, 2024, 2025) and related official materials.

The comparison reveals distinct trajectories. Lithuania maintains the strongest and most stable rule-of-law environment, while Poland shows partial recovery after an earlier decline. Kazakhstan records a gradual but limited improvement, mainly in procedural and enforcement stability. Hungary demonstrates persistent deterioration, whereas Ukraine's decline should be interpreted in the context of wartime pressure and incomplete institutional recovery. The following table, therefore, compares the direction and scale of change across the selected countries (Table 2).

Table 2. Change in the overall rule of law indicator during the study period¹⁸

Country	Baseline year	Final year	Change, p.p.	Change, %
Kazakhstan	0.52 (2020)	0.54 (2025)	+0.02	+3.8%
Poland	0.66 (2020)	0.66 (2025)	0.00	0.0%
Lithuania	0.75 (2021)	0.77 (2025)	+0.02	+2.7%
Hungary	0.53 (2020)	0.50 (2025)	-0.03	-5.7%
Ukraine	0.51 (2020)	0.48 (2025)	-0.03	-5.9%

Note. For Lithuania, the calculation covers 2021–2025, as the country was not included in the WJP 2020 edition. The percentage change was calculated from the baseline and final values.

Table 2 clarifies the comparative dynamics and shows that aggregate rule-of-law scores do not fully explain the institutional meaning of change. Ukraine and Hungary demonstrate the most pronounced decline, but the nature of this decline differs: Ukraine's score decreased from 0.51 to 0.48 under severe wartime pressure and incomplete judicial recovery, while Hungary's decline from 0.53 to 0.50 reflects more persistent systemic rule-of-law weaknesses, including corruption-related concerns and structural institutional deficits. Kazakhstan and Lithuania show moderate improvement, although at different levels. Kazakhstan increased from 0.52 to 0.54, indicating partial progress mainly in order-related and selected procedural dimensions, while constraints on power and guarantees of fundamental rights remain weaker. Lithuania improved from 0.75 to 0.77 and retained the strongest legal environment in the group, with continued emphasis on institutional quality and anti-corruption mechanisms. Poland returned to 0.66 from 0.64 after an earlier decline, suggesting partial institutional recovery, although the European Commission still notes the absence of an updated national anti-corruption strategy.

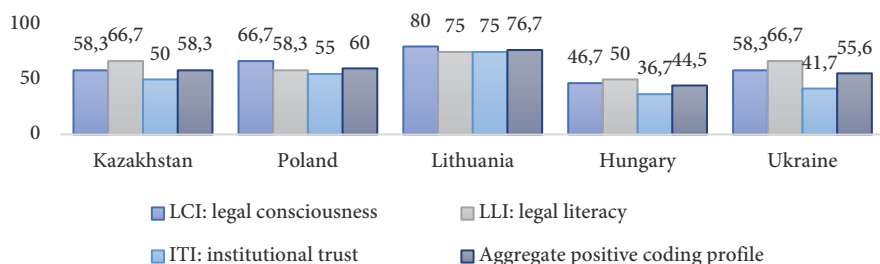
The comparison confirms that similar quantitative scores may conceal different institutional conditions. Kazakhstan, Hungary, and Ukraine fall within partly comparable numerical ranges, but their legal environments differ in substance. Kazakhstan reflects uneven but observable institutional strengthening; Hungary demonstrates more entrenched structural weaknesses; and Ukraine combines declining rule-of-law indicators with wartime pressure and incomplete institutional recovery.

¹⁸ Source: Compiled by the authors from official WJP materials.

At the next stage, these institutional differences were translated into measurable indicators through directed content analysis of official documents from 2020 to 2025. The analysis focused on three dimensions: LCI for legal consciousness, LLI for legal literacy and access to legal information, and ITI for institutional trust. Each dimension was coded using a predefined matrix and normalised on a 0–1 scale to ensure a standardised document-based comparison.

The document corpus used to calculate LCI, LLI, and ITI included sixty official and internationally recognised documents for 2020 to 2025, with 480 coding units in total. Each country was represented by twelve documents and ninety-six coding units, ensuring symmetry in the comparison. The corpus included annual human rights reports, Ombudsperson reports, Rule of Law country chapters, judicial governance materials, legal aid documents, mediation-related materials, public service reports, OECD governance materials, UN country reports, and stakeholder submissions. For Kazakhstan, the analysis relied on annual human rights materials, the 2024 Ombudsperson's report, the 2024 Annual Report of the State Corporation for Public Services, and the OECD Public Governance Scan of Kazakhstan. For Poland, Lithuania, Hungary, and Ukraine, the corpus was compiled from the European Commission Rule of Law country chapters, national judicial and legal aid materials, mediation documents, UN materials, and recognised institutional reports. One coding unit was defined as a distinct semantic fragment assigned to one of the nine indicators used in the study. The full list of documents included in the corpus is provided in Appendix A.

At the first analytical stage, the focus was placed not on the final indices themselves, but on the distribution of positive codes across the three thematic blocks. This made it possible to identify which elements of legal culture and legal accessibility were consistently present in institutional documents and which appeared only fragmentarily (Figure 2).

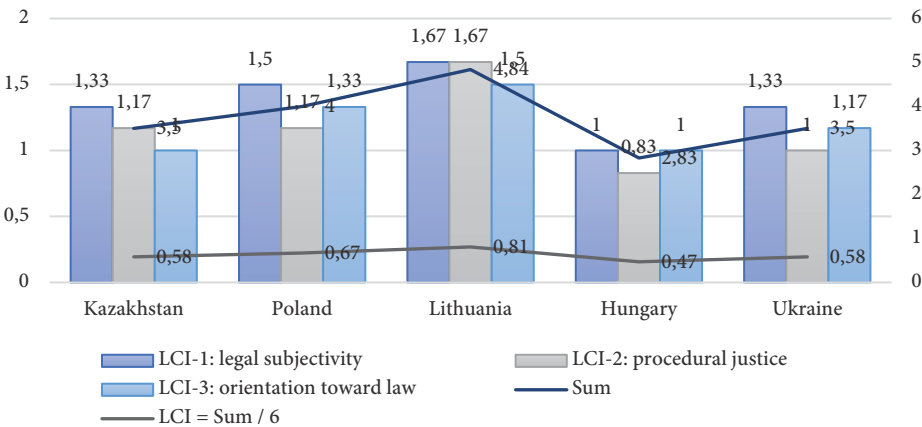


Note. The values show the share of positively coded features within each block. A feature was treated as positive if it received a score of 2 or if recurring level-1 features were consistently confirmed over several years.

Figure 2. Distribution of positive codes across the LCI, LLI, and ITI blocks in the 2020 to 2025 corpus, % of the maximum possible number of codes¹⁹

19 Source: Authors' calculations based on the directed content analysis of official documents for 2020 to 2025.

The initial coding results reveal clear cross-country differences. Lithuania shows the strongest profile across all three dimensions, while Hungary records the weakest results, especially in institutional trust. Poland demonstrates a stronger legal consciousness profile than legal literacy, whereas Kazakhstan and Ukraine show similar LCI and LLI values but differ in ITI. To refine this comparison, the next stage calculates the components of the Legal Consciousness Index: legal subjectivity, procedural justice, and orientation toward lawful recourse (Figure 3).



Note. Calculation formula:

$$LCI_{it} = \frac{LCI1_{it} + LCI2_{it} + LCI3_{it}}{3 \times 2}, \quad (1)$$

where 2 is the maximum possible score for each indicator.

Figure 3. Components of the Legal Consciousness Index (LCI) by country, average scores for 2020 to 2025 on a 0–2 scale²⁰

Lithuania records the highest LCI value (0.81), followed by Poland (0.67). Kazakhstan and Ukraine show equal scores (0.58), with Kazakhstan reflecting greater procedural stability, whereas Ukraine's profile is shaped by rights-protection discourse under crisis conditions. Hungary has the lowest LCI value (0.47), indicating a weaker basis for stable legal consciousness. Overall, higher LCI values reflect not only references to rights, but also the consistent presentation of law as a fair and usable procedural framework.

The next stage examines the Legal Literacy Index, which covers legal education, accessibility of legal information, procedural navigation, and legal aid mechanisms (Figure 4).

20 Source: Authors' calculations based on the coding of documents from 2020 to 2025.

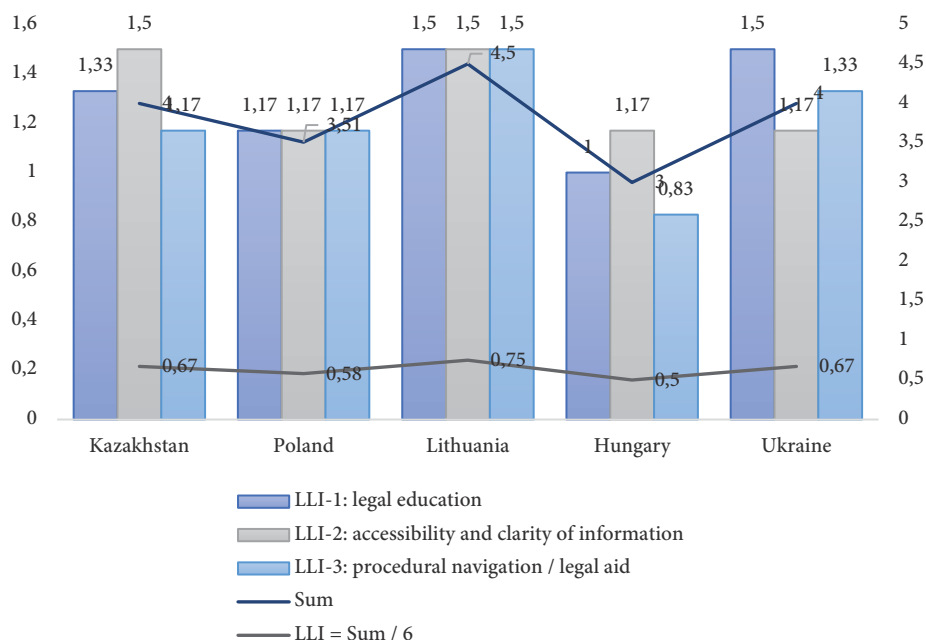


Figure 4. Components of the Legal Literacy Index (LLI) by country, average scores for 2020 to 2025 on a 0–2 scale²¹

The LLI results show a different pattern. Lithuania records the highest value (0.75), reflecting the strongest integration of legal aid, mediation, and accessible legal information. Kazakhstan and Ukraine have equal scores (0.67), but Kazakhstan's result is linked mainly to digital public services and procedural access, whereas Ukraine's reflects broad legal aid under wartime conditions. Poland and Hungary remain weaker in this dimension. Overall, legal literacy is understood here as a combination of legal knowledge, procedural navigation, and access to assistance.

The third stage calculates the Institutional Trust Index, covering accountability, openness, procedural impartiality, independence, responsiveness, and predictability (Figure 5).

21 Source: Authors' calculations based on the coding of official documents and materials related to legal aid, public services, and procedural access.

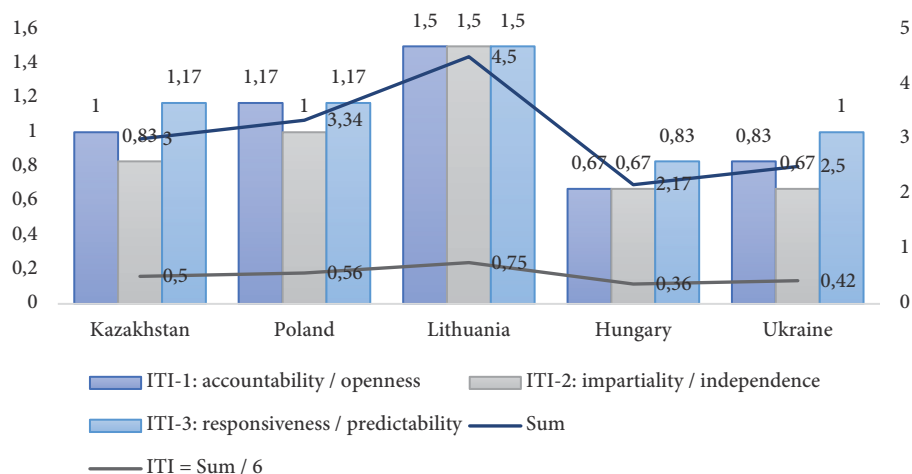


Figure 5. Components of the Institutional Trust Index (ITI) by country, average scores for 2020–2025 on a 0–2 scale²²

The ITI results most clearly differentiate the countries. Lithuania shows the strongest and most balanced trust profile, while Poland (0.56) and Kazakhstan (0.50) demonstrate moderate but incomplete levels of institutionally conveyed trust. Ukraine (0.42) and Hungary (0.36) record weaker results, shaped respectively by wartime pressure and deeper structural deficits. Overall, ITI is the most sensitive indicator, as it captures whether the legal environment is supported by procedural credibility and trust-generating capacity. The next step combines LCI, LLI, and ITI to assess the overall internal legal profile of each country (Table 4).

Table 4. Summary values of LCI, LLI, and ITI by country, average for 2020 to 2025²³

Country	LCI	LLI	ITI	Mean of the three indices	Rank by internal legal profile
Lithuania	0.81	0.75	0.75	0.77	1
Poland	0.67	0.58	0.56	0.60	2
Kazakhstan	0.58	0.67	0.50	0.58	3

²² Source: Authors' calculations based on the coding of country chapters, ombudsperson reports, and official materials on justice governance.

²³ Source: Compiled by the authors.

Country	LCI	LLI	ITI	Mean of the three indices	Rank by internal legal profile
Ukraine	0.58	0.67	0.42	0.56	4
Hungary	0.47	0.50	0.36	0.44	5

Note. The mean of the three indices was calculated as:

$$Profile_{it} = \frac{LCI_{it} + LLI_{it} + ITI_{it}}{3}, \quad (1)$$

The summary results indicate that Lithuania has the most balanced internal legal profile, while Hungary shows the weakest configuration. Poland ranks above Kazakhstan and Ukraine, although institutional trust remains its main limitation. Kazakhstan and Ukraine have similar average values but differ structurally: Kazakhstan shows a stronger ITI profile, whereas Ukraine relies more on legal aid and support mechanisms. These results confirm that the legal environment is shaped by the interaction of legal consciousness, legal literacy, and institutional trust. The next stage, therefore, examines the dynamics of LCI, LLI, and ITI over time (Table 5).

Table 5. Changes in LCI, LLI, and ITI in 2020 and 2025²⁴

Country	LCI 2020	LCI 2025	ΔLCI	LLI 2020	LLI 2025	ΔLLI	ITI 2020	ITI 2025	ΔITI
Kazakhstan	0.50	0.62	+0.12	0.58	0.75	+0.17	0.42	0.54	+0.12
Poland	0.58	0.71	+0.13	0.54	0.63	+0.09	0.46	0.58	+0.12
Lithuania*	0.76 (2021)	0.83	+0.07	0.71 (2021)	0.79	+0.08	0.71 (2021)	0.79	+0.08
Hungary	0.50	0.42	-0.08	0.54	0.46	-0.08	0.42	0.33	-0.09
Ukraine	0.54	0.58	+0.04	0.58	0.71	+0.13	0.46	0.38	-0.08

Note. For Lithuania, the starting point is 2021 because of the structure of the available comparable corpus.

Δ shows the change between the first and the last available point of the period.

The dynamic analysis shows uneven change across the indices. Kazakhstan records the strongest growth in LLI, reflecting the expansion of digital and service-based access to legal services. Poland improves across all three indices, while Lithuania grows moderately from an already high baseline. Ukraine strengthens LCI and LLI but declines in ITI, indicating

²⁴ Source: Authors' calculations based on the stage-by-stage annual coding of the 2020 to 2025 corpus.

that legal support may expand without a corresponding increase in trust. Hungary shows deterioration across all three dimensions, especially in institutional trust. These results confirm that higher legal literacy or legal consciousness does not automatically produce stronger institutional trust. The next step illustrates the calculation procedure using Kazakhstan as an example.

For LCI:

$$LCI_{KZ} = \frac{1.33 + 1.17 + 1.00}{6} = 0.58$$

For LLI:

$$LLI_{KZ} = \frac{1.33 + 1.50 + 1.17}{6} = 0.67$$

For ITI:

$$ITI_{KZ} = \frac{1.00 + 0.83 + 1.17}{6} = 0.50$$

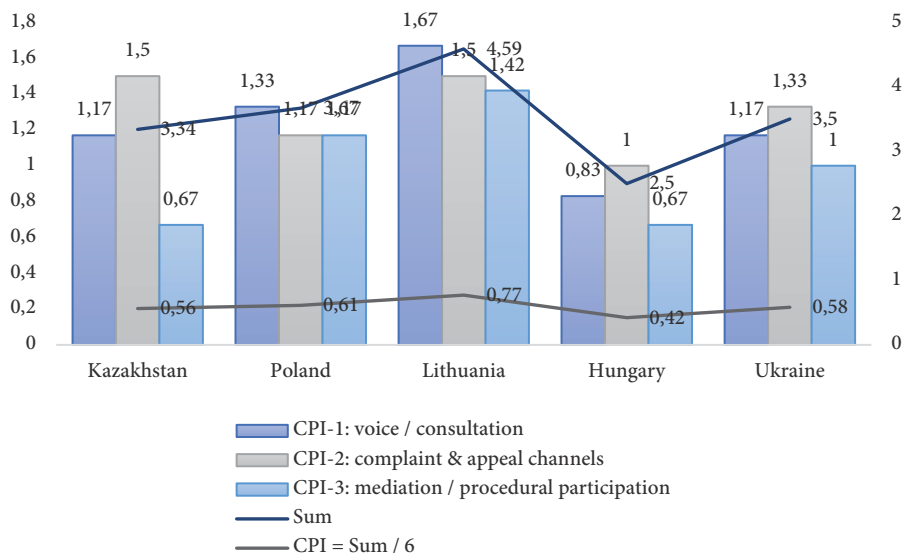
The consolidated internal profile is then calculated as follows:

$$Profile_{KZ} = \frac{0.58 + 0.67 + 0.50}{3} = 0.58$$

The Kazakhstan case shows that legal literacy is the strongest component, while institutional trust remains the main constraint. This means that legal and service accessibility are developing faster than public confidence in institutional impartiality and predictability.

To capture this imbalance, the study uses CPI, which measures structured civic participation, and LNI, which reflects distrust in the law and an orientation toward extra-legal strategies. Together, these indicators show whether legal infrastructure is converted into legitimate civic engagement.

Official markers for 2024–2025 reveal different participation patterns. Kazakhstan relies mainly on Epetition.kz, Citizens' Reception Centres, and video-based public services; Poland on public consultation and NGO support; Lithuania on court use, digital justice, and mediation; Ukraine on legal aid, the Ombudsperson network, and rights-based complaints; and Hungary remains constrained by limited civic space. Accordingly, CPI is measured through three components: voice and consultation, complaint and appeal channels, and mediation or other procedurally structured participation (Figure 6).



Note. Calculation formula:

$$CPI_{it} = \frac{CPI1_{it} + CPI2_{it} + CPI3_{it}}{3 \times 2}, \quad (2)$$

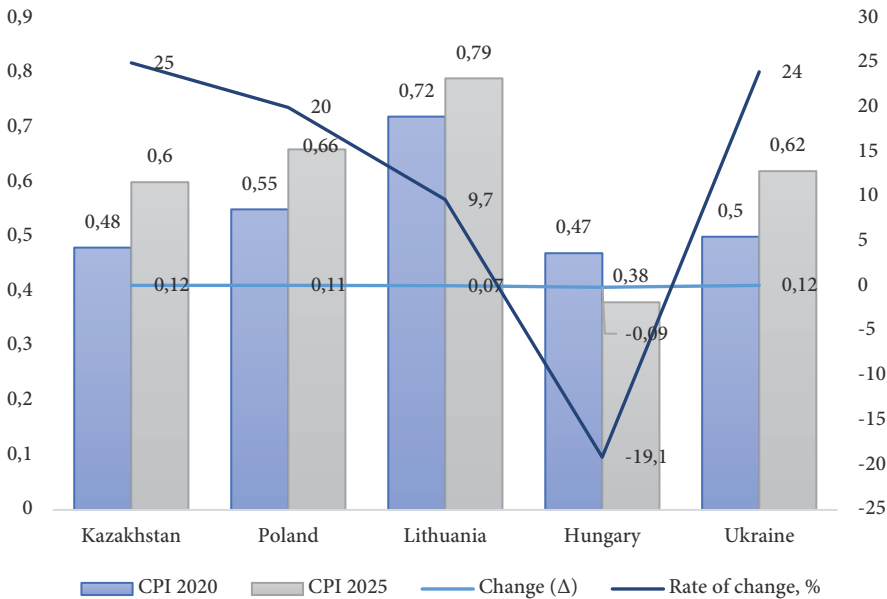
where 2 is the maximum score for each component.

Figure 6. Components of the Civic Participation Index (CPI) by country, average values for 2020 to 2025 on a 0–2 scale²⁵

Lithuania records the highest CPI value (0.77), confirming the strongest institutional basis for civic participation. Poland follows with 0.61, reflecting the recovery of consultation-based mechanisms. Ukraine (0.58) and Kazakhstan (0.56) show close results, although Ukraine relies mainly on legal aid and rights-based claims, while Kazakhstan's participation is driven by service-based and complaint channels. Hungary has the lowest CPI value (0.42), indicating weak enabling conditions for civic engagement.

These results show that civic participation depends less on formal declarations than on functioning procedures. CPI was therefore also calculated for the beginning and end of the period to assess its dynamics (Figure 7).

25 Source: Authors' calculations based on the directed content analysis of official documents and materials for 2020 to 2025.



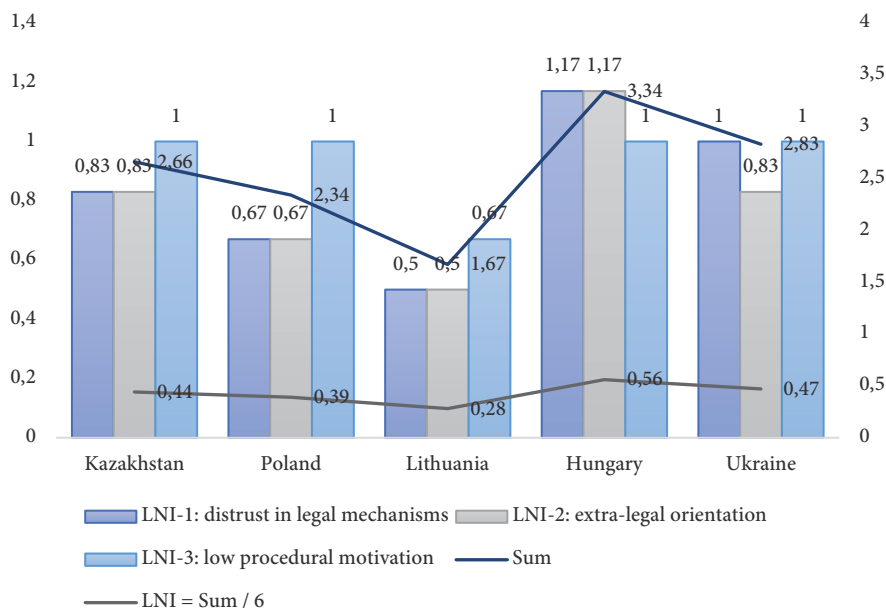
Note. The rate of change was calculated as the ratio of the difference between 2025 and 2020 to the 2020 value.

Figure 7. Dynamics of the Civic Participation Index (CPI), 2020 and 2025²⁶

Kazakhstan and Ukraine show the highest relative growth in CPI. In Kazakhstan, this reflects the expansion of formal appeal channels and service-based participation infrastructure, whereas in Ukraine, it indicates a stronger reliance on legal protection mechanisms amid systemic pressure. Poland also demonstrates positive dynamics, driven by improved consultation procedures and a more favourable civil society framework. Lithuania remains high with limited growth from a strong baseline, whereas Hungary is the only case with negative dynamics.

These results show that CPI growth may have different meanings: in stable contexts, it reflects deeper participation procedures; in crisis conditions, it may indicate increased dependence on formal rights-protection channels. This distinction is especially relevant for Ukraine. The next step calculates the Legal Nihilism Index (LNI), which encompasses distrust in the law, an orientation toward extra-legal strategies, and weak procedural motivation (Figure 8).

26 Source: Authors' calculations based on the annual coding of the 2020 to 2025 document corpus.



Note. Calculation formula:

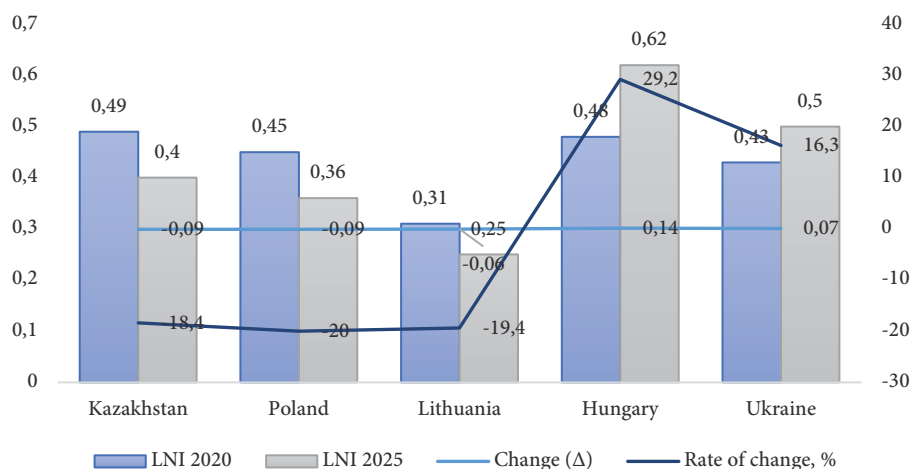
$$LNI_{it} = \frac{LNI1_{it} + LNI2_{it} + LNI3_{it}}{3 \cdot 2}, \quad (3)$$

The higher the value, the more strongly legal nihilism is expressed.

Figure 8. Components of the Legal Nihilism Index (LNI) by country, average values for 2020 to 2025 on a 0–2 scale²⁷

Lithuania records the lowest LNI value (0.28), consistent with its strong LCI, LLI, and ITI profile. Poland shows a moderate level (0.39), while Kazakhstan and Ukraine differ despite similar CPI values: Ukraine has a higher LNI, indicating that legal participation may coexist with incomplete trust. Hungary records the highest LNI (0.56), reflecting weak civic space and erosion of a trust-based legal environment. These findings confirm that high civic participation does not necessarily imply low legal nihilism. CPI and LNI should therefore be analysed together, and LNI dynamics were calculated for the beginning and end of the period (Figure 9).

²⁷ Source: Authors' calculations based on the directed content analysis of documents for 2020 to 2025.



Note. A negative Δ value indicates a decline in legal nihilism, while a positive value indicates its growth.

Figure 9. Dynamics of the Legal Nihilism Index (LNI), 2020 and 2025²⁸

Hungary shows the most unfavourable LNI dynamics, indicating stronger alienation from the formal legal order. Ukraine also records an increase in LNI despite CPI growth, which confirms that greater use of legal channels does not necessarily reflect stronger trust in law. By contrast, Kazakhstan, Poland, and Lithuania show declining LNI values. This suggests that legal nihilism decreases where participation is supported by clearer procedures and a more credible institutional environment.

For the final comparison, the Civic-Legal Balance Coefficient (CPB) was calculated:

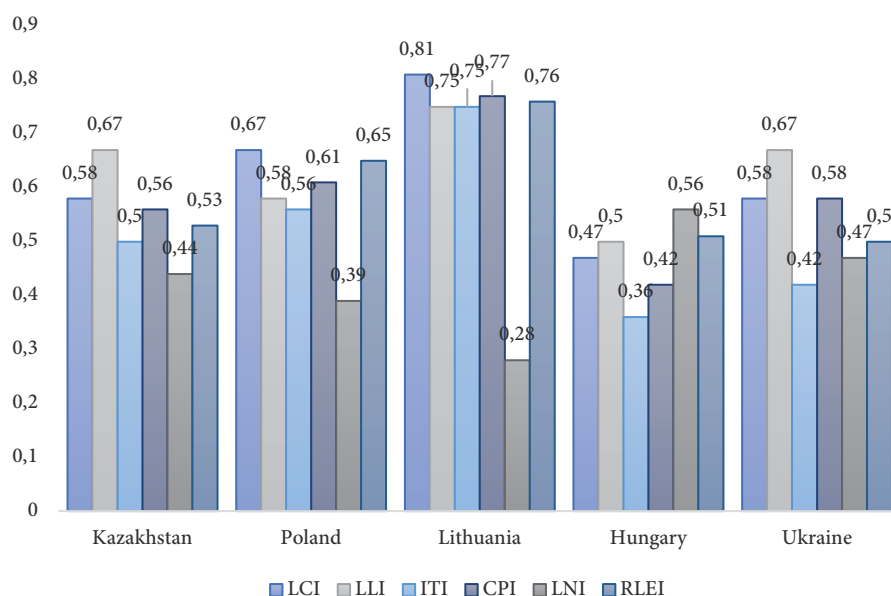
$$CPB_{it} = CPI_{it} - LNI_{it}, \quad (4)$$

A higher CPB value indicates that civic participation prevails over legal nihilism, whereas a negative value indicates that alienation from the law is stronger than the readiness to act within formal legal frameworks.

The CPB results show that Lithuania has the strongest civic-legal balance, with CPI exceeding LNI by 0.49. Poland also demonstrates a stable positive balance (0.22), indicating that the recovery of participation procedures is accompanied by lower legal scepticism. A higher CPB value indicates that civic participation prevails over legal nihilism, whereas a negative value indicates that alienation from the law is stronger than the readiness to act within formal legal frameworks. Hungary is the only country with a negative CPB value (−0.14), meaning that legal nihilism exceeds institutional participation.

28 Source: Authors' calculations based on the annual coding of the 2020 to 2025 document corpus.

These results confirm that civic participation becomes sustainable only when formal channels are supported by trust in law as a fair and effective mechanism. The study therefore proceeds to the Composite Civic-Legal Participation Index (CLPI), which integrates LCI, LLI, ITI, CPI, LNI, and RLEI into a single comparative measure (Figure 10).



Note. LCI, LLI, ITI, CPI, and LNI were derived from the authors directed content analysis of documents from 2020 to 2025. RLEI was constructed from internationally comparable rule-of-law data and qualitative country interpretations.

Figure 10. Summary values of the sub-indices by country, average for 2020–2025²⁹

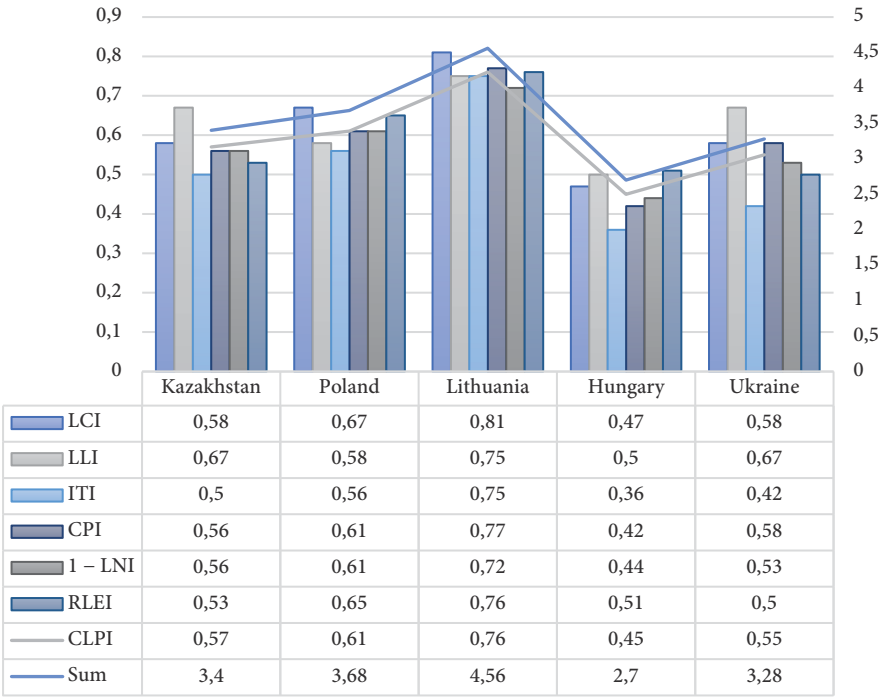
The table shows that the legal environment is distributed unevenly across the cases. Lithuania is the only country in which all positive sub-indices remain high while LNI stays low. Poland presents a more moderate but still coherent profile. Kazakhstan and Ukraine are similar in LCI and LLI, yet differ more clearly in ITI and RLEI, which points to different institutional foundations of legal activity. Hungary shows the weakest configuration, combining low trust and participation with the highest level of legal nihilism. These results indicate that neither legal literacy nor legal consciousness alone is sufficient. What matters is the coherence of all components, especially the relationship

²⁹ Source: Authors' calculations based on the figures, tables, and WJP Rule of Law Index data.

among institutional trust, the rule-of-law environment, and participation. In the next stage, the composite indicator CLPI was calculated:

$$CLPI_{it} = \frac{LCI_{it} + LLI_{it} + ITI_{it} + CPI_{it} + (1 - LNI_{it}) + RLEI_{it}}{6}, \quad (5)$$

This formula reflects the general logic of the study. Five indicators are included in the index in positive form because they strengthen civic-legal embeddedness. LNI is included through the expression (1 - LNI) because legal nihilism operates in the opposite direction. The higher it is, the lower the final CLPI value (Figure 11).



Note. 1 - LNI reflects the reverse transformation of the negative indicator of legal nihilism into a positive contribution to the final index.

Figure 11. Calculation of the composite Civic-Legal Participation Index (CLPI)³⁰

The composite index integrates the separate indicators into a single model of civic-legal embeddedness. Lithuania has the highest CLPI value (0.76), representing a high and structurally balanced model. Poland ranks second (0.61), indicating a moderately high

30 Source: Authors' calculations based on the data presented in the tables and figures.

restorative model. Kazakhstan records 0.57, indicating a medium service-procedural pattern in which legal literacy and appeal channels support participation, while institutional trust remains moderate. Ukraine has a close value (0.55), but its model is mobilisational-compensatory, as participation is driven mainly by demand for legal protection under weaker trust conditions. Hungary records the lowest CLPI value (0.45), showing a structurally imbalanced model marked by weak trust and high legal nihilism.

These results confirm that civic-legal embeddedness depends on the interaction of legal accessibility, institutional trust, and functioning participation channels. Similar CLPI values may therefore reflect different institutional mechanisms. To clarify this difference, the study uses the GAP coefficient: a positive value means that legal preparedness exceeds actual participation, while a negative value indicates that participation outpaces its legal and trust-based foundation, often under compensatory or crisis-driven conditions (Table 7).

Table 7. Coefficient of the gap between legal preparedness and civic participation (GAP)³¹

Country	Mean (LCI + LLI + ITI) / 3	CPI	GAP	Interpretation
Kazakhstan	0.58	0.56	0.02	Almost balanced relationship
Poland	0.60	0.61	-0.01	Participation slightly exceeds internal preparedness
Lithuania	0.77	0.77	0.00	Almost complete correspondence
Hungary	0.44	0.42	0.02	Low overall level with a small gap
Ukraine	0.56	0.58	-0.02	Participation exceeds the trust-legal framework

Note. A positive value means that legal preparedness is somewhat higher than actual participation; a negative value means that participation is outpacing its legal and trust-based foundation.

The GAP results show that similar CLPI levels may reflect different institutional mechanisms. Lithuania has an almost zero GAP, indicating consistency between legal preparedness and actual participation. Poland and Ukraine both record negative values, but Poland reflects restored participation procedures, whereas Ukraine indicates crisis-driven legal mobilisation. Kazakhstan has a near-zero positive GAP, suggesting that its legal and service-based foundation is close to being converted into stronger participation, although trust remains limited. Hungary's small positive gap reflects the low level of both legal preparedness and participation.

³¹ Source: Authors' calculations based on the data presented in the tables and figures.

Overall, the GAP coefficient distinguishes balanced models from compensatory ones.

The Balance indicator confirms the same pattern more compactly. Lithuania shows the strongest positive balance, with a mean of positive factors of 0.77, LNI of 0.28, and Balance of 0.49. Poland also has stable positive balances of 0.61, 0.39, and 0.22, respectively. Kazakhstan occupies an intermediate position, with a mean positive value of 0.57, LNI of 0.44, and Balance of 0.13. Ukraine shows a weaker positive balance, with 0.55, 0.47, and 0.08. Hungary is the only case with a negative value: the mean of positive factors is 0.45, LNI is 0.56, and Balance equals -0.11 . This means that legal nihilism outweighs the positive capacity of the legal environment only in Hungary.

These results show that stable civic participation depends on whether institutional resources are strong enough to offset legal scepticism. Where this margin is narrow, participation remains vulnerable and may become reactive. The next step, therefore, presents the full calculation for Kazakhstan.

$$CLPI_{KZ} = \frac{0.58 + 0.67 + 0.50 + 0.56 + (1 - 0.44) + 0.53}{6}$$

$$CLPI_{KZ} = \frac{0.58 + 0.67 + 0.50 + 0.56 + 0.56 + 0.53}{6} = \frac{3.40}{6} = 0.57$$

Gap coefficient:

$$GAP_{KZ} = \frac{0.58 + 0.67 + 0.50}{3} - 0.56 = \frac{1.75}{3} - 0.56 = 0.58 - 0.56 = 0.02$$

Balance of positive and negative factors:

$$Balance_{KZ} = \frac{0.58 + 0.67 + 0.50 + 0.56 + 0.53}{5} - 0.44$$

$$Balance_{KZ} = \frac{2.84}{5} - 0.44 = 0.57 - 0.44 = 0.13$$

The calculation shows that Kazakhstan has a medium but not fully stable civic-legal profile. Its strengths are legal literacy, expanded channels of appeal, and a moderately positive rule-of-law trajectory, while institutional trust remains the main constraint on stronger civic participation.

After constructing the sub-indices and CLPI, the study proceeded to hypothesis testing. Spearman's rank correlation was used to assess relationships between the indices, while an exploratory regression model treated CPI as the dependent variable and LCI, ITI, RLEI,

and LNI as predictors. The purpose was to identify stable empirical associations within the comparative legal framework rather than to develop a complex causal model.

The correlation results confirm the internal coherence of the index model. Civic participation is most strongly associated with legal consciousness (LCI–CPI: $r_s = 0.975$) and institutional trust (ITI–CPI: $r_s = 0.900$). The rule-of-law environment also supports participation (RLEI–CPI: $r_s = 0.700$), while legal literacy has a positive but weaker association with CPI (LLI–CPI: $r_s = 0.667$).

The negative correlations clarify the constraining role of legal nihilism. LNI is strongly and negatively associated with civic participation (LNI–CPI: $r_s = -0.900$). Legal literacy is moderately associated with lower nihilism (LLI–LNI: $r_s = -0.667$), while institutional trust shows the strongest anti-nihilistic relationship (ITI–LNI: $r_s = -1.000$). RLEI also has a very strong negative association with LNI ($r_s = -0.900$).

Overall, civic participation appears to be associated with a cluster of interrelated factors, among which legal consciousness and institutional trust show the most consistent relationships in the comparative sample (Table 9).

**Table 9. Testing Hypothesis H1:
the relationship between legal consciousness and civic participation³²**

Indicator	Value
r_s (LCI–CPI)	0.975
Direction of association	Positive
Strength of association	Very strong
Decision on H1	Confirmed

Note. The interpretation of strength follows the conventional scale used for rank correlation.

The result indicates an almost linear relationship between LCI and CPI across the countries under study. This supports the central assumption of the article: law becomes a basis of civic participation not merely when it exists formally, but when it is perceived as legitimate and practically usable. The fact that this relationship is stronger than that between LLI and CPI is especially important. Legal literacy matters, but it is not sufficient on its own. What matters more is a deeper orientation toward law as a fair and meaningful social mechanism.

H1 is empirically supported within the limits of the comparative dataset. The stronger the expression of legal consciousness and legal subjectivity, the higher the probability of stable

³² Source: Authors' calculations.

institutional participation. In this sense, civic participation should be understood as a practical manifestation of legal culture.

The second hypothesis addressed a broader question: whether differences in civic participation are shaped not only by formal legal norms but also by the quality of the institutional environment, particularly institutional trust, the rule-of-law environment, and legal nihilism. To test this, the following model was applied:

$$CPI = \beta_0 + \beta_1 LCI + \beta_2 ITI + \beta_3 RLEI - \beta_4 LNI + \varepsilon, \quad (8)$$

Because all indices had already been normalised, the model coefficients allow comparison of the relative direction and strength of the associations between variables (Table 10).

Table 10. Results of the author-developed regression model for CPI³³

Predictor	Coefficient β	Direction of effect	Interpretation
Constant	-0.960	–	Technical model parameter
LCI	2.064	Positive	Legal consciousness makes the strongest positive contribution to variation in CPI
ITI	0.539	Positive	Growth in institutional trust strengthens participation
RLEI	-0.899*	Formally negative	The coefficient should be interpreted cautiously because of interdependence among predictors
LNI	1.205*	Formally positive	The sign is distorted by high multicollinearity; substantively, LNI acts negatively, as confirmed by the correlations
R ²	1.000	–	Full explanation within a small, aggregated sample

Note. The model was estimated on aggregated cross-country values and has an exploratory character. Because of the small sample size and high interdependence among predictors, individual coefficients should be interpreted alongside the correlation matrix rather than as strict causal effects. Formally, unexpected coefficient signs are attributed to multicollinearity.

The regression model was estimated on aggregated cross-country values and is exploratory. Because the sample is small and the predictors are strongly interrelated, individual coefficients should be interpreted together with the correlation results. The unexpected

33 Source: Author's calculations.

signs for RLEI and LNI reflect multicollinearity: stronger LCI usually coincides with higher ITI and RLEI and lower LNI. Substantively, CPI is most strongly linked to LCI, followed by ITI, while LNI remains a constraining factor.

H2 is therefore supported by the comparative results, although the exploratory character of the regression model requires cautious interpretation. Civic participation depends not only on formal legal procedures but also on institutional trust, the rule-of-law environment, and the reduction of legal nihilism. Legal consciousness remains the strongest explanatory factor when supported by reliable institutions.

H3 was then tested by examining the relationship between LLI and LNI to determine whether stronger legal literacy and civic-legal education are associated with lower levels of legal nihilism (Table 11).

Table 11. Testing Hypothesis H3: the relationship between legal literacy and legal nihilism³⁴

Indicator		Value
r_s (LLI–LNI)		-0.667
Direction of association	Negative	
Strength of association	Moderately strong	
Decision on H3	Confirmed	

Note. A negative value indicates that, as legal literacy increases, the level of legal nihilism declines.

This relationship is weaker than LCI–CPI and ITI–LNI, which is analytically important. It indicates that legal literacy reduces legal nihilism, but its effect is limited without institutional trust and procedural justice. Where information channels and service infrastructure are developed but trust remains weak, nihilism declines more slowly.

H3 is supported in a qualified sense: legal literacy is associated with lower levels of legal nihilism, but this relationship becomes more meaningful when interpreted alongside institutional trust and procedural fairness. Legal literacy helps reduce legal nihilism, but its effect is stronger within a broader institutional environment characterised by trust, fairness, and procedural reliability. The results of hypothesis testing are summarised in Table 12.

³⁴ Source: Authors' calculations.

Table 12. Summary results of testing Hypotheses H1–H3³⁵

Hypothesis	Tested relationship	Empirical result	Status
H1	A higher level of legal consciousness is associated with more pronounced civic participation	$r_s = 0.975$ between LCI and CPI	Confirmed
H2	Civic participation is determined not only by norms, but also by the quality of the institutional environment	The largest contribution to CPI comes from LCI and ITI; RLEI and LNI are also significant within the overall model	Confirmed
H3	Stronger legal literacy reduces legal nihilism	$r_s = -0.667$ between LLI and LNI	Confirmed

Note. Confirmation of the hypotheses indicates empirical consistency between the findings and the proposed assumptions. It does not imply absolute causal exhaustiveness of the model.

The consolidated assessment provides comparative support for all three hypotheses, although the strength of the observed relationships varies across the dimensions tested. H1 receives the strongest confirmation, as legal consciousness shows the clearest relationship with civic participation. H2 is also confirmed, although its effect depends on the broader institutional configuration. H3 is supported in a qualified form: legal literacy reduces legal nihilism but cannot replace institutional trust and procedural fairness.

These findings confirm the central argument of the study: civic participation is shaped by the combined effect of legal consciousness, legal literacy, institutional trust, and the quality of the rule-of-law environment.

Kazakhstan requires separate interpretation as the central case of the study and as an intermediate model. Its profile is transitional: the country demonstrates visible institutional and service-based improvements, but formal legal channels are expanding faster than trust in law as an impartial and effective mechanism.

Kazakhstan's external profile confirms its intermediate but positive position. In the WJP Rule of Law Index, the country ranked 65th out of 142 states in 2024 and 66th out of 143 in 2025, while retaining fifth place among fifteenth countries in Eastern Europe and Central Asia. Procedural accessibility also expanded in 2024 through 137 Citizens' Reception Centres, eighty video-based public services, and the launch of Epetition.kz. The OECD Public Governance Scan of Kazakhstan further indicates that public administration reforms continue but require stronger coordination and governance quality.

³⁵ Source: Compiled by the authors on the basis of the results presented in the tables and figures.

The Kazakhstani case is neither stagnant nor crisis-driven. Externally, it shows moderate rule-of-law improvement, while procedurally it demonstrates broader access to appeal channels and public services. However, this progress remains uneven: digital and service-based accessibility is developing faster than trust-based and rights-oriented interaction with law.

Kazakhstan, therefore, represents a medium service-procedural model of civic-legal embeddedness. Its internal profile includes LCI = 0.58, indicating moderately expressed legal consciousness; LLI = 0.67, the strongest component, reflecting developed legal literacy and procedural accessibility; ITI = 0.50, showing that institutional trust remains the main constraint; CPI = 0.56, indicating participation above the mid-level; LNI = 0.44, meaning that legal nihilism remains visible; RLEI = 0.53, reflecting a moderately favourable external legal environment; and CLPI = 0.57, placing Kazakhstan within the medium type of civic-legal embeddedness.

These values show that Kazakhstan does not lack formal legal channels. Its central challenge is converting procedural access into stable, legitimate, and trust-supported participation. Further progress depends on strengthening institutional credibility, procedural fairness, and rights-protective guarantees. To clarify this specificity, Kazakhstan is compared below with Lithuania, Poland, Ukraine, and Hungary (Table 14).

Table 14. Kazakhstan in comparative positioning across the key indices³⁶

Indicator	Kazakhstan	Lithuania	Poland	Ukraine	Hungary	Kazakhstan's position
LCI	0.58	0.81	0.67	0.58	0.47	Lower than Lithuania and Poland, equal to Ukraine, higher than Hungary
LLI	0.67	0.75	0.58	0.67	0.50	Equal to Ukraine, higher than Poland and Hungary, lower than Lithuania
ITI	0.50	0.75	0.56	0.42	0.36	Lower than Lithuania and Poland, higher than Ukraine and Hungary
CPI	0.56	0.77	0.61	0.58	0.42	Intermediate position: participation is lower than in Poland and Lithuania, but higher than in Hungary

³⁶ Source: Compiled by the authors on the basis of the study calculations.

Indicator	Kazakhstan	Lithuania	Poland	Ukraine	Hungary	Kazakhstan's position
LNI	0.44	0.28	0.39	0.47	0.56	Lower than Ukraine and Hungary, but higher than Poland and Lithuania
CLPI	0.57	0.76	0.61	0.55	0.45	Third place in the sample

Note. Higher values of LCI, LLI, ITI, CPI, and CLPI indicate a stronger profile. For LNI, the interpretation is reversed.

Kazakhstan occupies an intermediate and internally uneven position. Its main strength is legal literacy and procedural accessibility: LLI reaches 0.67, exceeding Poland and clearly surpassing Hungary. However, Kazakhstan remains weaker than Lithuania and Poland in legal consciousness and, especially, in institutional trust: LCI is 0.58, while ITI is 0.50. This means that expanded access to legal and public service channels has not yet been fully converted into a stable trust-based model of civic participation.

The diagnostic coefficients confirm this transitional profile. GAP equals 0.02, showing that legal preparedness only slightly exceeds actual participation. Balance equals 0.13, indicating that positive institutional resources still outweigh legal nihilism, although the margin remains limited. Thus, Kazakhstan's main challenge is not the absence of formal legal mechanisms, but their incomplete conversion into public engagement and civic-legal confidence.

In comparative terms, Kazakhstan represents a medium, transitional, service-procedural model of civic-legal embeddedness. Its development is supported by relatively strong LLI, a growing CPI, and a moderate CLPI, but is constrained by weaker ITI and a still-visible LNI. Further progress will depend on whether existing channels of appeal, digital access, and public services are perceived by citizens as fair, predictable, and rights-protective.

Lithuania represents a balanced high-level model in which all major indices are coherent and no substantial internal imbalance is observed. Poland reflects a restorative model, marked by stronger participation and declining legal nihilism, although institutional trust remains less stable. Kazakhstan demonstrates a service-procedural transitional model: its strengths are relatively high LLI and expanding channels of recourse, while the main constraint is moderate ITI and incomplete trust-based conversion. Ukraine represents a mobilisational-compensatory model, where legal mobilisation and legal aid sustain participation under crisis pressure, but participation outpaces the trust base. Hungary shows a structurally imbalanced model, with high LNI, weak civic space, and the most vulnerable overall profile.

The comparative analysis shows that cross-country differences are shaped by the interaction of legal culture, institutional trust, legal literacy, and civic participation rather than by a single variable. The most stable models emerge where these dimensions develop coherently.

To outline the practical implications of the findings, the study uses a baseline scenario for CLPI dynamics in 2026–2030. The scenario is illustrative rather than deterministic and is based on the observed relationship between LCI, ITI, LLI, RLEI, CPI, and LNI.

For practical interpretation, three scenarios were introduced. The baseline scenario assumes the continuation of current reform and institutional tendencies without abrupt acceleration. The moderately optimistic scenario assumes gradual strengthening of the trust dimension and procedural justice. The inertial scenario assumes the preservation of the formal legal framework without meaningful improvement in trust or in the broader civic environment. For the purposes of the main article, the baseline scenario is the most appropriate, since it remains the most analytically neutral (Table 16).

Table 16. Forecast of the composite CLPI index for 2026 to 2030³⁷

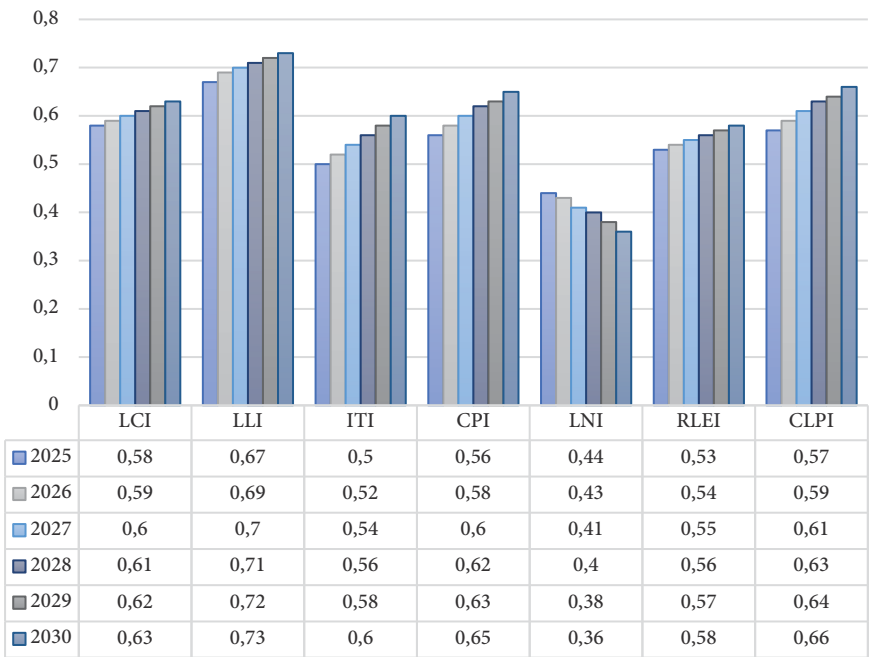
Country	CLPI 2025 (base)	2026	2027	2028	2029	2030	Expected trajectory
Kazakhstan	0.57	0.59	0.61	0.63	0.64	0.66	Gradual growth driven by legal literacy and stronger trust
Poland	0.61	0.63	0.65	0.66	0.68	0.69	Moderate restorative growth
Lithuania	0.76	0.77	0.78	0.79	0.80	0.81	Growth from a high base, with saturation effects
Hungary	0.45	0.45	0.46	0.47	0.48	0.49	Slow recovery, conditional on lower LNI
Ukraine	0.55	0.56	0.58	0.60	0.61	0.63	Growth conditional on institutional stabilisation and a stronger trust base

Note. The forecast was produced by the authors based on the baseline scenario, the initial CLPI values, and the identified directions of influence associated with LCI, ITI, LLI, RLEI, and LNI. The values are model-based rather than deterministic.

³⁷ Source: Authors' forecast based on the baseline scenario, initial CLPI values, and the identified directions of influence associated with LCI, ITI, LLI, RLEI, and LNI.

The forecast indicates the strongest five-year CLPI growth potential in Kazakhstan and Ukraine, although through different mechanisms. In Kazakhstan, this potential rests on an established service-procedural foundation, where stronger institutional trust could produce a significant multiplier effect. In Ukraine, growth depends more directly on broader institutional stabilisation. Poland is likely to continue its restorative trajectory, Lithuania to retain its leading position with moderate growth, and Hungary to improve more slowly due to persistent legal scepticism.

For Kazakhstan, the baseline values are CLPI = 0.57, LLI = 0.67, ITI = 0.50, and LNI = 0.44. Future progress, therefore, depends less on expanding basic infrastructure and more on increasing institutional trust and reducing legal nihilism. Under the baseline scenario, LLI is expected to grow by 0.01–0.02 annually, ITI by 0.02–0.03, while LNI is projected to decline by 0.01–0.02 annually (Figure 12).



Note. The forecast values were calculated by the authors under the baseline scenario, building on Kazakhstan's current service-procedural model and the results of the correlation and regression analyses.

Figure 12. Forecast dynamics of Kazakhstan's key indices, 2026–2030³⁸

38 Source: Authors' forecast based on the baseline scenario and the results of the correlation and regression analyses.

The model suggests that by 2030, Kazakhstan may reach CLPI ≈ 0.66 , moving from a medium transitional profile toward a more stable and moderately high model. This improvement would depend less on expanding procedures than on strengthening institutional trust (ITI) and reducing legal nihilism (LNI).

Kazakhstan's main reserve for growth, therefore, lies in converting its existing legal and service infrastructure into trust-supported participation. If service-procedural modernisation is accompanied by greater impartiality, accountability, and predictability, the country can substantially strengthen its civic-legal embeddedness over the next five years.

The broader conclusion is that legal culture becomes a real driver of civic participation only when supported by institutional trust, an intelligible legal environment, and low legal nihilism. For Kazakhstan, future progress depends not on multiplying channels of recourse but on increasing the trust-based and procedural credibility of law.

5 DISCUSSION

The findings show that legal culture should be understood not as an abstract value but as an institutional and behavioural mechanism that shapes civic participation. The comparison of Kazakhstan, Poland, Lithuania, Ukraine, and Hungary demonstrates that formal rights and procedures alone do not ensure stable inclusion in the legal sphere. What matters is whether law is perceived as legitimate, fair, intelligible, and practically effective. In this respect, legal consciousness emerges as the strongest predictor of participation, while institutional trust acts as a key condition that both supports participation and reduces legal nihilism. Legal literacy also contributes to this process, but its effect is more limited when it is not reinforced by trust and procedural credibility.

The country comparison reveals distinct models of civic-legal embeddedness. Lithuania shows the most balanced profile; Poland, a restorative one; Ukraine, a mobilisational-compensatory one; and Hungary, a structurally imbalanced one. Kazakhstan occupies an intermediate, service-procedural transitional position. Its main strength lies in expanding legal literacy, procedural accessibility, and channels of appeal. Its main limitation is the slower development of trust in institutions. This means that Kazakhstan's further progress depends less on creating additional formal procedures than on making existing ones more impartial, reliable, and socially credible.

6 CONCLUSION

The study shows that civic participation in post-socialist legal systems cannot be explained by the mere existence of rights and procedures. It is more accurately understood as the outcome of several interrelated conditions: legal consciousness, legal literacy, institutional trust, legal nihilism, and the quality of the rule-of-law environment. The comparative results do not establish strict causal relationships, but they indicate stable associations between these dimensions within the selected country sample.

The strongest and most consistent association was observed between legal consciousness and civic participation. Institutional trust also proved closely linked to participation and lower levels of legal nihilism. Legal literacy contributes to this process, but its effect is limited when citizens do not perceive institutions as impartial, predictable, and procedurally fair. This means that legal culture should not be reduced to knowledge of legal norms. It also includes legal subjectivity, procedural intelligibility, trust in institutions, readiness to use formal mechanisms, and reduced reliance on extra-legal strategies.

The comparison of Kazakhstan, Poland, Lithuania, Ukraine, and Hungary reveals several models of civic-legal embeddedness. Lithuania represents the most balanced configuration, where legal culture, institutional trust, and participation reinforce one another. Poland reflects a restorative model, in which participation mechanisms have strengthened, although the trust dimension remains less stable. Ukraine demonstrates a mobilisational-compensatory pattern, where formal legal channels remain important under crisis pressure. Hungary shows the clearest structural imbalance, combining weaker participation with higher levels of legal nihilism and lower levels of institutional trust.

Kazakhstan occupies an intermediate service-procedural position. Its main strength lies in legal literacy, procedural accessibility, and the expansion of recourse channels, while its main limitation remains the moderate level of institutional trust. The Kazakhstani case, therefore, suggests that further progress depends less on multiplying formal instruments of participation and more on converting existing legal infrastructure into fair, predictable, and trust-based mechanisms.

The practical implication is that transitional legal systems should not treat civic participation as a purely procedural outcome. Stronger results are more likely when legal education, accessible legal information, institutional accountability, procedural fairness, and effective feedback mechanisms develop together. For Kazakhstan, this means that the next stage of legal policy should focus on strengthening the credibility of existing channels of appeal, improving the predictability of enforcement, and deepening citizens' experience of law as an impartial and socially reliable framework.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВА КУЛЬТУРА, ІНСТИТУЦІЙНА ДОВІРА ТА ГРОМАДЯНСЬКА УЧАСТЬ У ПОСТСОЦІАЛІСТИЧНИХ ПРАВОВИХ СИСТЕМАХ: ПОРІВНЯЛЬНИЙ АНАЛІЗ КАЗАХСТАНУ ТА СХІДНОЇ ЄВРОПИ

Віктор Жамулдінов та Арман Ахметов*

АНОТАЦІЯ

Вступ. У сучасних постсоціалістичних правових системах, зокрема Казахстану та кількох держав Східної Європи, стійкість громадянської участі залежить не лише від формального існування прав і процедур, але й від ширшого соціально-правового середовища, у якому ці права діють. Особливе значення мають правова свідомість, правова культура, правова грамотність, інституційна довіра та якість середовища верховенства права. Ці фактори формують те, чи сприймають громадяни право як легітимну, зрозумілу та ефективну нормативну основу для дій, і чи використовуються формальні канали участі як змістовні інструменти взаємодії, а не просто як символічні механізми. Хоча кожен із цих аспектів уже висвітлювався в науковій літературі, їхня взаємодія залишається недостатньо вивченою в межах порівняльних досліджень Казахстану та країн Східної Європи. Тому у статті було здійснено аналіз громадянської участі не як ізольованого демократичного результату, а як продукту взаємопов'язаних правових, інституційних та культурних умов.

Методи. У дослідженні використовується змішаний порівняльно-правовий дизайн, який поєднує доктринальний правовий аналіз, спрямований контент-аналіз офіційних документів за 2020-2025 роки, моделювання на основі індексів та кореляційно-регресійне тестування. Для забезпечення аналітичної послідовності дослідження розроблено та застосовано Індекс правосвідомості, Індекс правової грамотності, Індекс інституційної довіри, Індекс громадянської участі, Індекс правового нігілізму та Індекс стану середовища верховенства права, а також зведений Індекс громадянсько-правової участі. Ця система використовується як структурований інструмент порівняльного аналізу, а не як причинно-наслідкова пояснювальна модель; вона допомагає впорядкувати документальні

дані та порівняти формальні та операційні аспекти громадянсько-правової інтегрованості у вибраних постсоціалістичних правових системах.

Результати та висновки. Результати дослідження свідчать про те, що правова свідомість та інституційна довіра найбільш послідовно пов'язані з рівнем громадянської участі в досліджуваних країнах, тоді як правова грамотність видається необхідною, але недостатньою умовою, якщо розглядати її окремо. У дослідженні визначено кілька різних моделей громадянсько-правової інтегрованості у вибраних країнах: від збалансованої та інституційно підкріпленої участі до компенсаторних та структурно незбалансованих форм. Казахстан демонструє значний потенціал для подальшого розвитку завдяки своїй порівняно розвиненій правовій та процесуальній доступності, проте прогрес залежить від вищого рівня інституційної довіри та зменшення правового нігілізму. У статті пропонується порівняльно-правова модель для аналізу громадянської участі за допомогою вивчення взаємодії між правовою культурою, інституційною довірою та процедурною доступністю. Було зроблено висновок, що стійка громадянська участь вимагає більше, ніж просто формальної правової модернізації: вона залежить від того, наскільки право сприймається як справедливе, передбачуване та таке, що має суспільну довіру. Отримані результати можуть бути використані для формування державної політики, спрямованої на зміцнення правової освіти, підвищення ефективності правозастосування та поглиблення взаємодії між державою і громадянами в Казахстані.

Ключові слова: правова культура; правова свідомість; громадянська участь; правова грамотність; інституційна довіра; верховенство права; правовий нігілізм; Казахстан; Східна Європа; порівняльно-правовий аналіз.

Research Article

BETWEEN AUTONOMY AND EU LAW: THE EUROPEAN SPORT MODEL IN THE ERA OF *LEX SPORTIVA*

Marina Kamenicka-Usova*, Laine Donāne and Elina Greine

ABSTRACT

Background: *The formalisation of sports law within the European Union (EU) has progressively reshaped the governance of sport. From the landmark Walrave and Koch judgement (1974) to Article 165 TFEU, and most recently, the Diarra case, EU law increasingly interacts with the autonomous regulatory framework known as lex sportiva. This dual system reflects a balance between the EU's market-oriented legal order and the self-regulatory structures developed by international sports federations and consolidated through the Court of Arbitration for Sport (CAS). Within this framework, the European Sport Model, based on openness, solidarity, and a pyramid competition structure, faces mounting pressures from commercialisation and alternative regulatory models.*

Method: *The article employs a doctrinal legal methodology, supported by a contextual institutional analysis. It examines the Court of Justice of the European Union's (CJEU) case law, Article 165 TFEU, European Union (EU) competition law principles, and selected CAS jurisprudence. These primary sources are assessed alongside scholarly literature on lex*

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sportiva, the European Sport Model, and governance reform to evaluate the evolving relationship between EU law and transnational sports regulation.

Results and Conclusions: *The analysis shows that EU sports law has developed towards a structured coexistence with lex sportiva rather than hierarchical control. CJEU jurisprudence confirms that sport is subject to EU law when constituting economic activity, while recognising its specific nature. Lex sportiva, reinforced by CAS arbitration, ensures regulatory coherence and practical harmonisation across jurisdictions. At the same time, the European Sport Model promotes solidarity and ethical governance but faces tension when confronted with scrutiny under competition law and increasing commercialisation. Good governance principles have emerged as a key mechanism for reconciling autonomy with accountability.*

The European Sport Model and lex sportiva function in a complementary partnership. Lex sportiva operates as the primary regulatory framework, while the European Sport Model provides normative oversight rooted in EU values. Maintaining this balance is essential for ensuring transparency, fairness, and legal coherence in European sport.

1 INTRODUCTION

This article explores the dynamic interplay between European Sport Model and *lex sportiva*, focusing on how these elements converge to shape the legal framework of European sports, which in turn, as highlighted in the Revised European Sports Charter,¹ is a social, educational, and cultural activity based on voluntary choice that encourages contact between European countries and their citizens, and plays a fundamental role in the realisation of the aim of the Council of Europe by reinforcing the bonds between peoples and developing awareness of a European cultural identity. This relationship has been shaped by developments in EU law, especially following the Lisbon Treaty, as well as international sports regulations. A significant focus of the article is on the importance of good governance, which has become increasingly vital for ensuring transparency, accountability, and integrity within sports organisations. As demonstrated in recent scholarship, the intersection of *lex sportiva*, sports law, and governance remains underexplored, with good governance emerging as a key bridging concept among these domains.²

This article argues that the relationship between the European Sport Model and *lex sportiva* should not be understood as hierarchical, but as a form of structured coexistence, in which EU law provides normative constraints while *lex sportiva* ensures regulatory coherence. However, this coexistence remains legally fragile, particularly considering recent CJEU case law.

1 EPAS, *Revised European Sports Charter: Recommendation CM/Rec(2021)5 adopted by the Committee of Ministers on 13 October 2021 at the 1414th meeting of the Ministers' Deputies* (Council of Europe Publishing 2022).

2 Marina Kamenecka-Usova and others, 'Research Patterns in Sports Law and Sports Governance: A Scopus Bibliometric Study' (2025) 7 *Frontiers in Sports and Active Living* 1590858, doi:10.3389/fspor.2025.1590858.

The article proceeds in three steps. First, it outlines the legal evolution of EU sports law and the emergence of *lex sportiva*. Second, it examines the European Sport Model as a normative and governance framework. Third, it analyses how these frameworks interact in practice through selected case law and governance principles, with illustrative reference to selected national systems.

2 METHODOLOGY

This research is based on the analysis of EU law, international sports regulations, and national legal frameworks governing sport. The study examines primary legal sources, including Article 165 of the Treaty on the Functioning of the European Union (TFEU),³ relevant judgements of the CJEU (notably Walrave and Koch, European Superleague Company, and Diarra), and regulatory instruments developed within the framework of *lex sportiva*, such as CAS jurisprudence, the Olympic Charter,⁴ and the World Anti-Doping Code.⁵ In addition, the article analyses policy and governance documents issued by European and international sports institutions, including EU Work Plans for Sport, the Study on the European Sport Model, and governance principles adopted by the IOC and Union of European Football Associations (UEFA). These documents are examined to assess the development of good governance standards in European sport.

To ensure methodological coherence, the selection of jurisdictions (France, Germany, Lithuania, Malta, and Latvia) is intended to provide a representative rather than exhaustive comparison of regulatory approaches within the European Sport Model. The jurisdictions were selected to reflect variation in legal traditions, regulatory density, and governance models: France represents a highly codified legislative framework, Germany illustrates a model characterised by organisational autonomy and soft governance mechanisms, while Lithuania, Malta, and Latvia provide examples of smaller EU Member States where sports governance structures are developing in interaction with EU law and international regulatory standards. The comparative analysis is, therefore, functional and illustrative rather than systematic, aiming to identify common governance patterns, regulatory divergences, and the degree of alignment with *lex sportiva* and EU good governance principles. This approach allows the study to highlight structural trends and regulatory convergence without attempting a comprehensive jurisdiction-by-jurisdiction legal comparison, which falls outside the scope of the present research.

3 Treaty on the Functioning of the European Union (TFEU, consolidated version) [2012] OJ C 326/47.

4 International Olympic Committee, *Olympic Charter: In force as from 23 July 2024* (IOC 2024).

5 World Anti-Doping Agency, World Anti-Doping Code (adopted 15 November 2021) <<https://likumi.lv/ta/lv/starptautiskie-ligumi/id/1967>> accessed 10 February 2026.

Given the doctrinal focus of the article, case law and national examples are used to demonstrate broader regulatory patterns rather than to provide an exhaustive case analysis. Accordingly, the methodological approach prioritises conceptual and doctrinal clarity over exhaustive comparative coverage.

3 LEGAL EVOLUTION OF SPORTS LAW IN THE EU

Before the Lisbon Treaty came into effect on December 1, 2009, the EU had no explicit powers in the realm of sports and its governance.⁶ However, sports-related economic activities gradually fell within the scope of EU law, as demonstrated by the 1974 *Walrave and Koch* case.⁷ The Court has consistently taken the view that, insofar as it constitutes an economic activity, sport falls within the scope of the Treaty and sporting practices must comply with its rules.⁸ This turning point marked the beginning of a more formalised role for sports within the EU, as outlined in Article 165 of TFEU that stipulates that the EU “shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function”, and, pursuant to Article 165(2), EU action shall be aimed at “developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.”⁹

The evolution of sports law in the EU represents a fascinating case study in the interaction between the orthodox rules governing the market-making project and the rules, formally sourced in private organisations, which underpin the global regime of sports governance. The EU’s law does not compete with sport’s own ‘internal law’; instead, it permits its conditional autonomy. In fixing the nature of those conditions, the institutions of the EU, primarily the CJEU and the Commission, have been forced to develop a concept of legitimate sports governance despite the absence of any directly relevant material in the Treaty itself.¹⁰ As highlighted by the Advocate General’s Opinion in Case C-333/21 *European Superleague Company*, Article 165 TFEU gives expression to the ‘constitutional’ recognition of the ‘European Sports Model’, which is characterised by a

6 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed 13 December 2007) [2007] OJ C 306/1.

7 Case 36/74 *BNO Walrave and LJN Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* (CJEU, 12 December 1974) ECLI:EU:C:1974:140.

8 Stephen Weatherill, *European Sports Law* (2nd edn, Springer 2013).

9 TFEU (n 3) arts 165, 165(2).

10 Weatherill (n 8).

series of elements applicable to a number of sporting disciplines on the European continent, including football.¹¹

The EU's involvement in the social aspects of sport tends to be cautious, as García suggests. As a result, the EU has chosen to focus on overseeing and subtly guiding the governance structures of European sports, particularly in ensuring their alignment with EU law.¹² The EU's approach to sport can be likened to parenting a teenager who enjoys a high level of independence and strives to distance themselves from parental oversight. While the parent watches from afar, they sometimes try to guide specific areas of the teenager's life that are especially important to align with the family's values. These efforts are sometimes effective, but at other times encounter resistance.

While EU law establishes the external legal framework within which sport operates, it does not function in isolation. The internal regulatory logic of sport is simultaneously shaped by transnational norms developed within *lex sportiva*, which must therefore be examined in parallel.

4 THE FRAMEWORK OF LEX SPORTIVA

This section contributes to the overall argument by examining *lex sportiva* as a transnational regulatory framework that operates alongside EU law in shaping sports governance.

The convergence of European law and *lex sportiva* offers significant opportunities and challenges, impacting the governance of sport across the EU. According to D. Panagiotopoulos,¹³ international sports activities have developed alongside the state, giving rise to a unique body of international sports law known as *lex sportiva*, which is adhered to by national federations. These sports institutions exclusively regulate relationships within the framework of *lex sportiva*. While these rules are not directly incorporated into domestic law, national bodies and federations must align their regulations with national law in accordance with the standards set by international federations. In this way, *lex sportiva* is integrated into a country's national sports law, allowing its provisions to be applied without conditions. More importantly, perhaps, Duval et al. explicitly state that, rather than being a genuinely self-regulating, fully autonomous

11 Case C-333/21 *European Superleague Company, SL v FIFA and UEFA* (CJEU, 21 December 2023) ECLI:EU:C:2023:1011.

12 Margaret Groeneveld, Barrie Houlihan and Fabien Ohl, *Social Capital and Sport Governance in Europe* (Routledge 2012).

13 Dimitrios P Panagiotopoulos, 'Aspects of Sports Law & Lex Sportiva' (RIU Austral, April 2013) <<https://riu.austral.edu.ar/bitstream/handle/123456789/2792/Aspects%20of%20Sports%20Law.pdf?sequence=1&isAllowed=y>> accessed 10 February 2026.

transnational legal construct, *lex sportiva* operates in intimate connection with the legal and political contexts in which it is grounded.¹⁴

Casini, in his fundamental and remarkable work “*The Making of a Lex Sportiva by the Court of Arbitration for Sport. Lex Sportiva: What is Sport Law?*”¹⁵ discusses the distinct nature and evolution of sports law, drawing on other scholars’ views as well. He highlights that sports law is unique because it is not only international but also non-governmental, setting it apart from other forms of law.

It operates globally, at both the international and domestic levels, and directly influences private actors. For instance, the Olympic Charter functions as a private yet constitution-like document that all states comply with,¹⁶ and the World Anti-Doping Code provides a framework that harmonises anti-doping policies across sports organisations and public authorities.¹⁷

Casini emphasises the normative dimension of global sports law, which has emerged as a comprehensive system of rules produced and enforced by various sporting regulatory bodies. These norms are not limited to transnational standards set by entities like the International Olympic Committee (IOC) and International Federations (IFs), which operate as private contractual orders. They also include “hybrid” public-private norms approved by the World Anti-Doping Agency (WADA) and international legal instruments such as the United Nations Educational, Scientific and Cultural Organization’s (UNESCO) Convention against doping in sport. This global sports law is highly heterogeneous, involving norms established by both central institutions, such as the IOC, IFs, and WADA and national bodies such as national Olympic committees and national anti-doping organisations. A key player in this system is the Court of Arbitration for Sport (CAS), founded in the 1980s, which has become a pivotal actor in the development of global sports law.

Over the past two decades, the CAS has become increasingly significant, issuing numerous decisions that have led to the development of a body of law specific to sports, commonly referred to as *lex sportiva*. This “judge-made” sports law is comparable to *lex mercatoria* (merchant law) and *lex electronica* (electronic law), reflecting its status as a transnational legal framework. Despite its growing acceptance, the existence of *lex sportiva* is not universally recognised. In 2001, the Frankfurt Oberlandesgericht notably ruled that *lex sportiva* does not exist as an independent legal system separate from

14 Antoine Duval, Alexander Krüger and Johan Lindholm (eds), *The European Roots of the Lex Sportiva: How Europe Rules Global Sport* (Hart 2024) doi:10.5040/9781509971473.

15 Lorenzo Casini, ‘The Making of a Lex Sportiva by the Court of Arbitration for Sport’ in Robert CR Siekmann and Janwillem Soek (eds), *Lex Sportiva: What Is Sport Law?* (ASSER Press 2012) 149, doi:10.1007/978-90-6704-829-3_8.

16 Jean-Loup Chappelet and Brenda Kubler-Mabbott, *The International Olympic Committee and the Olympic System: The Governance of World Sport* (Routledge 2008) 53.

17 Paul David, *A Guide to the World Anti-Doping Code: A Fight for the Spirit of Sport* (CUP 2008) 7.

state law.¹⁸ CAS's influence in the formation of global sports law is multifaceted. First, it applies general legal principles to sports institutions and has also developed specific sports law principles known as "principia sportiva" (principles of sport). Second, CAS plays a crucial role in interpreting sports law, thereby influencing and shaping the rule-making activities of sports organisations. Finally, CAS contributes significantly to the harmonisation of global sports law, serving as a supreme court in a global network of legal review mechanisms. For example, decisions made by national anti-doping panels can be appealed to CAS, positioning it as a central authority in ensuring coherence and consistency in sports law worldwide.¹⁹

A high-profile case worth mentioning in this regard is Carolina Kostner's. Carolina Kostner, an Italian figure skater and multiple medallist, became involved in a doping scandal in 2012 linked to her then-partner, Alex Schwazer, an Olympic race-walking champion. On July 30, 2012, when a Doping Control Officer (DCO) came to her home to test Schwazer, Kostner misled the officer by falsely stating Schwazer was not there. Schwazer later tested positive for erythropoietin (EPO) before the 2012 London Olympics, leading to a broader investigation. Kostner admitted her actions violated the Italian Anti-Doping Rules, specifically Articles 2.8 and 3.3, which prohibit complicity in doping and non-cooperation with anti-doping authorities. As a result, the Italian Anti-Doping Tribunal initially banned her from competition for sixteen months. In March 2015, Kostner and the Italian National Anti-Doping Tribunal (CONI) appealed to the CAS. Kostner sought to have her ban annulled, while CONI sought to extend it to two years. A settlement was reached in October 2015, with CAS extending the ban to twenty-one months but backdating it to April 1, 2014, allowing Kostner to return to competition on January 1, 2016.²⁰ The case attracted widespread media attention due to Kostner's prominence as an athlete and highlighted issues of sports liability related to complicity and misleading doping officials.

In summary, Casini's work illustrates how the evolution of sports law, particularly through the role of CAS, has shaped a global legal framework that is both complex and increasingly essential to the governance of international sport. It is important to note that in countries

18 "[E]ine von jedem staatlichen Recht unabhängige lex sportiva gibt es nicht". See, Casini (n 15).

19 *ibid*

20 'Prosecutor's Office Refers Carolina Kostner, Demands 4 Years and 3 Months Disqualification' (*Italian National Olympic Committee*, 28 November 2014) <<https://www.coni.it/en/news/prosecutor-s-office-refers-carolina-kostner-demands-4-years-and-3-months-disqualification.html>> accessed 10 February 2026; Tejaswini Ranjan, 'Carolina Kostner settled dispute with WADA and Italian NADO : Eligible to Compete in 2016' (*PLAwYERed*, 6 October 2015) <<https://plawyerred.wordpress.com/2015/10/06/carolina-kostner-settled-dispute-with-wada-and-italian-nado-eligible-to-compete-in-2016/>> accessed 10 February 2026; 'Events - Figure Skating' (*Carolina Kostner: official site*, 2026) <<http://www.carolina-kostner.it/it/>> accessed 10 February 2026.

with comprehensive national sports laws, such as Latvia, Lithuania, and France,²¹ these laws are generally drafted without direct reference to *lex sportiva*. As a result, sports regulation in these countries operates under two parallel systems: national legislation and sports federations' regulations, with *lex sportiva* integrated through international federations. In addition, the normative frameworks set by the IOC and WADA also play a significant role in shaping sports governance at the national level.

However, the interaction between these regulatory layers cannot be fully understood without considering the European Sport Model,²² which provides the institutional and normative context within which both EU law and *lex sportiva* operate.

5 EUROPEAN SPORT MODEL

This section contributes to the overall argument by examining the European Sport Model as the normative and organisational framework that structures sport in Europe.

The EU Work Plan on Sport 2021-2024 highlights the European Sport Model as a central issue and directs the European Commission to examine the impact of closed sports competitions on the system of organised sport, taking into account the unique characteristics of sport and the challenges faced by European sport organisations and federations. In line with this, the Directorate-General for Education, Youth, Sport, and Culture (DG EAC) commissioned a Study on the European Sport Model. The study aimed to provide a deeper understanding of the changes affecting the model by mapping the evolution of sport governance, finances, and practices across different regions and sports over time. It also sought to analyse how the model is adapting to varying conditions across EU Member States.²³

The European Sport Model emphasises the key principles of how sport is organised across Europe, particularly within competitive and organised sports. Key features include:

1. A *pyramid structure* that integrates sports from grassroots to international levels, led by sports federations.

21 Law of the Republic of Latvia on Sports 'Sporta Likums' (adopted 24 October 2002) [2002] Latvijas Vēstnesis 165 <<https://www.vestnesis.lv/ta/id/68294-sporta-likums>> accessed 10 February 2026; Law of the Republic Lithuania no I-1151 'On Physical Education and Sport' of 20 December 1995 (amended 14 May 2015, Law no XII-1722) <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a69875e0e9da11e59b76f36d7fa634f8?jfwid=2r1mca2o>> accessed 10 February 2026; French Sports Code 'Code du sport' (amended 1 January 2026) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT00006071318/2026-01-01> accessed 10 February 2026.

22 'The European Sport Model' (European Commission: Sport, 2026) <<https://sport.ec.europa.eu/sport-in-the-eu/the-european-sport-model>> accessed 10 February 2026.

23 James Sennett and others, *Study on the European Sport Model: A Report to the European Commission* (Publications Office of the EU 2022) doi:10.2766/28433.

2. *Open competition* based on promotion and relegation, distinguishing it from closed models such as those in North America (e.g., Major League Soccer).
3. *Solidarity mechanisms* that redistribute funds from elite to grassroots levels, ensuring equitable development across all tiers.
4. *Autonomy* of sports federations, balanced with accountability and good governance practices.
5. Heavy reliance on *volunteers*, crucial for running clubs and events across various sports.

As stated in the *Study on the European Sport Model – A Report to the European Commission*, challenges such as commercialisation, internationalisation, and the rise of closed competitions threaten these principles. Stakeholders recognise the need to maintain solidarity and transparency while adapting to trends such as increased digitalisation, sustainability, and the evolving role of volunteers. The study also underscores the need for collaboration between the public and private sectors to sustain grassroots efforts and ensure that sport remains a public good.²⁴

Ross states that most of the world uses governance models formalised by the EU's European Sport Model. Also observing that national sports federations' governing documents typically state their mission at very high levels of generality. Even today, governance is typically structured around a 'democratic' model that, as David Trodden observes, reflects the origins of English sport as a private leisure activity with clubs and federations serving their members' interests. National Federations tend to be governed by representatives of various stakeholders, who often act in the parochial interests of those they represent.

In contrast, the North American model is characterised by highly successful commercial major leagues, operated as for-profit businesses through joint ventures controlled by professional club owners. For example, Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL) are often collectively known as the "Big Four" sports leagues. These leagues represent the richest professional club competitions in their respective sports globally. Other notable leagues include Major League Soccer (MLS) and the Canadian Football League (CFL).²⁵ According to Ross, to address a past match-fixing scandal and to facilitate innovation despite minority-owner opposition, the owners grant significant authority to the league's chief executive, known as the Commissioner, to act in the sport's best interests.

²⁴ *ibid*

²⁵ 'Major pro Sports Teams Ranked by Market Size' (*Sports Media Watch*, 26 October 2018) <<https://www.sportsmediawatch.com/nba-market-size-nfl-mlb-nhl-nielsen-ratings>> accessed 10 February 2026.

Unlike the European model, North American professional leagues do not heavily invest in grassroots sports. This role is partly filled by local government recreation departments and by the often profitable organisation of interscholastic and intercollegiate sports. Additionally, youth sports are largely privatised, with participants or their parents paying substantial fees to private organisations that run recreational competitions.²⁶

The following concerns can be identified from García's analysis of the European Sports Model:

1. *Pyramidal structure and monopoly of governing bodies*: The European model is criticised for its reliance on a pyramidal, monopolistic, and hierarchical structure that confers excessive control on governing bodies. This system allows these bodies to maintain their regulatory power and position, which can be seen as reinforcing institutionalised relationships and power dynamics rather than promoting inclusiveness.
2. *Tensions between professional and amateur sports*: European sport has a history of conflicts and tensions between professional and amateur levels, posing governance challenges. The strong link between amateur and professional sports, while politically appealing, has often been used by sports organisations to defend their interests.
3. *Challenges to the socio-cultural vision*: The socio-cultural view of sport within the European model, which emphasises grassroots and non-commercial aspects, is regarded as somewhat idealistic. Critics argue that it fails to adequately address the commercial and economic realities of sport, especially at the professional level.²⁷
4. These issues illustrate the inherent complexity and diversity of structures within the European sports governance system, as outlined in the European Sport Model, where various stakeholders and competing interests complicate efforts to achieve uniform governance. A delicate balance between “development of the European dimension in sport” and “conditional autonomy”.

The tensions identified within the European Sport Model become particularly visible when examining how these principles are applied in practice through the interaction between EU law and *lex sportiva*.

26 Stephen F Ross, *Advanced Introduction to Global Sports Law* (Edward Elgar Publishing 2021).

27 Groeneveld, Houlihan and Ohl (n 12).

6 THE ROLE OF LEX SPORTIVA IN EUROPEAN SPORTS GOVERNANCE

This section contributes to the overall argument by analysing how the interaction between EU law and *lex sportiva* is operationalised in practice within European sports governance.

European governance, as a term, refers to the European Union's management of the exercise of public authority through a network of institutions, states, and non-state actors within a complex, multi-level system. It is characterised by the decentralisation of normative authority (values, ethics, laws) and steering capacity (the ability to enforce rules and policies).

At its core, European governance involves:

- Normative Dispersal: Managing the diversity of values and legal interpretations across member states. The EU is not a homogeneous entity but a coalition of countries with differing traditions of justice and democracy. The EU's governance must accommodate these differences through overlapping legal frameworks and constitutional orders.
- Capacity-Based Dispersal: Sharing governance responsibilities with a wide array of actors, such as national governments, independent agencies, private entities, and civil society. The EU lacks a hierarchical command structure like that of a nation-state and instead relies on a networked approach to enforce its rules and policies across jurisdictions.

This governance system moves away from top-down, centralised control, reflecting a collaborative and often decentralised exercise of power, where both authority and responsibility are dispersed. This creates a unique political framework that must balance various sources of power, manage diverse national interests, and ensure the effective implementation of shared rules across member states. Hence, "European governance" describes the EU's complex, multi-layered approach to public administration and lawmaking, in which power is shared and contested among a wide range of actors, institutions, and levels of governance.²⁸

An intriguing concept in the realm of sports and its governance in the EU is "reflexive governance." A governance model that, according to Lenoble and Maesschalck, involves establishing institutions and processes that facilitate learning for actors within a domain not only about policy options but also about their own interests and preferences.²⁹

Therefore, reflexive governance means making governance systems flexible, adaptable, and open to learning. It understands that modern challenges are complex and aims to solve them through processes that include everyone, encourage participation, and allow for self-reflection. This approach is designed to be responsive to new information, changing values, and uncertainties.

28 Mark Dawson, *The Governance of EU Fundamental* (CUP 2017) 2-4, doi:10.1017/9781107707436.

29 Emma Lantschner, *Reflexive Governance in EU Equality Law* (OUP 2021) 52.

In the EU, reflexive governance is evident in how policies are developed through continuous consultation with member states, citizens, and experts, and adapted in response to feedback and changing political landscapes (e.g., environmental policies). The reflexive governance model is essential for addressing sport-related matters. The European Sport Model should continue to evolve through collaboration and consultation with major sports governing bodies, such as the Fédération Internationale de Football Association (FIFA), UEFA, and national Olympic committees, to ensure it accurately reflects the practical realities of sport at both the professional and grassroots levels.

Lex sportiva plays a vital role in maintaining consistency in global sports governance, particularly as international private bodies like the IOC, FIFA, International Tennis Federation (ITF), World Athletics (formerly IAAF), International Basketball Federation (FIBA), International Ice Hockey Federation (IIHF), and others enforce their own regulations. The EU's stance on *lex sportiva* grants sports organisations a degree of conditional autonomy under Article 165 of the TFEU. However, this autonomy is subject to EU law, which requires sporting institutions to establish governance structures that align with European legal principles, as discussed above.

According to Duval et al., international sports governing bodies (SGBs) such as the WADA, FIFA, and the IOC engage in transnational governance by implementing their private regulations. Additionally, private dispute resolution bodies, particularly the CAS, hold near-exclusive authority to resolve disputes arising from this private governance system. The CAS not only interprets the rules of SGBs but also helps define general principles of sports law through its rulings.³⁰

The CJEU also plays a critical role in shaping sports governance within the EU.

In its recent ruling in the *European Superleague Company* case, the CJEU found that the rules of FIFA and UEFA, which require prior approval for inter-club competitions such as the Super League, violated EU law because they conflicted with competition law and the freedom to provide services.³¹ This decision highlights the ongoing tension between sports governing bodies and EU law, particularly in areas related to competition. This is also confirmed by the sensational case of footballer Lassana Diarra, a decision (décision préjudicielle) of the CJEU dated October 4, 2024.³²

The *Diarra* case revolves around a significant ruling by the CJEU regarding football transfer rules:

Lassana Diarra, a professional footballer, had his contract with Lokomotiv Moscow terminated in 2014. He sought to join Belgian club Sporting du Pays de Charleroi but was unable to do so because FIFA's transfer framework created regulatory

30 Duval, Krüger and Lindholm (n 14).

31 Case C-333/21 (n 11).

32 Case C-650/22 *FIFA v BZ* (CJEU, 4 October 2024) ECLI:EU:C:2024:824.

obstacles that prevented the transfer from being completed, citing rules requiring him to pay compensation to his former club.

FIFA's regulations mandated that players who terminate their contracts without just cause must compensate their former clubs. Additionally, any new club signing such a player would also be liable for this compensation.

The CJEU ruled that these FIFA rules violated EU law by impeding the free movement of professional footballers. The court likened these restrictions to "no-poach agreements", which are generally illegal under EU competition law. The judges stated that while some restrictions might be justified, FIFA's rules were not essential or necessary and imposed significant legal and financial risks on players and clubs.

This ruling challenges the foundational aspects of how player transfers are regulated in football, potentially allowing greater freedom for players to move between clubs without facing heavy financial penalties.

Following the ruling, FIFA indicated it would review the decision, which only questioned specific paragraphs of its transfer rules. Final decisions regarding Diarra's compensation claims will be made by a Belgian tribunal.³³

This case underscores the ongoing tensions between sports governance and EU laws concerning the free movement of workers and competition.

One of the ongoing challenges in European sports governance is aligning national sports laws and regulations in countries without a solid sports law (e.g., Germany) with *lex sportiva*, while ensuring compliance with EU standards. Achieving this requires close cooperation between national governing bodies, international federations, and EU regulators. In turn, the collaboration between EU soft law on sports and national regulations creates a comprehensive and supportive framework for sports governance, improving the efficiency and fairness of sports administration.³⁴

Currently, in countries like Latvia, the influence of *lex sportiva* extends only to the national level, through the harmonisation of international sports federation norms with those of national sports federations.

These regulatory tensions highlight the need for governance mechanisms that reconcile autonomy with accountability, bringing the concept of good governance to the forefront of European sports regulation.

33 *ibid*

34 Marina Kameņeckā-Usova and others, 'Latvian Sports Regulation in Transition: Navigating Historical Evolution and Contemporary Development Trends' (2024) 13(4) *European Journal of Sustainable Development* 437, doi:10.14207/ejsd.2024.v13n4p437.

7 GOOD GOVERNANCE IN SPORTS

This section contributes to the overall argument by examining good governance as a key mechanism for addressing the structural tensions between EU law and *lex sportiva*.

Governance encompasses the institutions, systems, "rules of the game", and other elements that shape political and economic interactions, influencing how decisions are made and resources allocated. Implicit in this concept is the idea that good governance is a desirable attribute of political systems, while poor governance presents challenges that countries must address.³⁵ Hence, good governance constitutes well-structured and transparent processes of organisations' functioning and decision-making.³⁶ Thus, in the bundle of good things that have come to be understood as good governance, institutional qualities are often combined with expectations for the promotion of particular kinds of policies.³⁷

The concept of *good governance* has gained significant importance in the world of sports regulation. Mataija claims that a key turning point was the IOC's introduction of the "Basic Universal Principles of Good Governance" in 2009. These principles were adopted by all member associations under the IOC's Code of Ethics. They provide a blueprint for what is expected from sporting bodies in terms of governance. These principles are:

1. Vision, mission, and strategy: Organisations should have clear values and objectives, such as promoting sport, ensuring fairness, and encouraging solidarity.
2. Structures, regulations, and democratic processes: Governance structures must include transparent rules for leadership, elections, and decision-making. This also includes clear terms of office, conflict-of-interest rules, and fair review procedures.
3. Competence, integrity, and ethical standards: Organisations should maintain high standards of professionalism, competence, financial monitoring, risk management, and ethics.
4. Accountability, transparency, and control: Transparency in operations is essential, especially in finances, with internal controls and clear accountability between different governance levels.
5. Solidarity and development: Resources and revenues should be allocated fairly, with a focus on development and equitable distribution of benefits.

35 Merilee Grindle, 'Good Governance: The Inflation of an Idea' (Working Papers 202, Center for International Development at Harvard University 2010) <<https://dash.harvard.edu/handle/1/4448993>> accessed 10 February 2026.

36 Marina Kamenecka-Usova, 'Good Governance in National Sports Organizations: The Need for the Internal Dispute Resolution Procedures' (2022) 14(1-2) International Sports Law Review Pandektis 141.

37 Grindle (n 35).

6. Athletes' involvement: Athletes must have a role in governance, with their protection and rights, including anti-doping measures, being a priority.
7. Relations with governments: While cooperation with governments is encouraged, sports bodies should maintain autonomy in their governance.³⁸

Another notable document on good governance is the EU Work Plan for Sport 2011-2014, specifically XG GG – Deliverable 2: Principles of Good Governance in Sport³⁹ (EU Work Plan for Sport), which outlines the following key principles of good governance in sports:

1. Clarity of Purpose: Sports organisations should have clear objectives and a strategic vision that aligns with long-term goals and is communicated transparently.
2. Code of Ethics: A code of ethics should guide conduct within the organisation, promoting integrity, fairness, and transparency across all levels of participation.
3. Stakeholder Involvement: Effective engagement with stakeholders, including athletes, coaches, and supporters, is essential. Stakeholders should have a voice in decision-making processes.
4. Democratic Processes: Decision-making should be democratic, ensuring fair representation, regular elections, and clear roles for leadership positions, with procedures to manage conflicts of interest.
5. Accountability and Transparency: Sports bodies should ensure transparency in financial matters, internal controls, and decision-making, while implementing mechanisms for oversight and accountability.
6. Inclusivity and Diversity: Organisations should promote inclusivity and ensure diversity in leadership roles, offering opportunities across gender, race, and other social factors.
7. Management Efficiency: Clear management structures, task delegation, and regular performance monitoring should be in place to ensure the organisation's effectiveness.
8. Judicial Procedures: Organisations should establish fair and impartial judicial or disciplinary procedures to address rule or ethical violations.

These principles aim to promote effective, ethical, and transparent governance within sports organisations while ensuring accountability to stakeholders. The EU work plan elaborates on

38 Mislav Mataija, 'False Friends: Proportionality and Good Governance in Sports Regulation' in Antoine Duval, Alexander Krüger and Johan Lindholm (eds), *The European Roots of the Lex Sportiva: : How Europe Rules Global Sport* (Hart Publishing 2024) 191, doi:10.5040/9781509971473.ch-008.

39 Expert Group "Good Governance", *Deliverable 2: Principles of Good Governance in Sport* (EU Work Plan for Sport, European Commission (EAC/Sport) 2013) <https://ec.europa.eu/assets/eac/sport/library/policy_documents/xg-gg-201307-dlvrl2-sept2013.pdf> accessed 10 February 2026.

organisational structures, democratic processes, and decision-making bodies in greater detail. However, it does not emphasise solidarity and development as prominently as the Basic Universal Principles of Good Governance, where these concepts are fundamental. The Basic Universal Principles also place greater emphasis on athlete involvement, whereas the EU work plan addresses this aspect only indirectly. Overall, the EU work plan has a broader scope and often includes more specific details, particularly regarding operational practices such as performance monitoring and ethical governance. While both sets of principles align closely with most core tenets, they differ slightly in focus and detail.

A prime example of a sports organisation that illustrates the importance of effective governance in ensuring the proper functioning of its governing bodies is UEFA. Notably, during its Congress in Helsinki on April 5, 2017, UEFA introduced a specific Article making ethics and good governance a statutory objective of the organisation, among other amendments discussed. European Commissioner for Education, Culture, Youth and Sport, Tibor Navracsics, offered positive remarks on these important reforms, noting that governance failures have damaged the reputation of sports, with football being particularly susceptible, though not exclusively affected. Due to its immense popularity, football faces heightened scrutiny. Navracsics emphasised that transparency, accountability, and stakeholder involvement are central to good governance principles, and stressed that regaining public trust is essential for sport to maintain its central role in society.⁴⁰ Additionally, as emphasised by UEFA regarding the roles of the President and Board/Executive Committee members, a system of "*checks and balances*" is essential to prevent an excessive concentration of power in a single individual, while also ensuring that appropriate measures are in place to maintain continuity in the work of these bodies.⁴¹

In the case of UEFA, it acts as an umbrella organisation that promotes the right model of good governance to its members and supports the implementation of its good governance principles at the national level, also through the "Good Governance Principles for UEFA Member Associations".⁴² Also, the 2022 "*Arrangement for Cooperation*"⁴³ between the European Commission and UEFA highlights good governance in sport as a condition for maintaining the autonomy of sports organisations, as Mataija points out. Overall, this cooperation agreement reinforces the joint commitment to driving positive social change

40 Mark Chaplin, 'European Commissioner Welcomes UEFA Reforms' (UEFA, 6 April 2017) <<https://www.uefa.com/insideuefa/about-uefa/news/0238-0f8e4fe1f2cc-77d21b664e65-1000--european-commissioner-welcomes-uefa-reforms/?referrer=%2Finsideuefa%2Fabout-uefa%2Forganisation%2Fcongress%2Fnews%2Fnewsid%3D2455627>> accessed 10 February 2026.

41 Kamenecka-Usova, 'Good Governance' (n 36).

42 UEFA, 'A Guide to UEFA's Good Governance Reform' (*Law in Sport*, 17 January 2019) <<https://www.lawinsport.com/topics/features/item/a-guide-to-uefa-s-good-governance-reform>> accessed 11 February 2026.

43 European Commission Decision on the adoption of the Arrangement for Cooperation between the European Commission and the Union of European Football Associations (UEFA) (C(2022) 3721 final, adopted 9 June 2022) <<https://sport.ec.europa.eu/news/european-commission-and-uefa-sign-third-cooperation-agreement>> accessed 10 February 2026.

and upholding the European sports model. The partnership, originally signed in 2014, focuses on EU priorities such as climate action, equality, and social inclusion, leveraging football's visibility to promote these goals. The agreement also emphasises the protection of the European sports model, which promotes solidarity by reinvesting professional competition revenue into grassroots development. UEFA's initiatives, such as supporting the EU Green Deal and promoting healthy lifestyles through campaigns, further highlight its commitment to European values and objectives.

The EU itself has pushed for better governance in sports. The European Commission has backed the development of the *Principles for Good Governance in Sport*, which many sports organisations have pledged to follow. Similarly, the Council of Europe and UNESCO are working on their own governance initiatives. In some countries, governments have required sports bodies to adopt good governance codes as a condition for receiving public funding.⁴⁴

It is important to highlight that most good governance documents place strong emphasis on judicial procedures. Judicial and disciplinary processes within sports organisations are considered vital to good governance, as an effective judicial system is expected to include a dispute-resolution mechanism capable of delivering swift, efficient conflict resolution. However, in Latvia, well-developed and established internal dispute resolution systems within national sports federations remain rare. The combined influence of EU policies and international sports organisations provides optimism for future improvements in achieving adequate governance standards.

In conclusion, the push to establish good governance in EU sports is driven by two main sources: EU soft law and influential international sports organisations like UEFA and the IOC. Both sources underscore the critical importance of internal dispute resolution procedures in maintaining effective governance in sports organisations. It is also essential to recognise the global impact of the IOC on all members of the Olympic movement, whereas UEFA's policies primarily affect national football federations.

In practice, however, when assessing the good governance in national sport organisations, it should be noted that the effectiveness of management and governance structures in sports organisations is shaped by several key factors, including the fragmentation within these organisations, inconsistent long-term funding in the sports industry, and the lack of a systemic approach in financial models and sports infrastructure development. Strengthening these governance structures is crucial to promoting transparency, accountability, and ethical management. A key improvement would be the establishment of a stable, long-term funding model for the sports industry, where priority sports are identified and supported by a centralised organisation.⁴⁵

44 Mataija (n 38).

45 Marina Kamenicka-Usova, Ilona Lejniece and Karina Zalcmane, 'Hosting Large Sports Events Sustainably: A Contemporary Administrative and Economic Evaluation' (2024) 13 *European Journal of Sustainable Development* 609, doi:10.14207/ejsd.2024.v13n3p609.

7.1. Good Governance in Sports Regulations:
Analysis of France, Germany, Lithuania, Malta, and Latvia

This subsection illustrates how good governance principles are implemented in practice across selected European jurisdictions, providing concrete examples of the broader governance dynamics discussed above.

Table 1 below provides an overview of the legislative and governance frameworks concerning sports law and good governance across five European countries: France, Germany, Lithuania, Malta, and Latvia. It highlights several key aspects, including national sports laws, applied governance principles, regulations of National Olympic Committees (NOCs) and anti-doping agency guidelines.

Table 1. Comparative Overview of Sports Law, Governance Principles, Olympic Governance, and Anti-Doping Frameworks in Selected European Countries

Country	National Sports Law	Governance Principle	National Olympic Committee (NOC)	Anti-Doping Agency & Relevant Rules
France	Code du Sport – federations, in coordination with the professional leagues they have created, draw up a charter of ethics and professional conduct	Ethical charter defined by decree after consulting the National Olympic Committee	Strategic plan for sustainability and governance	Agence Française de Lutte contre le Dopage: Adheres to World Anti-Doping Code, strict governance principles
Germany	No specific national sports law; governance guided by DOSB (Olympic Sports Confederation)	Strong governance guidelines from DOSB; sustainability and ethics focused	DOSB ensures ethical practices and sustainability measures	Nationale Anti-Doping Agentur Deutschland: Implements World Anti-Doping Code, good governance emphasis
Lithuania	Law on Physical Education and Sport outlines transparency, democratic governance	Law specifies governance principles: objectivity, continuity, accountability	NOC follows strategic plan for Olympic governance and adherence to international norms	Antidopingo Agentūra: Follows World Anti-Doping Code, promotes good governance

Country	National Sports Law	Governance Principle	National Olympic Committee (NOC)	Anti-Doping Agency & Relevant Rules
Malta	Sports Act emphasises ethics, doping prevention, environmental responsibility	Principles like ethics, doping prevention, and environmental concern	NOC promotes governance, youth education, and ethics	National Anti-Doping Organization: Implements national rules, aligned with World Anti-Doping Code
Latvia	Sports Law emphasises democratic structures, transparency, sustainability, and stakeholder collaboration	Law includes good governance principles: democratic management, transparency, fairness	NOC follows Olympic and sports movement's universal governance principles	Latvijas Antidopinga Birojs: Implements World Anti-Doping Code, promoting ethics and good governance

To put the comparative elements outlined above in context, the subsequent analysis examines the relevant statutory provisions, regulatory frameworks, and policy documents underpinning sports governance and anti-doping compliance in each country.

a) National Sports Law

France: Federations, in coordination with the professional leagues they establish, are responsible for creating a charter of ethics and professional conduct, aligned with the principles outlined in Article L. 141-3. They also establish an independent ethics committee to ensure the charter's enforcement. This committee monitors compliance with ethical standards and professional conduct rules, and with measures to prevent conflicts of interest, and refers cases to appropriate disciplinary bodies when necessary.⁴⁶ This reflects France's emphasis on structured ethical guidelines in sports governance.

Germany: A dedicated sports law act on sports law is absent, but references to governance and ethics can be found in organisational statutes, such as those of the German Olympic Sports Confederation (DOSB).⁴⁷

⁴⁶ French Sports Code (n 21) s 3.

⁴⁷ DOSB, *Good Governance Regularien* (Deutscher Olympischer Sportbund, 18 July 2024) <<https://www.dosb.de/ueber-uns/good-governance-im-dosb>> accessed 10 February 2026.

Lithuania: Section 4 of the Law on Physical Education and Sport outlines principles of physical education and sport, including equality, fair play, objectivity, and accountability.⁴⁸ There is no explicit reference to good governance.

Malta: Sports governance is regulated by the Sports Act (Chapter 455) Article 2.1.6, which emphasises promoting ethics, combating doping, and fostering environmental responsibility in sports.⁴⁹

Latvia: Article 3 of the Sports Law highlights the principle of good governance, specifically focusing on democratic management structures, clear objectives, and effective regulation, establishing the country's priority on transparency and accountability in sports organisations.⁵⁰

b) National Olympic Committees (NOCs)

The role of NOCs in promoting good governance and ethical principles is outlined for several countries:

France and Germany focus on developing sustainability and good governance measures that align with the principles of the Olympic movement.⁵¹ Lithuania and Latvia reference their NOCs' adherence to global standards of good governance, emphasising strategic planning and ethical governance in sports administration.⁵² Malta emphasises the role of its Olympic Committee in promoting governance, ethics, and fair play.⁵³

All five NOCs are members of the Association of National Olympic Committees (ANOC), whose strategic plan 2021-2024, Section 11, specifies the implementation of effective sustainability measures to protect the environment and promote good governance practices across all ANOC's projects and activities.⁵⁴

48 Law of the Republic Lithuania no I-1151 (n 21) s 4.

49 Laws of Malta, ch 455 'Sports Act' (2002) <<https://legislation.mt/eli/cap/455/eng/pdf>> accessed 10 February 2026.

50 Law of the Republic of Latvia on Sports (n 21).

51 Comité National Olympique et Sportif Français (CNOSF), *Statuts du CNOSF* (adopted 9 March 2017, amended 2022) arts 2 (II)(A)(2), 16. <<https://cnosf.franceolympique.com/api/media/sites/default/files/2025-04/Statuts%20CNOSF%202022.pdf>> accessed 10 February 2026; DOSB (n 47).

52 International Olympic Committee, *Etica* (IOC Ethics Commission 2018) <<https://tok.lt/api/assets/2f08b44f-f05d-422c-bf6b-56144c0838c5/Tok%20Etika%202018>> accessed 10 February 2026; LNOC, *Statute of the Lithuanian National Olympic Committee* (2021) art 2.2.4 <<https://tok.lt/api/assets/46c1d394-c899-47e4-9416-07c529209f72/Ltok%20I%CC%A8statai>> accessed 10 February 2026.

53 Maltese Olympic Committee, *Statute of the Maltese Olympic Committee* (approved 7 October 2020) art 3.1.6 <<https://nocmalta.org/wp-content/uploads/2021/09/MOC-STATUTE-APPROVED-7.10.2020.pdf>> accessed 10 February 2026.

54 Association of National Olympic Committees, 'ANOC Strategic Plan 2021-2024' <<https://www.anocolympic.org/wp-content/uploads/2021/11/2021-11-ANOC-Documents-ANOC-Strategic-Plan-FINAL-wide.pdf>> accessed 13 January 2025.

c) Anti-doping Measures

Good governance principles also intersect with anti-doping regulations. The countries included in the table align with the World Anti-Doping Code, ensuring that national sports organisations adopt and enforce anti-doping measures that reflect international best practices.

All five countries have either specific sections in their national laws or regulations on anti-doping, reflecting a governance structure aimed at sports integrity and compliance with the World Anti-Doping Code, ensuring that their national sports bodies adhere to global standards for combating doping.⁵⁵

The above can be summarised as follows. France demonstrates a strong commitment to ethical governance through its federations and independent ethics committees. While Germany lacks a specific sports law, it incorporates governance principles within organisational statutes. Lithuania, Malta, and Latvia, though varied in approach, emphasise ethics and governance, with Latvia particularly highlighting good governance principles in its Sports Law.

All NOCs, including those from France, Germany, Lithuania, Malta, and Latvia, adhere to global governance standards and align with the principles outlined in the Olympic movement's strategic plans. Additionally, all five countries comply with the World Anti-Doping Code, ensuring that good governance extends to anti-doping regulations, which are integral to promoting fairness and integrity in sports.

A comparative reading of these frameworks demonstrates that, while national regulatory intensity varies, all jurisdictions converge toward governance standards shaped by EU policy and international sports regulation, particularly in integrity, transparency, and anti-doping compliance.

55 French Sports Code (n 21) s 2; Nationale Anti Doping Agentur Deutschland, *Nationaler Anti-Doping Code 2021* (NADA 2020) <https://www.nada.de/fileadmin/nada/SERVICE/Downloads/Regelwerke/2021_Nationaler_Anti-Doping_Code_2021.pdf> accessed 10 February 2026; Lietuvos Antidopingo Agentūra, *Lietuvos Antidopingo Agentūros Antidopingo Taisyklės* (approved 2 October 2020) <http://lengvoji.lt/wp-content/uploads/2021/01/LAA2021_antidopingo_taisykl%C4%97s.pdf> accessed 10 February 2026; National Anti-Doping Organisation of Malta, 'Anti-Doping Regulations' (2021) <https://maltahandball.com/wp-content/uploads/2023/02/Malta-Sports-Act-Cap.-455-Anti-Doping-Regulations-2021_compressed.pdf> accessed 10 February 2026; Resolution of the Cabinet of Ministers no 661 'Nacionālie Antidopinga Noteikumi' (adopted 28 September 2021) <<https://likumi.lv/ta/id/326512-nacionalie-antidopinga-noteikumi>> accessed 10 February 2026.

8 CONCLUSION

The convergence of the European Sport Model and *lex sportiva* represents both an opportunity and a challenge. While the EU carefully balances its regulatory oversight with sports' autonomy to ensure fairness and openness, tensions persist, especially when addressing issues such as competition law and governance structures. Key challenges include aligning the governance of professional and amateur sports and reconciling national laws with the transnational scope of *lex sportiva*.

Good governance is vital to the future of sports in Europe, with the European Commission and international sports organisations like UEFA driving reform efforts. As sports continue to globalise and commercialise, the need for a transparent, fair, and democratic governance system becomes more critical to maintain the integrity of the European Sport Model and its alignment with *lex sportiva*.

The contribution of this article lies in demonstrating that the European Sport Model and *lex sportiva* should not be understood as competing regulatory systems, but rather as interacting governance layers within a pluralistic legal order. In this complementary yet asymmetrical relationship, *lex sportiva* serves as the primary regulatory mechanism, while the European Sport Model provides normative orientation within EU law.

More specifically, from a legal perspective, the interaction between *lex sportiva* and EU law does not establish a strict hierarchy but rather a conditional relationship, where autonomy is preserved insofar as it complies with EU internal market principles. CJEU case law, particularly in areas of competition and free movement, demonstrates that this balance remains contested. This creates a structurally unstable coexistence, requiring stronger governance mechanisms to ensure both legal certainty and respect for sport-specific characteristics.

In this context, good governance emerges as a critical point of convergence between *lex sportiva* and European sports governance. While *lex sportiva* provides the regulatory substance through transnational rules and adjudicatory practices, good governance principles translate these norms into organisational standards, ensuring transparency, accountability, and procedural fairness at both international and national levels. As such, good governance functions as a practical mechanism through which the conditional relationship between autonomy and legal oversight is stabilised, aligning private regulatory authority with public law expectations.

This conceptualisation contributes to ongoing debates on the autonomy of sport by framing EU-*lex sportiva* interaction as a legally conditioned form of governance pluralism, in which good governance serves as the key integrative mechanism.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

МІЖ АВТОНОМІЄЮ ТА ЗАКОНОДАВСТВОМ ЄС: ЄВРОПЕЙСЬКА СПОРТИВНА МОДЕЛЬ В ЕРУ LEX SPORTIVA

Марина Каменецька-Усова*, Лайне Донане та Еліна Грейне

АНОТАЦІЯ

Вступ. Формалізація спортивного права в межах Європейського Союзу (ЄС) поступово змінила управління спортом. Від знакового рішення у справі Вальрейва та Коха (1974) до статті 165 ДФЄС і, найновішої справи Діарра, право ЄС дедалі більше взаємодіє з автономною регуляторною системою, відомою як *lex sportiva*. Ця подвійна система відображає баланс між ринково-орієнтованим правовим порядком ЄС та саморегульованими структурами, розробленими міжнародними спортивними федераціями та консолідованими через Спортивний арбітражний суд (CAS). У цих межах європейська спортивна модель, що базується на відкритості, солідарності та пірамідальній структурі змагань, стикається зі проблемою комерціалізації та альтернативних моделей регулювання.

Методи. У статті використовується доктринальна правова методологія, підкріплена контекстуальним інституційним аналізом. Розглядається практика Суду Європейського Союзу (CJEU), а також стаття 165 ДФЄС, принципи конкурентного права ЄС та вибрана судова практика CAS. Ці первинні джерела оцінюються разом з науковою літературою в сфері *lex sportiva*, європейською спортивною моделлю та

реформою управління для оцінки розвитку взаємозв'язку між правом ЄС та транснаціональним регулюванням спорту.

Результати та висновки. Спортивне право ЄС розвивалося в напрямку структурованого співіснування з *lex sportiva*, а не ієрархічного контролю. Судова практика CJEU підтверджує, що спорт підпадає під дію права ЄС, якщо він становить економічну діяльність. Водночас CJEU визнає специфічний характер спорту. *Lex sportiva*, розроблений CAS, забезпечує регуляторну узгодженість та практичну гармонізацію між юрисдикціями. Водночас європейська спортивна модель сприяє солідарності та етичному управлінню, але стикається з проблемами під час перевірки відповідно до конкурентного права та зростанням комерціалізації. Принципи належного управління стали ключовим механізмом для узгодження автономії з підзвітністю.

Європейська спортивна модель та *lex sportiva* функціонують у взаємодоповнювальному партнерстві. *Lex sportiva* діє як основна регуляторна база, тоді як європейська спортивна модель забезпечує нормативний нагляд, що ґрунтується на цінностях ЄС. Підтримка цього балансу є важливою для забезпечення прозорості, справедливості та правової узгодженості в європейському спорті.

Ключові слова: європейська спортивна модель, *lex sportiva*, управління спортом, належне управління.

Research Article

LEGAL FRAMEWORK FOR THE PREVENTION OF PSYCHOLOGICAL VIOLENCE AT WORK IN LITHUANIA AND ESTONIA: A COMPARATIVE ANALYSIS

Aistė Mačiulaitė

ABSTRACT

Background: Psychological violence in the workplace is now recognised as one of the most dangerous psychosocial risk factors, causing direct harm not only to employees' dignity and mental health, but also to the economic stability of organisations and nations. At the international level, legal regulation in this area has evolved consistently from general human rights principles - enshrined in the Universal Declaration of Human Rights and the European Social Charter, to specialised standards, culminating in International Labour Organization Convention No. 190 (hereinafter "ILO Convention No. 190"). In this context, Lithuania and Estonia, two neighbouring Baltic states, have chosen fundamentally different regulatory models: in 2022, Lithuania established a detailed concept of psychological violence and specific preventive obligations for employers, while Estonia continues to rely on general principles of employee safety and health, without establishing a specific definition of psychological violence in national law.

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Method: This article employs a comparative research approach to systematically examine the legal frameworks of Lithuania and Estonia regarding the prevention of psychological violence in the workplace. The study is based on an analysis of legislation, examining key national legal sources and international documents. Using case law analysis, Tallinn Circuit Court Case No. 3-17-164 was examined, illustrating the Estonian courts' approach to classifying psychological violence. A systematic review of the scientific literature enabled the development of a theoretical foundation and the evaluation of the regulations of both countries within a broader international context.

Results and Conclusions: A comparative analysis of legal regulations in Lithuania and Estonia revealed fundamental differences between the two countries' models. Lithuania has established a broad and detailed definition of psychological violence, covering both one-time and repeated unacceptable behaviour or the threat thereof, while Estonian law does not establish a specific definition of psychological violence at all. Furthermore, in Lithuania, employers are required to take specific preventive measures, whereas in Estonia, employers are subject only to a general obligation to assess psychosocial risks, with specific preventive measures left to their discretion. Finally, sanction mechanisms also differ, as in Lithuania, employers can be penalised for failing to fulfil specific preventive obligations, regardless of whether an actual incident of violence has occurred, whereas in Estonia, the Labour Inspectorate can impose fines only after establishing a real threat to an employee's life or health.

1 INTRODUCTION

Psychological violence in the workplace is now recognised as one of the most dangerous psychosocial risk factors, directly damaging not only the dignity and mental health of individuals, but also the economic stability of organisations and countries.¹ Studies show that violence and harassment can reduce worker productivity by up to 60% and cost companies thousands of euros in employee turnover and poor climate. The relevance of the topic in Lithuania and Estonia has been reinforced in particular by the trends in international legal regulation related to the implementation of the standards of the ILO Convention No. 190,² as well as by recent national reforms, such as the amendments to Article 30 of the Labour Code of the Republic of Lithuania, which entered into force on 1 November 2022.³ Despite improvements in the legal framework, psychological violence remains a latent and difficult-to-prove phenomenon, and employers often limit themselves to formal declarations of preventive measures. A comparative analysis of the

1 Aistė Leščinskaitė, 'Psychological Violence at Work: Problems in Applying the Law in Lithuania' (2024) 17(2) *Baltic Journal of Law and Politics* 228, doi:10.2478/bjlp-2024-00023.

2 ILO Violence and Harassment Convention no 190 (adopted 21 June 2019) <https://normlex.ilo.org/dyn/nrmlx_en/?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:C190> accessed 23 March 2026.

3 Law of the Republic of Lithuania no XII-2603 of 14 September 2016 'Labour Code' (amended 1 November 2022) art 30 <<https://www.infolex.lt/ta/368200>> accessed 23 March 2026.

Lithuanian and Estonian models is therefore critical to identify the most effective legal mechanisms to ensure safe working conditions.

International legal frameworks have played a crucial role in curbing this phenomenon, evolving from general human rights principles to specialised standards such as the ILO Convention No 190. These global instruments constitute the fundamental standards for the protection of workers and directly influence national legislative processes, obliging States to ensure a safe and dignified working environment.

This article provides a comparative analysis of Lithuanian and Estonian legislation to assess how these neighbouring countries interpret the concept of psychological violence and what prevention mechanisms they impose on employers. Although both countries are seeking to harmonise their legislation with international guidelines, they have chosen different paths: Lithuania has introduced a detailed and strict concept of violence and harassment from 2022 onwards, covering even single or hypothetical incidents, as well as compulsory preventive measures. In Estonia, meanwhile, general safety principles and psychosocial risk assessment are still used, while case law still links psychological violence to systematic and persistent psychological abuse. This paper analyses which of these models is more effective in encouraging employers to take proactive action and ensuring real protection for workers.

The objective of this study is to examine social labour relations and the factors adversely affecting them, resulting from psychological violence in the work environment. The study focuses on the full set of Lithuanian and Estonian legal norms governing workers' psychological safety, encompassing both individual employment relations and general occupational safety and health requirements. The subject matter includes employers' obligations to implement preventive measures, the legal identification of forms of violence and harassment (both vertical and horizontal), and legal liability mechanisms to protect workers' rights to honour, dignity, and mental health that have been violated. Specific aspects of the legal framework relating to the management of psychosocial risks and the legal protection of workers against ill-treatment are also examined.

The aim of this study is to conduct a systematic, comparative analysis of the legal regulation of the prevention of psychological violence in Lithuania and Estonia to assess the effectiveness of national legislation. The study aims to find out which legal mechanisms establish liability for psychological violence and how these norms are applied in practice in labour disputes. By analysing the experiences of both countries, it seeks to identify aspects of the recognition of psychological violence and to assess whether the legal instruments in place are sufficient to ensure effective protection of workers' rights. Finally, based on the insights gained from the comparative analysis, the study aims to provide legal recommendations to improve preventive policies, address the complex issues of the burden of proof, and promote a safe working environment.

2 METHODOLOGY

This article employs a qualitative legal research methodology, combining comparative, doctrinal, and case-law analysis to systematically examine and evaluate the legal frameworks governing the prevention of psychological violence in the workplace in Lithuania and Estonia.

The primary method applied is comparative legal analysis, through which the regulatory models of the two countries are examined in parallel to identify structural similarities, differences, and gaps. The doctrinal method underpins the analysis of primary legal sources. At the international level, the study examines the Universal Declaration of Human Rights,⁴ the European Social Charter,⁵ Council Directive 89/391/EEC,⁶ the Charter of Fundamental Rights of the European Union,⁷ and ILO Convention No. 190,⁸ which constitutes the most comprehensive international instrument addressing violence and harassment in the world of work. At the national level, the key sources examined include the Labour Code of the Republic of Lithuania,⁹ Order No. EV-221 of the Chief State Labour Inspector of the Republic of Lithuania approving the Measures for the Prevention of Violence and Harassment at Work,¹⁰ the Estonian Occupational Health and Safety Act,¹¹ the Employment Contracts Act,¹² and the Equal Treatment Act.¹³ The selection of these instruments was guided by their direct relevance to preventing psychological violence in the employment context and by their role in shaping the respective national regulatory frameworks.

Case law analysis was employed to examine the judicial interpretation of psychological violence in Estonia, where statutory definitions are absent. The principal case examined is Tallinn Circuit Court Case No. 3-17-164 (2017), which was selected as the leading judicial authority on the conceptualisation of psychological violence in Estonian employment law.

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- 4 Universal Declaration of Human Rights (10 December 1948 UNGA Res A/RES/217(III) A) <[https://docs.un.org/A/RES/217\(III\)](https://docs.un.org/A/RES/217(III))> accessed 23 March 2026.
 - 5 European Social Charter (adopted 18 October 1961, revised 3 May 1996) [1996] ETS 163.
 - 6 Council Directive 89/391/EEC of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work [1989] OJ L 183/1.
 - 7 Charter of Fundamental Rights of the European Union [2016] OJ C202/389
 - 8 ILO *Violence and Harassment Convention* (n 2).
 - 9 Law of the Republic of Lithuania no XII-2603 (n 3).
 - 10 Order no EV-221 of the State Labour Inspectorate of the Republic of Lithuania 'On the Approval of the Description of Measures for the Prevention of Violence and Harassment at Work' (adopted 17 December 2024) [2024] TAR 2024-22312.
 - 11 Law of the Republic of Estonia 'On Occupational Health and Safety' (adopted 16 June 1999) [1999] RT I 60/616 <<https://www.riigiteataja.ee/et/akt/122122021026?leiaKehtiv>> accessed 23 March 2026.
 - 12 Law of the Republic of Estonia 'On Employment Contracts' (adopted 17 December 2008) [2009] RT I 5/35 <<https://www.riigiteataja.ee/et/akt/103022026015?leiaKehtiv>> accessed 23 March 2026.
 - 13 Law of the Republic of Estonia 'On Equal Treatment' (adopted 11 December 2008) [2008] RT I 56/315 <<https://www.riigiteataja.ee/et/akt/V%C3%B5rdKS>> accessed 23 March 2026.

This case was identified through a systematic review of publicly available Estonian court decisions and selected for its direct relevance to the research subject.¹⁴

The literature was selected for its relevance to the research questions and its contribution to the conceptual framework underpinning the comparative analysis.

3 THE LEGAL CONCEPT OF PSYCHOLOGICAL VIOLENCE

Although psychological violence at work has been analysed extensively in the literature, existing definitions vary considerably, as researchers have tended to draw on their own findings and experiences, thereby preventing the emergence of a unified conceptualisation of the phenomenon. Psychological violence is considered to be moral harassment, which is defined as psychological, subtle, disguised, intentional, repeated and sustained violence in which the aggressor seeks to humiliate and exclude a person in the context of work activities.¹⁵ Workplace harassment is defined as interpersonal behaviour intended to harm an employee in the workplace.¹⁶ It should also be noted that psychological violence is seen as systematic unfriendliness towards certain social groups and is, therefore, a substitute for unacceptable forms of discrimination, despite the fact that such systematic acts of unfriendliness are discriminatory.¹⁷ Several terms are used to describe psychological violence: “psychoterror”, “harassment”, “bullying”, “intimidation”, “threatening”, and “aggression”. So, it is clear that psychological violence at work is a complex phenomenon.¹⁸ Other studies present psychological violence as including verbal aggression (excessive criticism, derogatory comments, rumours), manipulation (deliberate exclusion from the team), and abuse of power (deliberate concealment of work tools).¹⁹ Psychological violence occurs in several stages: first, the abuse is subtle, infrequent and hardly noticeable, e.g., unfriendliness; then the negative actions become direct, e.g., humiliation, ridicule; and, finally, the workers are completely isolated and are exposed to intense negative

14 Case no 3-17-164 (Tallinn Circuit Court, 8 January 2019).

15 Júnior Wallison Miranda, Stela Mariana de Moraes and Daniela de Castro Melo, ‘Psychological and Disguised Violence at Work: A Study of Moral Harassment in Brazilian Public Careers’ (2022) 12(2) REUNIR 56, doi:10.18696/reunir.v12i2.831.

16 Natalia Lapshina and Mirit K Grabarski, ‘Double Disadvantage: Disability and Gender in the Context of Workplace Harassment’ (2023) 75(3) Consulting Psychology Journal: Practice and Research 277, doi:10.1037/cpb0000244.

17 *ibid*

18 Andrea Bencsik, József Poór and Tímea Juhász, ‘Psychological Harassment at Work in Hungary and Slovakia’ (2024) 19(1) Management & Marketing 51, doi:10.2478/mmcks-2024-0004.

19 Nicole M Steele and others, ‘The Effects of Working in a Bullying Climate on Psychological Distress and Job Satisfaction: A Multilevel Analysis’ (2022) 74(1) Australian Journal of Psychology e2125341, doi:10.1080/00049530.2022.2125341.

behaviour against which they are unable to defend themselves, with more detrimental psychological and physical consequences.²⁰

3.1. Definition of psychological violence in international documents

Before examining the legal framework for the prevention of psychological violence in Lithuania and Estonia, it is necessary to consider the international instruments that have shaped national legislation in this area. International law addresses psychological violence at work through the lens of human rights, occupational safety and health, and equal opportunities, and an understanding of these global standards is essential for assessing the effectiveness and compliance of national prevention measures.

The Universal Declaration of Human Rights serves as the primary normative reference point in international human rights law, enshrining the principles of dignity and equality from which state obligations to prevent psychological violence and degrading treatment in the workplace are derived. The Universal Declaration of Human Rights, while not directly prohibiting psychological violence, establishes universal principles: all human beings are born equal in dignity and rights;²¹ no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;²² everyone has the right to work, to free choice of employment, to just and favourable conditions of work and protection against unemployment;²³ and the right to rest.²⁴ In interpreting these articles of the Universal Declaration of Human Rights, it is clear that any unacceptable treatment and harm to workers is unacceptable.

The European Social Charter (revised) protects employees' rights and enshrines the right to dignity at work for all workers. Although the term "psychological violence" was not yet common in the text itself in 1996, the European Social Charter provides a solid legal basis for preventing this phenomenon through several key articles. Article 26 of the European Social Charter states that "With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations: to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct; to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to

20 Sarah-Geneviève Trépanier and others, 'When Does Exposure to Daily Negative Acts Frustrate Employees' Psychological Needs? A Within-Person Approach' (2023) 28(2) *Journal of Occupational Health Psychology* 65, doi:10.1037/ocp0000338.

21 Universal Declaration of Human Rights (n 4) art 1.

22 *ibid*, art 5.

23 *ibid*, art 23.

24 *ibid*, art 24.

work and to take all appropriate measures to protect workers from such conduct”,²⁵ to directly educate employees on what constitutes psychological violence and inappropriate behaviour and to ensure that all measures are taken to protect employees from such inappropriate behaviour. Article 3 of the European Social Charter also requires employers to periodically assess not only mechanical hazards but also psychosocial risks that may lead to psychological violence.²⁶

It should be noted that as long ago as 12 June 1989 the Council of the European Union adopted Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (Directive 89/391/EEC), which is the cornerstone of the EU's legislation laying down employers' obligation to ensure the safety and health of workers in all aspects of their work, and even though the Directive 89/391/EEC does not use the term “psychological violence” directly, the link with it is crucial.²⁷

Directive 89/391/EEC obliges employers to assess and manage all occupational risks. The European Commission and the courts have clarified that this obligation covers not only physical safety but also psychosocial risks such as stress, harassment, and psychological violence at work.

In 2007, the EU social partners concluded a framework agreement on harassment and violence at work, which aims to raise awareness among employers and employees about such incidents and to provide guidance on identifying, managing and preventing them. It stresses the need for companies to have a zero-tolerance policy on violence. Although the agreement does not define psychological violence, it describes the phenomenon in terms of its impact on the dignity of the worker and the working environment: “Harassment occurs when one or more workers or managers are repeatedly and deliberately abused, threatened and/or humiliated in circumstances relating to work”, “Violence occurs when one or more workers or managers are assaulted in circumstances relating to work”. The agreement emphasises that violence is not just a physical act, but encompasses a wider pattern of action: “Harassment and violence can: be physical, psychological and/or sexual; be one off incidents or more systematic patterns of behaviour; be amongst colleagues, between superiors and subordinates, or by third parties such as clients, customers, patients, pupils, etc.”; the agreement specifies that companies must have internal mechanisms in place to address these issues: “Enterprises need to have a clear statement outlining that harassment and violence will not be tolerated. This statement will specify the procedures to be followed where cases occur”; the agreement clearly sets out the principles to be followed by the employer in the event of an investigation into an incident of psychological violence: “The investigation of complaints should be based on the following principles: confidentiality; the

25 European Social Charter (n 5) art 26.

26 *ibid*, art 3.

27 Council Directive 89/391/EEC (n 6).

right to a fair hearing for both parties; no victimisation of the person making the complaint; and where appropriate, sanctions for the perpetrator”.²⁸

The Charter of Fundamental Rights of the European Union has significantly influenced the legislative development of both Lithuania and Estonia in the domain of psychological violence prevention. Article 31 of the Charter establishes a justiciable right to working conditions that respect the health and dignity of every worker,²⁹ thereby providing an explicit normative basis for state obligations to address degrading and harmful treatment in employment relations. Complementing this provision, Article 47 guarantees the right to an effective remedy before a tribunal when those conditions are violated, reinforcing the procedural dimension of workers' protection.³⁰ Collectively, these provisions impose binding obligations on EU Member States, including Lithuania and Estonia, to ensure that national legislative frameworks not only prohibit psychological violence at work but also provide accessible and effective mechanisms for its redress.

In summary, international regulation has evolved from general health protection to specialised protection against psychological violence, at the heart of which today is the ILO Convention No. 190 and the international standard specifically addressing psychological violence. ILO Convention No. 190 defines violence and harassment as unacceptable conduct or the threat thereof (whether a single incident or repeated) that causes physical, psychological, sexual, or economic harm.³¹ It obliges ratifying States to prohibit violence by law, to establish mechanisms for control, and to aid victims. In 2024, the Estonian government agreed to ratify ILO Convention No. 190.³² Lithuania has not yet ratified the ILO Convention No. 190, but has chosen to strengthen national law first. As of 1 November 2022, Amendments to the Labour Code of the Republic of Lithuania entered into force, requiring employers to take measures to prevent violence and harassment, and requiring companies with more than fifty employees to have an approved violence and harassment prevention policy.³³ These amendments are in principle in line with some of the objectives of the Convention, so the sense of urgency for ratification may have diminished on the political agenda, but it was not until 25 March 2024 that the Council of the European Union formally adopted a decision inviting all Member States to ratify the Convention in the areas of the EU's competence (such as occupational health and safety, as

28 BUSINESSSEUROPE and others, *Framework Agreement on Harassment and Violence at Work* (adopted 18 April 2007) <<https://osha.europa.eu/en/legislation/guidelines/framework-agreement-harassment-and-violence-work>> accessed 23 March 2026.

29 Charter of Fundamental Rights (n 7) art 31.

30 *ibid*, art 47.

31 ILO Violence and Harassment Convention (n 2).

32 Law of the Republic of Estonia ‘On the Ratification of the ILO Convention on the Elimination of Violence and Harassment in the World of Work (no 190)’ (adopted 23 October 2024) <<https://www.riigikogu.ee/tegevus/eelnoud/eelnou/6f956dbc-4c15-411c-95bc-3488327522d1/>> accessed 23 March 2026.

33 Law of the Republic of Lithuania no XII-2603 (n 3) art 30.

well as gender equality).³⁴ As the ILO Convention No. 190 covers areas within the competence of the EU (in particular, occupational safety and health and equality of opportunity between men and women in matters of employment), EU Member States are invited to ratify it jointly and in a coordinated manner. This may provide additional impetus for Member States to complete the process soon, although some civil society organisations and politicians have expressed concern about the Convention's use of the concept of 'gender-based violence', linking it to wider ideological debates (similar to those surrounding the Istanbul Convention).³⁵

3.2. The concept of psychological violence in Lithuania

The regulation of psychological violence in Lithuanian legislation has evolved quite significantly over the last five years. Until 1 November 2022, Article 30 of the Labour Code of the Republic of Lithuania, provided only for the employer's obligation to create a working environment in which an employee or a group of employees would not be subjected to hostile, unethical, degrading, humiliating, aggressive, abusive, insulting or offensive actions, which infringe the honour and dignity, physical or psychological integrity of an individual employee or group of employees, or which are intended to intimidate, humiliate or reduce an employee or a group of employees to a defenceless and helpless position, and the concept of psychological violence was not contained in the Labour Code of the Republic of Lithuania.³⁶ However, from 1 November 2022 Article 30 of the Labour Code introduces an additional definition of psychological violence, providing that violence and harassment, including psychological violence, gender-based violence and harassment (violence and harassment directed against persons on the basis of their sex or disproportionately affecting persons of a particular sex, including sexual harassment), means any unacceptable treatment or threat of treatment by an employer (natural person or manager of a legal person) or other employees, whether the unacceptable conduct is intended to have a physical, psychological, sexual or economic impact, whether the unacceptable conduct has or is likely to have such an impact, whether it violates the dignity of a person or creates an intimidating, hostile, degrading or offensive environment, and or whether it has caused, or is likely to cause, physical, material and or non-material damage.³⁷ Violence and harassment shall be prohibited in workplaces, including public and private places, when the worker is at the employer's disposal or performing duties in accordance with the contract of employment; during rest and meal breaks or when using domestic, sanitary and hygiene

34 Council Decision (EU) 2024/1018 of 25 March 2024 inviting Member States to ratify the Violence and Harassment Convention, 2019 (No 190) of the International Labour Organisation [2024] OJ L 1018/1.

35 Diana Karvelienė, 'Stambulo Konvencijos Nuostatos Sugrįžta Tarptautinėje Darbo Organizacijos Konvencijoje Nr 190' (*BNS - Baltic News Service*, 18 September 2025) <<https://sc.bns.lt/view/item/stambulo-konvencijos-nuostatos-sugrizta-tarptautineje-darbo-organizacijos-konvencijoje-nr-190-501595>> accessed 23 March 2026.

36 Law of the Republic of Lithuania no XII-2603 (n 3) art 30.

37 *ibid*

facilities; during work-related trips, travel, training, events or social activities; during work-related communication, including communication by information and electronic communication technologies; in accommodation provided by the employer; on the way to or from work.³⁸ This definition of psychological violence is somewhat confusing and could mean that psychological violence at work could refer to various hypothetical scenarios: the threat of any unacceptable behaviour, whether the aim is to cause a negative impact once or repeatedly, whether the impact is likely to be sustained or whether harm is likely to result. However, from a legal point of view, this can be seen as an obligation to take preventive measures, either to anticipate potential incidents or to anticipate potential harm. In the absence of a real, tangible event that can be assessed according to the legal criteria for psychological violence, employers are paradoxically obliged to anticipate potential problems and take action to prevent them, even in the absence of any concrete signs of psychological violence in the workplace. From a legal perspective, although the concept is confusing, the anxiety it raises about future preventive action is beneficial to both employers and employees. Employers need to act and anticipate potential risks and thus avoid incidents of psychological violence, while employees will not be subjected to psychological violence if employers act preventively.

3.3. The concept of psychological violence in Estonia

As regards the introduction of the concept of psychological violence in Estonian legislation, the situation differs substantially from that in Lithuania. The legislation does not provide for the concept of psychological violence, but it does provide for general obligations for employers to ensure the prevention of and protection from psychological violence. Article 3(3) of Equal Treatment Act of Estonia states that direct discrimination includes also harassment which occurs when unwanted conduct on grounds of any characteristic specified in subsection 1 (The purpose of this Act is to ensure the protection of persons against discrimination on grounds of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation) of § 1 of this Act takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.³⁹ Article 28 of the Employment Contracts Act of Estonia states that an employer must fulfil its obligations regarding employee loyalty and ensure working conditions that comply with occupational health and safety requirements.⁴⁰ Article 9(1) of Occupational Health and Safety Act of Estonia states that psychosocial hazards are work involving a risk of an accident or violence, unequal treatment, bullying and harassment at work, work not corresponding to the abilities of an employee, working alone for an extended period of time and monotonous work and other factors related to management, organization of work and working environment that may

38 *ibid*

39 Law of the Republic of Estonia 'On Equal Treatment' (n 13) art 3(3).

40 Law of the Republic of Estonia 'On Employment Contracts' (n 12) art 28.

affect the mental or physical health of an employee, including cause work stress. In order to prevent damage to health arising from a psychosocial hazard, the employer must take measures, including adapting the organisation of work and workplace to suit the employee, optimising the employee's workload, enabling breaks to be included in the working time for the employee during the working day or shift and improving the enterprise's psychosocial working environment.⁴¹ Thus, as we can see, Estonian legislation does not provide a definition of psychological violence but only imposes obligations on employers to take all possible measures to prevent psychological violence.

The Tallinn Circuit Court has defined workplace violence as hostile and unethical behaviour that is systematic and long-term, directed at one or more individuals who are consequently placed in a helpless and vulnerable position.⁴² The Estonian Labour Inspectorate further identifies psychosocial hazards as encompassing bullying and harassment at work, alongside other aspects of work organisation that may adversely affect the mental or physical health of employees.⁴³ Based on Article 13 of the Occupational Health and Safety Act, the employer is obliged to organise a risk assessment of the working environment to ascertain environmental hazards, measure their parameters as necessary, and assess the risks to an employee's health and safety.⁴⁴ In principle, in Estonia, every employer with at least one employee under an employment contract must conduct a risk assessment.⁴⁵ At the same time, the employee has the right to receive information about working environment hazards, the results of risk assessments of the working environment, and the measures implemented to prevent damage to health.⁴⁶ It is welcome that the law incentivises companies, when organising work, to consider how to improve the psychosocial working environment and better manage employees' workloads.

Looking at the legal framework, it is clear that the legislator has only laid down a general obligation for the employer to ensure safe and healthy working conditions and to assess the working environment, but has provided absolutely no specific recommendations or guidelines on how this should be done, and finally it is not clear at all what constitutes psychological violence in Estonia and what behaviour the employer is obliged to prevent. A good example of the vagueness of the concept of psychological violence is the fact that ILO Convention No. 190 defines violence and harassment in the world of work as a range of unacceptable behaviours, whether a single occurrence or repeated, although Estonian case law explains that only repeated acts, and only those from which the employee is unable to defend himself, can be considered psychological violence.

41 Law of the Republic of Estonia 'On Occupational Health and Safety' (n 11) art 9(1).

42 Case no 3-17-164 (n 14).

43 Labour Inspectorate of Estonia, 'Relations at Work: *Psychosocial Hazards*' (Tööelu, 20 June 2025) <<https://www.tooelu.ee/en/67/psychosocial-hazards#psychosocial-hazards>> accessed 23 March 2026.

44 Law of the Republic of Estonia 'On Occupational Health and Safety' (n 11) art 13.

45 Labour Inspectorate of Estonia (n 43).

46 Law of the Republic of Estonia 'On Occupational Health and Safety' (n 11) art 14.

Judgement No 3-17-164 of Tallinn Circuit Court dealt with an employee's complaint against his dismissal from the Tax and Customs Service, in which the applicant alleged that he had been subjected to prolonged and systematic psychological violence, which was the real reason for his dismissal from his post. Although the Court acknowledged that the employer had committed procedural irregularities in carrying out the redundancies, it rejected the claim for an increase in compensation for psychological violence, reasoning that the employee's subjective feelings or strained relations with management did not, in themselves, prove the existence of systematic harassment. This decision confirms the strict Estonian case law, which states that the finding of psychological violence requires *prima facie* evidence of purposeful, continuous, and humiliating acts, not just isolated disagreements or improperly conducted dismissal procedures.⁴⁷

Therefore, this indicates that the existing regulation is rather superficial and fails to adequately address the increasingly acute problem of psychological violence in the workplace. While national case law has attempted to conceptualise psychological violence and afford protection to employees, the prevailing judicial approach, which requires conduct to be systematic and long-term⁴⁸, is arguably too restrictive. Notably, ILO Convention No. 190 does not impose a requirement of systematicity; it defines violence and harassment broadly as a range of unacceptable behaviours, practices, or threats, adopting a pragmatic, victim-centred approach that focuses on the effect of the conduct rather than its frequency or duration. Accordingly, a single severe act may, in certain circumstances, be sufficient to render an employee helpless and vulnerable, and its exclusion from the scope of protection under current national frameworks constitutes a significant gap warranting legislative attention.

4 EMPLOYER OBLIGATIONS AND PREVENTION MECHANISMS IN LITHUANIA

Article 30 of the Labour Code of the Republic of Lithuania provides not only for a general obligation for employers to create a working environment in which an employee or a group of employees is not subjected to hostile, unethical, degrading, humiliating, aggressive, abusive, insulting or offensive actions, which violate the honour and dignity, physical or psychological integrity of an employee or group of employees, or which are intended to intimidate, embarrass or render defenceless and helpless an employee or group of employees, but also imposes very clear obligations on employers to prevent psychological violence.⁴⁹ Article 30(3) of the Labour Code of the Republic of Lithuania stipulates that the employer shall take all necessary measures to prevent violence and harassment and to

47 Case no 3-17-164 (n 14).

48 *ibid*

49 Law of the Republic of Lithuania no XII-2603 (n 3) art 30.

actively provide assistance to persons who have suffered violence or harassment.⁵⁰ The legislation stipulates that the employer must take measures to eliminate and or control potential risks of violence and harassment, must have adopted a procedure for reporting and dealing with reports of violence and harassment and must make it known to employees, and must provide training to employees on the risks of violence and harassment, on measures to prevent violence and harassment, and on the rights and obligations of employees in relation to violence and harassment.⁵¹ It should be noted that all of these obligations are not recommendations, but direct instructions to employers to act preventively, without waiting for the consequences of an incident of psychological violence. The practical application of these obligations is reflected in emerging case law. Lithuanian courts have recognised psychological violence as an independent ground for non-pecuniary damages, awarding compensation in cases of systematic harassment,⁵² and retaliation against whistleblowers.⁵³

It should also be noted that the Labour Code of the Republic of Lithuania also provides that the list of necessary measures shall be approved by the Chief State Labour Inspector of the Republic of Lithuania and the frequency of training shall be determined by the Chief State Labour Inspector of the Republic of Lithuania, which means that the legislation lays down very clear measures that employers are obliged to take in order to ensure that the prevention of psychological violence is actually guaranteed, rather than being left to the employers' discretion as to the ways of dealing with the issue. In this case, it can be claimed that the State is being proactive not only in controlling and punishing employers but also in providing clear preventive measures. Article 30 of the Labour Code of the Republic of Lithuania also provides for additional preventive measures for employers with more than fifty employees. Such employers must have a policy on the prevention of psychological violence, which sets out how to identify violence and harassment, the possible forms of violence and harassment, the procedure for introducing violence and harassment prevention measures, the procedure for reporting and dealing with violence and harassment, the measures for the protection of and assistance to persons reporting violence and harassment and to the victims of violence and harassment, the rules of conduct (work ethics) for workers and other information relating to the prevention of violence and harassment. At this point, it suggests drawing attention to the fact that employers with fewer than fifty employees should not be misled, as the above-mentioned obligations to create a safe and healthy environment apply to all employers; therefore, the regulatory provision on the number of employees is somewhat misleading.

50 *ibid*, art 30(3).

51 *ibid*

52 Case no e2A-349-587/2022 (Kaunas Regional Court, 24 March 2022).

53 Case no e2A-1616-643/2023 (Vilnius Regional Court, 1 August 2023).

On 17 December 2024, the Chief State Labour Inspector of the Republic of Lithuania, by Order No EV-221, approved the Measures for the Prevention of Violence and Harassment at Work, which entered into force on 1 January 2025 and applies to all employers, regardless of the number of employees.⁵⁴ The order establishes a systematic framework for preventive action to ensure a safe working environment. The measures provided for in the inventory can be divided into three main groups: firstly, identify the necessary preventive measures, which are directly related to the organisation of work, the improvement of working conditions, and the appointment of a responsible person who can be contacted by victims of violence. Secondly, the organisation of training is a crucial part of prevention. The aim of this training is to educate employees and managers about the risks of violence and sexual harassment, thereby creating a culture of prevention within the organisation. Thirdly, the procedures for investigating cases of violence and harassment also serve a preventive function. Establishing clear investigation procedures not only helps respond to incidents that have already occurred but also helps ensure accountability for inappropriate behaviour in the workplace. This set of measures is geared towards preventing violence and improving workplace social affairs, in line with established legal standards.

5 EMPLOYER OBLIGATIONS AND PREVENTION MECHANISMS IN ESTONIA

In 2019, the Estonian Ministry of Social Affairs produced an analysis to help employers manage psychosocial risks and prevent mental health disorders, with recommendations to the state. The analysis highlights that in Estonia, mental health problems are the second most frequent cause of work disability, at a cost to the country of around EUR 572 million per year. The Estonian Ministry of Social Affairs stressed that mental health is an organisational problem, not an individual one, and that employers must be proactive by identifying risk factors, identifying vulnerable employees, using objective and subjective assessment methods, and finally introducing management measures to prevent conflicts, i.e., making it clear that harassment and bullying are not tolerated, establishing rules for resolving disputes within the team, clearly defining the boundaries of employees' responsibilities, building the competence of managers, encouraging open communication, and demonstrating exemplary behaviour as part of a culture.⁵⁵

The Labour Inspectorate of Estonia has also stated in its recommendations that the most effective way to prevent psychological violence (which is a psychosocial risk factor) is to be proactive. The Labour Inspectorate of Estonia recommends, as key prevention measures, clearly defining the responsibilities and powers of employees, clearly setting out principles and guidelines for the management of harassment and bullying, ensuring transparency in

54 Order no EV-221 (n 10).

55 Sotsiaalministeerium, *Töökeskonnas vaimse tervise analüüs* (Sotsiaalministeeriumi töö- ja pensionipoliitika töökeskonnas üksus 2019) <<https://www.tooelu.ee/et/313/uuringud>> accessed 23 March 2026.

decision-making regarding employees, and involving employees in decision-making, providing training for employees and middle managers on how to recognise stress and how to provide support, providing support for employees who are subjected to violence, ensuring reintegration after the experience and, of course, the employer must take every complaint seriously, investigate the facts with an impartial person and take measures to address the situation.⁵⁶ However, these are only recommendations, and the legislation does not impose these obligations on employers.

As already discussed in section 3.3 above, the statutory framework for the prevention of psychological violence is rather narrow and stems from general legislative requirements, i. e., an employer must ensure the protection of employees against discrimination, follow the principle of equal treatment, and promote equality in accordance with the Equal Treatment Act⁵⁷ and Gender Equality Act,⁵⁸ an employer must ensure working conditions conforming to occupational health and safety requirements and in order to prevent damage to health arising from a psychosocial hazard, an employer must take measures, including adapt the organization of work and workplace to suit the employee, optimise the employee's workload, enable breaks to be included in the working time for the employee during the working day or shift, and improve the enterprise's psychosocial working environment.⁵⁹

Such regulation in Estonia, which imposes only general obligations to assess psychosocial risk factors, does not adequately address the problem of psychological violence in a preventive manner, as employers are not obliged to take specific targeted measures to prevent it. By contrast, Lithuanian regulation is considerably more prescriptive. Following the 2022 amendments to the Labour Code, employers with more than fifty employees are required to adopt and implement a workplace violence and harassment prevention policy⁶⁰, and the obligation to provide training on the prevention of violence and harassment applies to all employers regardless of their size, with training required at least once every three years.⁶¹ Non-compliance with these obligations exposes employers to sanctions imposed by the State Labour Inspectorate. This comprehensive and binding regulatory framework, which leaves considerably less discretion to employers than the Estonian approach, creates stronger structural incentives for proactive prevention of psychological violence in the workplace.

In legal literature, it is argued that the existence of a legislative framework is insufficient to address the problem unless it is accompanied by other primary and secondary interventions implemented in the workplace. Management and employee training, organisational

56 Labour Inspectorate of Estonia (n 43).

57 Law of the Republic of Estonia 'On Employment Contracts' (n 12) art 28.

58 Law of the Republic of Estonia 'On Gender Equality' (adopted 07 April 2004) [2004] RT I 27/181 <<https://www.riigiteataja.ee/et/akt/107032023043?leiaKehtiv>> accessed 23 March 2026.

59 Law of the Republic of Estonia 'On Occupational Health and Safety' (n 11) art 9(1).

60 Law of the Republic of Lithuania no XII-2603 (n 3) art 30.

61 Order no EV-221 (n 10).

surveys, and risk assessment, with measures of possible antecedents of harassment (such as psychosocial working conditions, organisational culture, management, and leadership practices) and psychosocial work environment redesign are examples of primary-level interventions. The aim is to reduce harassment by decreasing the risk in the work environment and increasing awareness, recognition, and understanding of harassment and its consequences. Commonly used secondary measures include conflict management training, training for the investigation of complaints, and mediation. Strategies that can be used to prevent harassment and in situations where harassment has occurred include assertiveness training, social support, counselling, and therapy.⁶²

It should be noted that, even with such an incomplete legal framework, workers still have the right to refuse to carry out work or to stop work the performance of which endangers their health or that of other persons or does not allow to comply with environmental safety requirements, promptly notifying the employer or the employer's representative and a working environment representative thereof,⁶³ and the employer may be obliged to pay the average wage to an employee who is able to work and ready to work even if the employee does not work because the employer has not provided work, has not performed the necessary actions for the performance of the work, or has otherwise delayed accepting the work, unless the failure to provide work is due to the employee's fault. It can be argued that if the psychological violence relates to the performance of vicious tasks, the employee may refuse to perform such duties, and the employer will be obliged to pay the employee's average wage for such time.

As regards the assessment of psychosocial risk factors, the Labour Inspectorate has created a tool aimed mainly at small and medium-sized enterprises to assist them in assessing the risks in the workplace,⁶⁴ however, while the initiative is positive, the Labour Inspectorate is solely responsible for the implementation of legislative requirements, in this case for compliance with Occupational Health and Safety Act of Estonia and may impose a fine on the persons responsible where it finds violation of requirements established for working environment affected by physical, chemical, biological, physiological or psychosocial hazards if it involved a threat to the health or life of an employee, committed by an employer or an employer's management board member or another representative to whom the obligation to ensure compliance with these requirements was delegated. This means that the Labour Inspectorate also needs to identify a real threat to the worker's life or health to impose a fine. However, proving a direct link between the working environment and a "real threat" is extremely difficult. Therefore, such regulation is by no means preventive, and the existing regulation, lacking a preventive mechanism, does not sufficiently encourage companies to take the initiative before emergencies arise.

62 Helge Hoel and Ståle Einarsen, 'Shortcomings of Antibullying Regulations: The Case of Sweden' (2010) 19(1) *European Journal of Work and Organizational Psychology* 30, doi:10.1080/13594320802643665.

63 Law of the Republic of Estonia 'On Occupational Health and Safety' (n 11) art 14.

64 Labour Inspectorate of Estonia (n 43).

6 COMPARATIVE ANALYSIS OF THE SPECIFICITIES OF THE LEGAL FRAMEWORK

As can be seen, the Lithuanian and Estonian regulations on psychological violence and harassment are characterised by substantial differences, ranging from the legal definitions to the details of the obligations imposed on employers. Firstly, in Lithuania, as of 1 November 2022, the Labour Code introduces a very broad and detailed definition of violence and harassment. It covers any unacceptable behaviour or threat thereof, whether a single incident or repeated, with the intent to cause physical, psychological, or other effects.⁶⁵ Regulation covers not only the immediate workplace, but also business trips, rest periods, and electronic communication. Estonian legislation does not provide a specific definition of psychological violence. In Estonia, the general principles of non-discrimination and the assessment of psychosocial risk factors are used. In case law, workplace violence is defined as systematic and persistent hostile behaviour, which differs from the definition in Lithuania (where a single incident is sufficient) and from international standards. In Lithuania, there are very clear and binding obligations. Employers are obliged to adopt a procedure for dealing with reports, to organise periodic training and, for those with more than fifty employees, to draw up a violence prevention policy. A specific preventive measure has been in force since 2025, detailing the necessary actions. In Lithuania, the State actively prescribes specific measures rather than leaving them to employers to decide. In Estonia, the regulation only provides for a general obligation to ensure safe conditions and to assess psychosocial risks (stress, bullying, strain). Although the Ministry of Social Affairs and the Labour Inspectorate issue recommendations for proactive action (open communication, managerial competence), this regulation is seen as superficial because it lacks concrete implementation guidelines. In Lithuania, regulation is much stricter; employers must act preventively, as they face sanctions for failing to fulfil specific obligations (such as not organising training and not having a company policy on psychological violence), without waiting for an actual incident of violence to occur. The practical effect of this framework is evidenced by enforcement data, as in 2025, the State Labour Inspectorate recorded 181 violations of Article 30 of the Labour Code, with a 48 per cent increase compared to 2024, and examined 462 complaints relating to psychological violence, nearly double the figure recorded in 2022, when the legislative reforms first entered into force.⁶⁶ In Estonia, the Labour Inspectorate can impose fines, but this requires proof of a real threat to the worker's life or health. As it is difficult to prove a direct link between the working environment and such a threat, this regulation does not sufficiently encourage companies to be proactive before emergencies arise.

65 Law of the Republic of Lithuania no XII-2603 (n 3) art 30.

66 Valstybinė darbo inspekcija, '2025 m smurto ir priekabiavimo darbe pažeidimų užfiksuota beveik dvigubai daugiau nei pernai' (*State Labour Inspectorate of Lithuania*, 12 March 2026) <<https://vdi.lrv.lt/lt/naujienos/2025-m-smurto-ir-priekabiavimo-darbe-pazeidimu-uzfiksuota-beveik-dvigubai-daugiau-nei-pernai-vFG/>> accessed 23 March 2026.

The divergence between the two regulatory models is borne out by enforcement data. In Lithuania, the number of psychological violence claims before Labour Dispute Commissions increased by 89 per cent between 2024 and 2025, reaching 196 claims in 2025, nearly double the figure recorded in 2022, when the legislative reforms first entered into force.⁶⁷ However, the outcomes of these proceedings reveal persistent practical challenges; approximately 42 per cent of psychological violence claims were dismissed, while only 1.5 per cent were upheld in full or in part, with the majority resolved through settlement agreements.⁶⁸ In contrast, Estonia's labour dispute statistics do not disaggregate claims by category of psychological violence, as the concept lacks a specific legal definition under national law. The Estonian Labour Dispute Committee recorded 2,411 applications in total in 2024; however, psychological violence, as a distinct legal ground, is not recorded or reportable separately within the Estonian system.⁶⁹ This absence of category-specific enforcement data is not merely a statistical gap; it is a structural consequence of the regulatory framework itself, which, without a statutory definition and specific employer obligations, there is no systematic basis on which enforcement activity relating to psychological violence can be measured, reported, or assessed. The Estonian regulatory framework does not create the conditions necessary for proactive action by employers. Since there are no specific statutory obligations as mandatory training, complaint-handling procedures, or prevention policy requirements, employers have neither a clear legal standard to meet nor a meaningful risk of sanctions for failing to act before an incident occurs. This stands in stark contrast to the Lithuanian model, where the existence of specific obligations and the active enforcement of those obligations by the State Labour Inspectorate creates structural incentives for employers to act preventively and in a timely manner.

In summary, Lithuania has chosen the path of strict, detailed regulation, requiring employers to implement specific prevention procedures. Estonia relies more on general safety principles and risk assessment methodologies but lacks a clear legal framework on what constitutes psychological violence, giving employers more freedom but less clarity on how to manage the problem, and sanctions only reach employers in exceptional cases where a real risk to a worker's life or health is identified. Moreover, the absence of a specific legal definition and enforceable preventive obligations means that the Estonian regulatory framework does not create the conditions necessary for employees to act proactively in identifying psychological violence or asserting their potentially violated rights.

67 Valstybinė darbo inspekcija, 'Darbo ginčų komisijų veiklos apžvalga už 2025 metus' (State Labour Inspectorate of Lithuania, 2026) <<https://vdi.lrv.lt/lt/darbo-gincai/apie-dgk/dgk-statistika-dgk-spendimu-ir-teismu-spendimu-apzvalgos/>> accessed 23 March 2026.

68 ibid

69 Tööinspektsioon, *Tööinspektsiooni Aastaraamat 2024* (Tööinspektsioon 2025) <<https://www.ti.ee/enetus-ja-teave/infomaterjalid/tooinspektsiooni-aastaraamat>> accessed 23 March 2026.

7 CONCLUSIONS

The comparative analysis of Lithuanian and Estonian legal frameworks reveals that, while both countries have reached a significant milestone in recognising psychological violence as not merely an ethical but also a legal problem, it remains a conceptually contested phenomenon, and there is no unanimous international or national consensus on a definition of psychological violence. Although both legal systems draw on international standards, they have adopted different legislative approaches. Lithuania has introduced a broad definition of 'violence and harassment' in the Labour Code, encompassing even one-off acts and the threat of hypothetical harm, whereas Estonia addresses psychological violence primarily within the occupational safety and health framework, treating it as a systematic psychosocial risk rather than a distinct legal category.

In Estonia, the prevention of psychological violence continues to rest on the general principles of occupational safety and non-discrimination, without a specific definition of the phenomenon. Although the Estonian system places considerable emphasis on the assessment of psychosocial risks, national case law remains conservative, consistently linking psychological violence to systematic and long-term conduct. This approach risks leaving victims of isolated but severe incidents without adequate legal protection, as a single act may fall outside the scope of judicial recognition. The absence of a specific legal definition of psychological violence in Estonian law and the high judicial threshold requiring proof of systematic and long-term conduct mean that the Estonian regulatory framework does not create the conditions necessary for employees to seek redress through dispute resolution bodies, employees who experience psychological violence have no clear legal basis on which to formulate a claim, and therefore no meaningful incentive to initiate formal proceedings.

Taken together, these findings suggest that the Lithuanian model offers greater clarity and stronger employee protection, as employers are directly obligated to ensure a preventive culture and are subject to specific sanctions for non-compliance. The Estonian regulatory framework, by contrast, remains superficial, while proactivity is encouraged through administrative guidance; enforceable sanctions are imposed only when a direct threat to life or health can be identified.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВА БАЗА ДЛЯ ЗАПОБІГАННЯ ПСИХОЛОГІЧНОМУ НАСИЛЬСТВУ НА РОБОТІ В ЛИТВІ ТА ЕСТОНІЇ: ПОРІВНЯЛЬНИЙ АНАЛІЗ

Айсте Мачюляйте

АНОТАЦІЯ

Вступ. Психологічне насильство на робочому місці зараз визнається одним із найнебезпечніших психосоціальних факторів ризику, що завдає прямої шкоди не лише гідності та психічному здоров'ю працівників, але й економічній стабільності організацій та країн. На міжнародному рівні правове регулювання у цій сфері послідовно розвивалося від загальних принципів прав людини, закріплених у Загальній декларації прав людини та Європейській соціальній хартії, до спеціалізованих стандартів, що закріплені в Конвенції Міжнародної організації праці № 190 (далі – «Конвенція МОП № 190»). У цьому контексті Литва та Естонія, дві сусідні балтійські держави, обрали принципово різні моделі регулювання: у 2022 році Литва запровадила детальну концепцію психологічного насильства та конкретні превентивні зобов'язання для роботодавців, тоді як Естонія продовжує покладатися на загальні принципи безпеки та здоров'я працівників, не встановлюючи конкретного визначення психологічного насильства в національному законодавстві.

Методи. У цій статті використовується порівняльний дослідницький підхід для систематичного вивчення правових баз Литви та Естонії щодо запобігання психологічному насильству на робочому місці. Дослідження ґрунтується на аналізі законодавства, вивченні ключових національних правових джерел та міжнародних документів. У роботі було використано аналіз судової практики та розглянуто справу Талліннського окружного суду № 3-17-164, яка ілюструє підхід естонських судів до класифікації психологічного насильства. Систематичний огляд наукової літератури дозволив розробити теоретичну основу та оцінити нормативно-правове регулювання обох країн у ширшому міжнародному контексті.

Результати та висновки. Порівняльний аналіз правового регулювання в Литві та Естонії виявив фундаментальні відмінності між моделями двох країн. Литва встановила широке та детальне визначення психологічного насильства, яке охоплює як одноразову, так і повторювану неприйнятну поведінку або загрозу її прояву, тоді як естонське законодавство взагалі не встановлює конкретного визначення психологічного насильства. Крім того, в Литві роботодавці зобов'язані вживати конкретних превентивних заходів, у той час як в Естонії роботодавці несуть лише загальний обов'язок оцінювати психосоціальні ризики, а конкретні запобіжні заходи залишаються на їхній розсуд. Зрештою, механізми санкцій також відрізняються, оскільки в Литві роботодавці можуть бути покарані за невиконання конкретних профілактичних зобов'язань, незалежно від того, чи мав місце фактичний випадок насильства, тоді як в Естонії Інспекція праці може накладати штрафи лише після встановлення реальної загрози життю чи здоров'ю працівника.

Ключові слова: психологічне насильство на робочому місці; домагання на робочому місці; зобов'язання роботодавця; охорона праці; Литва та Естонія.

Research Article

THE PRACTICE OF BANKRUPTCY LAW IN SAUDI COURTS

Ahmed Fagehy

ABSTRACT

Background: Recent years have seen a growing interest in bankruptcy law, both domestically in the Kingdom of Saudi Arabia and globally. A significant and concrete step in the larger legal and economic changes in the Kingdom of Saudi Arabia was the passage of the bankruptcy law in 2018. A key step is to understand how these relatively new rules are enforced in Saudi courts, as this offers insight into the practical legal processes that companies seeking to enter the Kingdom's market and scholars studying commercial law need to consider. This study aims to explore how bankruptcy law is implemented in the Saudi legal system and to outline the strategies Saudi judges use to interpret and enforce it when resolving conflicts.

Method: The study employs an inductive and analytical approach to examine judicial practices and rulings under Saudi Arabia's bankruptcy law and relevant legal texts. These methods enabled the collection and systematisation of relevant materials, including legal texts and bankruptcy cases stored in the Judicial Scientific Portal, which were carefully examined by top judicial authorities. The method used facilitated the division of bankruptcy cases into two distinct groups: procedural and substantive matters, drawing on the framework

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underpinning the Saudi Bankruptcy Law. The advantage of this two-pronged approach is that it thoroughly examines judicial rationales in both procedural and substantive areas before developing recommendations.

Results and Conclusions: *Examining and analysing the cases and procedures used in Saudi bankruptcy courts confirms the significance of uniform judicial application of bankruptcy law and the crucial role of specialised bankruptcy chambers in promoting procedural efficiency and consistency. The study highlighted that the unified judicial application of the bankruptcy law and its regulations should be reflected in upcoming legal updates to ensure consistency with judicial interpretation and the system's objectives. The research suggests that continuing to publish court rulings and decisions on bankruptcy cases contributes to understanding the applicable law and to developing solutions for emerging bankruptcy cases.*

1 INTRODUCTION

Recent years have witnessed increasing interest in bankruptcy law, both domestically and globally. This is, in fact, a testament to the shifting nature of legal and economic systems. The backbone of this growing interest is, in fact, several factors, such as the country's attempts to cast a wider net as part of Vision 2030,¹ its drive to open its doors to international investment, and its initiatives to create a better business environment. A significant and concrete step in the Kingdom of Saudi Arabia's larger legal and economic changes that can be mentioned here was the passage of the bankruptcy law in 2018.² This law was intended to serve three main purposes: i) preserving creditors' interests, ii) regulating bankruptcy proceedings, and iii) clearing the path for the processes of restructuring and liquidating insolvent people through offering the necessary legal treatment. A critical step here is to understand how these relatively new rules are applied in Saudi courts, as this provides insight into the real-world legal procedures that companies seeking to enter the Kingdom's market and academics studying commercial law must consider. This study examines how bankruptcy law is applied in the Saudi legal system and delineates the strategies Saudi judges adopt to interpret and enforce it in conflict situations. The study also aims to assess whether judicial interpretations of the law stand up to scrutiny in terms of consistency and coherence with its intended objectives, and to cast light on the hurdles the judiciary faces in effectively implementing the law.

The study also derives its importance from several factors. It concerns judicial precedents on the Saudi bankruptcy law, even though they are not officially recognised as legal principles. Nonetheless, they remain important resources for beneficiaries, including jurists, judges, attorneys, and politicians. Through analysing these precedents, the study sheds light

1 Saudi Vision 2030 (25 January 2016) <<https://www.vision2030.gov.sa/en/>> accessed 3 February 2026.

2 Saudi Arabia Royal Decree No (M/50) of 28/05/1439H 'Bankruptcy Law' (adopted 14 February 2018) <https://laws.moj.gov.sa/en/legislation/_ZXh1it653k5JuoCi4LEZQ> accessed 3 February 2026.

on judicial reasoning and justifies its necessity in i) assisting statutory regulation and ii) setting the stage for future legal developments. The study also delves into a lateral examination and review of the most often cited judicial authorities operating under Saudi bankruptcy law. It is thus in line with the legislative objective of fostering consistency in judicial interpretation and making sense of the law's provisions. The study ultimately supports a clearer, more predictable legal and regulatory landscape for bankruptcy in Saudi Arabia. This, in turn, serves two purposes: i) building trust in the country's legal framework and ii) laying the foundation for growth in the commercial sector. When viewed through a theoretical lens, this study connects the dots between the letter of the law and its actual interpretation. That way, it offers a roadmap that could help lawmakers and regulators alike to fine-tune existing laws and policies. This, of course, sheds light on just how crucial judicial stability can be in several respects, such as paving the way for legal certainty, breathing new life into investor confidence, and ensuring the legal system holds its ground. What's more, the current study also examines how specialised bankruptcy chambers can play a central role in enhancing the speed and efficiency of judicial proceedings. It peels back the layers of how legal formalities are put in practice while probing how a legal system can genuinely uphold justice when the rules are carried out to the letter. Ultimately, the aim of this research is not solely to enrich scholarly efforts on Saudi bankruptcy law but also to furnish practical recommendations that can guide both practitioners and policymakers as they navigate the intricacies of the field.

The enactment of the Saudi bankruptcy law in 2018 was the most significant modification to Saudi Arabia's insolvency law. Thus, the purpose of this procedure is to achieve a less time-consuming and more reliable legal means of resealing and dissolving insolvent debtors, while protecting creditors' rights. However, only when the courts consistently interpret and enforce the law's provisions to advance legislative objectives are those objectives achieved. It's important to know that the judicial decisions rendered by specialised courts in matters related to bankruptcy law and its regulations are predominantly based on judges' interpretations of these laws, as they apply them to the cases and controversies submitted to them. The judicial discretion employed in applying or interpreting the law in conflicts constitutes a pragmatic interpretation of its provisions. These interpretations may establish precedents for future disputes concerning bankruptcy law and its regulations. This research, therefore, seeks to examine the published decisions of the Saudi bankruptcy courts regarding the law and its regulations to identify the most frequently adopted interpretations, both in form and substance, particularly where interpretations were not in the regulations or where there was variation. Against this background, this study aims to fill the existing gap by exploring how Saudi courts have understood and applied bankruptcy law, as well as the factors that Saudi judges rely on when making decisions in bankruptcy cases. The main question guiding this research is how the Saudi courts have implemented the provisions of the Bankruptcy Law in handling conflict and bankruptcy issues before them, and the key challenges and trends emerging in Saudi judicial practice. However, a dearth of empirical review of Saudi courts' practices in this area of law persists to date.

2 RESEARCH METHODOLOGY

To examine the landscape of Saudi Arabia's bankruptcy law, this study analyses judicial practices and rulings through an inductive and analytical lens. The research sheds special light on how Saudi courts apply bankruptcy law provisions to resolve disputes and insolvency cases. The current study draws on a wealth of case materials archived in the Judicial Scientific Portal, which have been closely scrutinised by high judicial bodies, lending them added gravitas.

After the selection process is complete, the analysis divides the rulings into two distinct categories: procedural and substantive matters, in accordance the framework underpinning the Saudi Bankruptcy Law. The procedural realm covers the ins and outs of case management, including court jurisdiction and required licenses, as well as legal deadlines. By contrast, the substantive side addresses the core of bankruptcy matters, including debtor eligibility criteria, debt quantification, creditor entitlements, and the treatment of assets and liabilities.

The study is guided by two primary research questions: Which courts have jurisdiction over bankruptcy disputes? How do Saudi courts interpret and apply the provisions of the Bankruptcy Law in resolving disputes and handling bankruptcy cases? These questions provide the framework for examining decisions and offer insights into how the judicial system addresses bankruptcy issues.

In answering these questions, the study aims to achieve the following objectives: to provide an overview of the Saudi judiciary in general and of the bankruptcy-disputes-specific judiciary in particular, and to demonstrate the current state of judicial review of bankruptcy cases.

3 THE LEGAL AND REGULATORY FRAMEWORK

An analysis of the foundational framework governing the bankruptcy judiciary reveals that the primary sources shaping both research and practice in this domain are statutory laws, implementing regulations, and judicial precedents. The cornerstone of this framework is the Bankruptcy Law, enacted by the Council of Ministers, which serves as the primary legislative reference for both judicial and executive authorities, establishing the overarching legal principles and statutory requirements. This primary legislation is operationalised through the Implementing Regulation of the Bankruptcy Law—a comprehensive set of rules, procedural mechanisms, and guidelines issued by the competent governmental body and subject to Cabinet approval, which dictates the practical application of the statutory provisions.

Institutional governance is facilitated by the Bankruptcy Commission (EISAR), an independent governmental entity tasked with developing regulatory standards and

standardised documentation as stipulated by the overarching legislation. The Commission manages administrative liquidation procedures and oversees the credentialing of insolvency officeholders and experts.

Within the judicial sphere, the adjudication process is structured by the Rules Governing Bankruptcy Procedures in Commercial Courts. Promulgated pursuant to a resolution by the Ministry of Justice, these rules organise the judicial review of bankruptcy applications. Furthermore, the evidentiary threshold for such applications is codified in the Rules of Information and Documents Stipulated in the Bankruptcy Law and the Implementing Regulations Thereof, which mandate the specific documentation required for submissions to the judiciary. Additionally, the professional qualifications and conduct of practitioners are regulated by the Code of Licensing the Officeholders and Experts. Issued by the Bankruptcy Commission, this code delineates the licensing provisions, application requirements, and fiduciary obligations of bankruptcy trustees and experts.

The legislative acts and regulatory instruments analysed in this research are officially promulgated through primary Saudi legal repositories: the Laws and Regulations Portal (boe.gov.sa), the Umm Al-Qura Official Gazette, and the National Centre for Archives and Records (ncar.gov.sa). The Laws and Regulations Portal serves as the central repository for updated legislation, accessible in multiple languages, including English. It should be noted, however, that international access to certain official governmental websites may occasionally be restricted due to security-related geo-blocking measures.

Regarding the judicial rulings, the research relied on appellate court decisions in bankruptcy cases from 2018 to 2022, as these were the only cases available for publication on the official website, The Scientific Judicial Portal. The literature also features another important contemporary study: Abdullah Turki Al-Hamoud's Treatises on bankruptcy cases, which focuses on the judicial implementation of bankruptcy legislation. The current study builds on Al-Hamoudi's work to offer a fresh perspective on judicial activity and a more accurate picture of the current state of bankruptcy law in Saudi Arabia. This is achieved by piecing together and breaking down some cases.

The study includes several important references that present the historical development of the judiciary in Saudi Arabia, up to the specialised bankruptcy judiciary. In this section, the research of two groups of researchers was selected:

The first is research on some public judicial employees, such as Saud Saad Al-Duraib and Ahmed Abdullah Al-Jaafari, as they are best suited to explain the systems of those bodies and their effects. The second is research by some interested in the Saudi judiciary, its transformations, and its systems, such as that of Ahmed Saleh Makhoulouf, Nasser bin Mohammed Al-Ghamdi, and Ayoub bin Mansour Al-Jarboa.

The current study examines the philosophical meaning and historical view of the term "judicial practice" and takes a closer look at related concepts such as "judicial precedents". Judicial practice, on the other hand, refers to the consistent application of reason in

handling cases. The works of Abdul Salam AlAsri and Muhammad Ibrahim Ali were selected because the authors are scholars of the Maliki school of thought and are more qualified to explain the Maliki terminology.

This study is crucial for understanding these concepts and their impact on judicial decisions in bankruptcy disputes. By doing so, it advances knowledge of the nature of these relationships and strengthens the conceptual foundation that can inform future judicial application and legislative development, enriching both.

4 THE PRACTICE OF BANKRUPTCY LAW IN SAUDI COURTS

Understanding the concepts in the title, along with related terms, is essential to understanding judicial reality and the methods judges use to interpret statutory texts. In this context, the intended meaning of the practice of bankruptcy law in Saudi courts is the established practice of bankruptcy circuit judges when interpreting articles of the Saudi Bankruptcy Law during the consideration and resolution of cases and disputes related to its implementation and its regulations.³

The term "established practice" refers to legal opinions that opposed the school's ideology but were maintained in good faith to protect the public or for practical necessity.⁴ Initially, the term "established practice" originated in Andalus in response to the mandatory application of the Maliki school in legal and theological decisions, in which scholars and judges were strictly prohibited from deviating from the Maliki doctrine unless there were urgent circumstances, such as changes in customs or the emergence of new case types.⁵ As mentioned before, the judiciary's interpretation of the Saudi Bankruptcy Law exemplifies the established practice in the Saudi judicial system.⁶

3 These articles give an overview about the bankruptcy under Saudi system before enacting the law and after enforcement, Adam Al-Sarraf, 'The Wave of Insolvency Reform Across the MENA Region: Analysing Saudi Arabia's New Bankruptcy Law' (2018) 2 The MENA Business Law Review 34; Fahad Alarifi, 'The Bankruptcy Law of Saudi Arabia: Policy, Operation and Comparison' (2021) 7(3) PSU Research Review 201, doi:10.1108/PRR-02-2021-0011.

4 Abdul Salam AlAsri, *The Theory of Adopting Established Practices in Morocco within the Framework of the Maliki School* (Ministry of Awqaf and Islamic Affairs, Kingdom of Morocco, 1996) 102 [in Arabic].

5 ibid. Note that the book by Abu al-Walid Sulayman Al-Baji, one of the Maliki scholars of Andalusia, includes many examples of Established Practice in the Maliki school: Abu al-Walid Sulayman Al-Baji, *Chapters on Judiciary and an Explanation of Past Practices Among Jurists and Judges* (Library of Repentance 2002) [in Arabic]. See, Muhammad Ibrahim Ali, *The Terminology of the Maliki School* (Research Centre for Islamic Studies and Heritage Revival, Government of Dubai, 2002) 209 [in Arabic].

6 It can be said that the established practice is common in the Saudi judicial system. See, for example, Faisal Ibrahim Alnassir, 'The Practice of the Cassation Courts Contrary to the Hanbali School: A Collective Case Study' (PhD thesis, College of Education, King Saud University, 2017) [in Arabic].

The Saudi legal system has undergone various phases, including mandatory compliance and discretionary choices.⁷ Initially, the mandate was for judges to make decisions based on the teachings of Imam Ahmad ibn Hanbal.⁸ This process continued until the regulatory authority began codifying judicial rulings, requiring judges to decide cases in accordance with the system established the ruler.⁹ This effort aimed to standardise judicial reasoning and guide judges in delivering verdicts within a defined framework.¹⁰ Regarding bankruptcy, the judicial authority has limited the review of judgments from primary bankruptcy courts to a single appellate division within the Commercial Court in Riyadh, aiming to standardise legal interpretations of the system's provisions and make appropriate decisions on emerging bankruptcy issues. Over time, appellate judges' interpretations in bankruptcy cases have earned respect and admiration, especially when their foundations are strong and consistently applied. In such situations, it becomes challenging for lower court judges to stray from this practice without a valid reason.¹¹

The Saudi judiciary functions under a dual jurisdiction model¹² that divides authority between the administrative judiciary, represented by the Board of Grievances,¹³ and the

- 7 Saud Saad Al-Duraib, 'King Abdulaziz and the Establishment of the Rules of Judicial Organization in the Kingdom' (1985) 12(1) King Abdulaziz Foundation Journal 15, doi:10.46968/0326-012-001-002 [in Arabic]; Hussam bin Abdullah Al-Muhammad, 'The Development of the Judiciary and its Legal System in the Kingdom of Saudi Arabia - The Era of the Custodian of the Two Holy Mosques, King Salman Bin Abdulaziz: Analytical Inductive Study' (2023) 35(42) Journal of Jurisprudential and Legal Research 1971, doi:10.21608/jlr.2023.217091.1227 [in Arabic].
- 8 Al-Duraib (n 7) 20.
- 9 Such as the Family law and others. This requirement is according to the Saudi Arabia Royal Decree No (M/21) of 20/4/1421AH 'Law of Procedure Before Sharia Courts' (adopted 20 August 2000) <https://hrlibrary.umn.edu/research/saudiarabia/law_of_procedure.html> accessed 3 February 2026. Art. 1, which states: "Courts shall apply the provisions of Sharia to cases brought before them, as derived from the Quran and Sunnah, and State laws not conflicting therewith."
- 10 For more information on the history and diverse opinions about this topic, see: Abdul Rahman Ahmed Al-Jar'I, 'Codifying Islamic Rulings: Between Those Who Prohibit and Those Who Permit Them' (2006) 7 Journal of the Teachers' College of Abha 55 [in Arabic]; Tawfiq Ahmed Ali Al-Sanbani, 'Codification of the Provisions of Islamic Law, Its Guarantees and Controls, and the Practical Plan for Legal Codification' (2022) 2(2) Ibn Khaldoun Journal for Studies and Researches 24, doi:10.56989/benkj.v2i2.483 [in Arabic].
- 11 Abdullah bin Mohammed Al-Khunin, *Judicial Precedents* (Saudi Judicial Scientific Society Publications 2013) 18 [in Arabic] <<https://qadha.org.sa/ar/books/113>> accessed 3 February 2026.
- 12 Saudi Arabia Royal Decree No (A/90) of 27/8/1412H 'Basic Law of Governance', arts 51, 52 (adopted 2 March 1992) <<https://www.wipo.int/wipolex/en/legislation/details/7973>> accessed 3 February 2026. See also, Ikrami Bassiouni Khattab, 'The Reality of the Double Judicial System in Saudi Arabia: A Comparative Analysis' (2017) 24(3) International Review of Law 1, doi:10.5339/irl.2017.24 [in Arabic]; Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies' (2004) 19(1/4) Arab Law Quarterly 91, doi:10.1163/026805504774478427.
- 13 Saudi Arabia Royal Decree No (M/78) of 19/9/1428H 'Law of the Board of Grievances' (adopted 1 October 2007) <<https://www.wipo.int/wipolex/en/legislation/details/14607>> accessed 3 February 2026. See also, Ayoub M Al-Jarbou, 'The Saudi Board of Grievances: Development and New Reforms' (2011) 25(2) Arab Law Quarterly 117, doi:10.1163/157302511X551446.

general judiciary, represented by the Supreme Judicial Council, which addresses non-administrative disputes.¹⁴

The commercial courts, as part of the general judiciary, hear and resolve business disputes in accordance with relevant laws and are the first-instance courts affiliated with the general judiciary that specialise in adjudicating various commercial claims and disputes.¹⁵ Bankruptcy circuits that handle bankruptcy-related disputes fall under the jurisdiction of the commercial courts.¹⁶ Thus, in the title, Saudi courts refer to the judicial bodies that adjudicate disputes under the Bankruptcy Law and its regulations, known as bankruptcy circuits. These circuits address both procedural and substantive aspects, ensuring cases meet legal requirements. Exploring the structure of these commercial courts and their judges is essential to understanding how bankruptcy law is applied in practice. This topic will be examined as follows:

5 JURISDICTION AND ORGANIZATION OF COMMERCIAL COURTS

As mentioned above, commercial courts are part of the general judiciary that hears and resolves business disputes in accordance with relevant laws and rulings.

The Supreme Judicial Council oversees the courts and judges of the general judiciary, and issues related to regulations and systems.¹⁷ Therefore, by the Council's decision, commercial courts are established in regions and governorates. In areas lacking established commercial courts, commercial circuits will be created within general courts until such courts are established in those regions.¹⁸

14 Saudi Arabia Royal Decree No (M/78) of 19/9/1428H 'Law of the Judiciary' (adopted 1 October 2007) <<https://www.wipo.int/wipolex/en/legislation/details/14616>> accessed 3 February 2026. See also, Saud bin Saad Al-Duraib, 'The Judicial System in the Kingdom of Saudi Arabia in Light of Islamic Law and the Judicial Authority System' (PhD thesis, Imam Muhammad bin Saud Islamic University 1999) [in Arabic].

15 Saudi Arabia Royal Decree No (M/93) of 15/08/1441H 'Law of Commercial Courts', art 16 (adopted 8 April 2020) <<https://www.wipo.int/wipolex/en/legislation/details/20321>> accessed 3 February 2026. See also, Masoud Younis Atwan, 'Evolution of Means of Settling Commercial Disputes to Achieve the Vision of the Kingdom of Saudi Arabia 2030' (2025) 24 The Journal of Jurisprudential and Legal Studies, Sultanate of Oman 373, doi:10.70299/hji.i24.9 [in Arabic].

16 Saudi Arabia Minister of Justice Decision No (6421) of 17 November 2019 'Rules Governing Bankruptcy Procedures in Commercial Courts', art 3 <<https://laws.moj.gov.sa/en/legislation/xCbJni6ThD9OP5PQVEydMA>> accessed 3 February 2026.

17 Law of the Judiciary (n 14) art 6.

18 *ibid*, art 15. For more information about the law of governorates and regions in the Kingdom of Saudi Arabia, see Saudi Arabia Royal Decree No (A/92) of 27/08/1412H 'Law of Provinces' (2 March 1992) <<https://hrlibrary.umn.edu/research/saudi-arabia/law-provinces.html>> accessed 3 February 2026.

The original jurisdiction assigned to commercial courts is as follows:

1. All primary and subsidiary commercial disputes between merchants.
2. Claims filed against merchants concerning their primary and subsidiary commercial activities.
3. Disputes arising between company partners.
4. All claims and violations related to commercial regulations, without prejudice to the Board of Grievances' jurisdiction.
5. Bankruptcy cases, including the interdiction of bankruptcy and its lifting.
6. Other commercial disputes.

This jurisdiction of commercial courts also applies to general courts in locations lacking commercial courts unless otherwise decided by the Supreme Judicial Council.¹⁹

Commercial courts follow a structure consisting of both first-instance and appellate circuits.²⁰ Parties dissatisfied with decisions at the first instance may appeal to the appellate circuits, challenging either the judgment rendered or the procedures followed.²¹ Since courts handle a wide range of cases, the operation of Commercial Courts is divided into circuits based on their jurisdiction, either by case size or subject matter.²² Bankruptcy circuits specialise in matters related to the application of bankruptcy law and its regulations.²³

Following this overview of litigation levels, a detailed discussion of the commercial circuits, their judges, and their specific jurisdictions is warranted, in accordance with the relevant regulations and resolutions.

The Commercial Courts Law and its implementing regulations clarify the jurisdiction of first-instance circuits,²⁴ which includes:

- 1) The cases were either between merchants because of their main or ancillary business activity or initiated against merchants in commercial business contracts, so that when the primary demand in these cases exceeded one million riyals.²⁵

19 Law of Commercial Courts (n 15) art 35.

20 *ibid*, art 3.

21 Rules Governing Bankruptcy Procedures in Commercial Courts (n 16) art 5.

22 Law of the Judiciary (n 14) art 15. See also, Nasser Mohammed Al-Ghamdi, 'Specific Judicial Jurisdiction in Islamic Jurisprudence and the Saudi System' (2024) 36(2) *Journal of the Faculty of Sharia and Law at Assiut, Alazhar University* 984, doi:10.21608/jfsu.2023.233092.1160 [in Arabic].

23 Rules Governing Bankruptcy Procedures in Commercial Courts (n 16) art 3.

24 Law of Commercial Courts (n 15) art 15. See also, Ahmed Abdullah Al-Jaafari, 'The Organizational Development of Commercial Judiciary in the Kingdom of Saudi Arabia: Litigation Bodies and its Procedural Systems' (2023) 33 *Judiciary Magazine* 581 [in Arabic].

25 Ahmed Abdulaziz Bin Shabeeb, 'The Value Jurisdiction in the Commercial Court System: A Comparative Study' (2022) 28 *Qadha Magazine* 400 [in Arabic].

- 2) Litigation where the claims and requests are made by judicial receivers, trustees, liquidators, appointed experts, and similar people, inasmuch as such a dispute originates in the case lying within the jurisdiction of the court and is linked with a claim as specified in paragraph (1).
- 3) Compensation claims for damages resulting from previously adjudicated court cases, irrespective of the claim amount, when linked to claims specified in paragraph (1).
- 4) Analysis of urgent applications that are automatically forwarded to competent circuits and disposed of within three working days from forwarding. The following requests may be determined in the presence of the petitioner if the circumstances are so required, but in the absence of opposing counsel. Commercial Courts Law, Article 16, and Implementing Regulations, Article 34.

In cases not provided for in the Commercial Regulations or in the Treaties, Conventions, and Agreements, to which the Kingdom is a party, the rules of international jurisdiction in the Law of Civil Procedure apply in such cases as fall within the jurisdiction of the court.²⁶ This is in line with the Commercial Courts Law provided by Article 15.

When examining the judicial hierarchy, we can see that appellate circuits play a pivotal role in maintaining the integrity of the judicial system by reviewing judgments and decisions handed down by first-instance circuits.²⁷ These reviews are heard by either three-member or single-judge panels, with the nature of the case determining which panel hears the case.²⁸ It can also be observed that single-judge appellate circuits rise to the occasion for specific tasks, ranging from handling urgent appeals to issuing payment orders and procedural decisions regarding document inspection or retrieval. Regarding the jurisdiction and operational framework for these appellate circuits, they are firmly established, ensuring that legal proceedings remain.²⁹

The Supreme Court, which serves as the highest court in the general judiciary, has both substantive and procedural jurisdiction, including appeals from judgments and decisions of the appellate circuits. It evaluates these rulings on their legal validity, application, and interpretation, as well as procedural adherence, without delving into factual descriptions or evidence assessment.³⁰ Acknowledging the need for a commercial judiciary at the Supreme Court, a commercial circuit within the Court was established to handle appeals from judgments of the Commercial appellate circuits.

26 Law of Commercial Courts (n 15) art 15.

27 Law of the Judiciary (n 14) art 17.

28 *ibid*, art 22.

29 *ibid*. Mohammed Libya and others, 'Commercial Courts in the Kingdom of Saudi Arabia' (2020) 35(1) *Journal of the Faculty of Sharia and Law, Tanta University* 620 [in Arabic].

30 Law of the Judiciary (n 14) arts 11–14.

The judicial authority handling commercial cases operates through circuits, with experienced and well-informed judges assigned to oversee these matters.³¹ The commercial circuits in all Litigation Levels (the Supreme, Appellate, and the First-Instance Circuits) consist of three judges, with one serving as the presiding judge. If a member is absent or unable to serve, the Chief Justice of the Court appoints a substitute judge from another circuit within the court.³² The Chief Justice recommends the names of the circuit heads and members, then submits them to the Supreme Judicial Council for approval. Supreme Court judges are appointed by royal decree, on the recommendation of the Supreme Judicial Council, and serve as the Chief Justice of the Appellate Court.³³

6 ESTABLISHED PRACTICE IN BANKRUPTCY ADJUDICATION

The earlier discussion about the Saudi judiciary, its courts, and judges served as an important introduction to this chapter. It will help gain a broader understanding and a more comprehensive view of the discussion in this chapter on the judicial practices used in bankruptcy courts. The established practice in bankruptcy courts is a practical interpretation of the articles introduced by the Saudi Bankruptcy Law, and it sets a precedent for future rulings.³⁴ It's important to note that regulations generally, and the Bankruptcy Law in particular, contain two main types of provisions:

First, procedural provisions address the parties to the case (the debtor and the creditor), court jurisdiction, legal timelines, official documents, and other legal processes. These are provisions that require consideration and verification before resolving conflicts outside the law's application.

Second, substantive provisions are typically examined and adjudicated after procedural requirements are satisfied to ensure compliance with statutory provisions and the intended objectives. These include matters related to debtor eligibility for bankruptcy procedures, due debts, security interests, contracts, and other substantive issues.

31 *ibid*, art 23.

32 *ibid*, arts 11, 15.

33 *ibid*, art 10.

34 It is important to note that all judicial decisions referenced in this chapter were obtained from the Saudi Ministry of Justice's Scientific Judicial Portal. See, *Regulations and Legislation: Legal Portal, Saudi Ministry of Justice*. <<https://laws.moj.gov.sa/ar/JudicialDecisionsList/1>> accessed 3 February 2026. Additionally, such cases can be found in a collection of articles and e-books on bankruptcy cases compiled by a lawyer and a bankruptcy trustee, Abdullah Khalid Al-Hamoudi, located on the blog "Code of Commercial Judgments". See, Abdullah Khalid Al-Hamoudi, *Articles on Bankruptcy Judiciary: A Collection of Rulings Issued on Applications for Approval of the List of Claims in Bankruptcy Proceedings* (Code of Commercial Judgments, 22 August 2022) [in Arabic] <https://www.atahamoudi1.com/2022/08/blog-post_22.html> accessed 3 February 2026.

Consequently, the established practice in the bankruptcy judiciary within this chapter is divided into two main sections: one addressing procedural practices and the other addressing substantive practices.

6.1. Procedural Established Practice in Bankruptcy Judiciary

The legislator requires that bankruptcy judges and their assistants address procedural issues before deciding on the merits of any bankruptcy-related case or violation. Therefore, procedural matters have been consistently emphasised by bankruptcy circuit judges, particularly the evaluation of the plaintiff's solvency, the contents of the lawsuit petition, and the proper notification of the defendant. Established practice in bankruptcy judiciary on some procedural matters will be explored as follows.

1) A debt settlement request, along with the indication of the initiation of bankruptcy proceedings in the event of non-payment, must be made at least 28 days before starting bankruptcy

Judicial Decision No. 821 of 2021, issued by the First Circuit of the Dammam Commercial Court, clarifies that the creditor must provide solid proof that he requested the debtor to pay the debt at least 28 days prior to initiating bankruptcy proceedings. Not only this, but also the request must spell out the possibility of initiating bankruptcy if the debtor fails to clear the debt. A similar principle was applied in Judicial Decision No. 3262 of 2020 in the First Circuit of the Dammam Commercial Court, demonstrating consistency in the judicial approach to bankruptcy procedural requirements.

2) A creditor presents proof that the debtor received a demand for payment before starting bankruptcy proceedings

In bankruptcy proceedings, a creditor must provide evidence that the debtor received a demand to pay debts before commencing the bankruptcy process. This requirement is outlined in judicial decision no. 2363 of 2021 at the Ninth Circuit of the Riyadh Commercial Court and in judicial decision no. 2387 of 2021. In these judicial decisions, the court found that the debtor failed to fulfil the legal obligation because the repayment request sent by mail served only as a notification of dispatch and lacked proof that the debtor received it. Additionally, the communication was sent to an unverified phone number that was not confirmed to belong to the debtor company's legal representative. Therefore, the court rejected the request for noncompliance with the specified legal procedures and regulations. Article 93 of the bankruptcy law, Article 48 of the law's implementation regulation, and Article 9 of the Information and Documentation Regulation guide the ruling. Taken together, these articles help ensure that creditors follow legal procedures to promote fairness and transparency in bankruptcy.

3) Claims Arising from Bankruptcy Law Implementation Must Be Filed By an Attorney

The courts require that bankruptcy claims be represented by an attorney, as set out in Articles 51, 52, and 56 of the Implementing Regulations of the Commercial Courts Law. A significant judicial decision addressing this requirement is Case No. 1695 of 2021 of the Riyadh Commercial Court, Ninth Circuit. This case affirmed that procedural issues, being preliminary in nature, must be resolved before considering the merits of the case. Since the petition was not filed by an attorney, and claims and violations arising from the implementation of bankruptcy law must be filed by an attorney under the Commercial Courts Law and its Implementing Regulations, the Circuit dismissed the petition for lack of jurisdiction. Similarly, in Case No. 208 of 2021, decided in the First Circuit of the Dammam Commercial Court, the ruling followed the same approach.

4) Legal Training Certificate Does Not Confer Attorney Status

The previous subsection highlighted that bankruptcy claims must be filed through an attorney, and that a legal training certificate does not suffice in place of an attorney's qualifications. Judicial Decision No. 853 of 2020 in the First Circuit of the Abha Commercial Court clarifies this point by stating that a plaintiff's representative holding a legal training certificate is not entitled to file a claim, as the certificate does not confer the status of an attorney. According to the statutory text, only licensed attorneys have the authority to file bankruptcy petitions and to plead in such cases. The course of action was firmly anchored in Article 20 of the Commercial Courts Law, as well as Articles 51 and 53 of its Implementing Regulations.

5) The Commencement Petition is filed in the court located at the Debtor's principal place of business, as determined by commercial registration

The laws governing bankruptcy procedures in business courts underscore the importance of geographical jurisdiction. Article (4) stipulates that "the territorial jurisdiction to evaluate the request is established by the court that holds jurisdiction over the principal location of the debtor's business, irrespective of whether the debtor is an individual or a legal entity." Judicial discretion has relied on the debtor's business commercial registry to determine the principal address and the appropriate court. In Judicial Ruling No. 2355 for the year 2021 in the Ninth Circuit of the Commercial Court in Riyadh, the court noted: "The formal aspects of the submitted request must be assessed prior to addressing the substance of the lawsuit; upon reviewing the commercial register, it was evident that the principal location is in Dammam." As the regulations governing bankruptcy proceedings in commercial courts assign jurisdiction to the court overseeing the debtor's principal business location, the Commercial Court in Riyadh lacked the authority to entertain this request. As a result, the court ruled that it lacked territorial jurisdiction.

6) *The Plaintiff must serve the Debtor with the Notification of Procedure Commencement Petition*

One procedural requirement in bankruptcy law and its regulations is the obligation to notify the debtor of a bankruptcy filing. This requirement is outlined in Articles 47, 92, and 93 of the bankruptcy law; Article 48 of the implementing regulations; and Article 9 of the information and documentation regulations. This obligation was also reaffirmed in Judicial Decision No. 119 of 2021 in the First Circuit of the Dammam Commercial Court, which states: "As the plaintiff had never served the notice, this fundamental precondition for initiating bankruptcy proceedings was not met, leading the court to dismiss the case on this basis."

6.2. Substantive Established Practice in Bankruptcy Judiciary

This section discusses a sequence of varied material contentions that have become standard practices in bankruptcy judiciary. Of these matters, the stay of claims rule, in which one has seen exceptions created through judicial creativity. These exceptions are ways of setting limits to the general rule of staying claimed, in that the goals of fairness and compliance with the law shall not be violated. Furthermore, what the trustee is empowered to do with bankruptcy assets before claims are allowed is also an area of substantial legal concern. Other important issues related to the time when petitioners' sources of debt originated. Whether the competent court's decision on debt verification adequately satisfies the statutory notice to the debtor is also contentious. These considerations have been developed through numerous judicial experiences, emphasising the bankruptcy judiciary's role as both an interpreter of the law and a problem-solving authority.

1) *Creditors with Pre-Procedure Debts May Not Pursue Enforcement Actions Against Debtor, Nor Resume Enforcement Proceedings for 24 Months Following Procedure Termination*

Generally, the suspension of claims remains in effect until the court either denies the request to commence the proceedings or issues a ruling terminating it. However, in the event of liquidation, this suspension should be extended for an additional 24 months following the court's order terminating the procedure, in accordance with the judicial precedent in Case No. 14782 of 2018 and Case No. 8474 of 2019 of the Ninth Division of the Commercial Court in Riyadh.

The rationale was as follows:

The court holds that, pursuant to Article 181 of the bankruptcy law and Article 21 of its implementing regulations, although the suspension of claims against the debtor formally ends upon the completion of the procedure, creditors with claims arising before the procedure commenced are prohibited from submitting enforcement requests against the debtor. Additionally, they cannot initiate enforcement actions against the debtor within 24 months after the proceedings

conclude. Moreover, to allow the debtor to participate in any commercial or professional endeavours within the specified term, all enforcement measures against the debtor's bank accounts must be rescinded.

2) Travel Ban and Asset Freeze Orders Exempt from Claims Suspension Decision

Bankruptcy law has the unique feature of providing an extraordinary remedy that can halt any claim that might weaken the effectiveness of a settlement or restructuring plan. Nevertheless, the broad scope of the terms used in Articles 1 and 97 of the law necessitated legal interpretation to clarify some exceptions. An example of this clarification is Judicial Decision No. 2344 of 2021: the case of the Ninth Circuit of the Riyadh Commercial Court. Under Article 1, claims suspension refers to the suspension of all legal measures against the debtor, the debtor's assets, or the debt guarantor by any authority. This suspension remains in effect until a court judgment rejects the commencement petition or concludes the procedure. Generally, claims suspension covers all active cases against the debtor or debt guarantor in any judicial or quasi-judicial forum. However, orders such as travel bans and asset freezes remain in effect until the court ruling in the bankruptcy case nullifies them. This exception was granted under Article 10 of the Regulatory Rules for Bankruptcy Proceedings.

3) Request for Multiple Distributions of Bankruptcy Estate Proceeds Prior to Final Claims Validation

The legislator's intent in these articles 116 and 196 can be inferred from Judicial Decision No. 6368 of 2021 issued by the Ninth Circuit of the Riyadh Commercial Court when the trustee's application to a court for permission to distribute part of the liquidation funds in his possession to the employees, under Article 116 of the bankruptcy law, was considered. The court noted that debts owed to creditors take precedence under Article 196 of the law, and that when priority creditors receive all estate proceeds, employees may not even be paid. Therefore, the early approval of the distribution to employees will cause the trustee to violate the ranking order. The court also observed that the legislation aimed to ensure equal protection for creditors. Since the claims list remains unapproved, it is impossible to definitively determine whether the employees are entitled to the amounts allocated for distribution. Based on these reasons, the court denied the trustee's petition.

4) Proposal Reformulation After Voting and Subsequent Re-voting

The Bankruptcy Law prescribes specific procedures and timeframes for drafting settlement or reorganisation plans and voting on them. Therefore, the Ninth Circuit of the Riyadh Commercial Court, in its Judicial Decision No. 1711 of 2021, ruled that the trustee's request for a re-vote on a modified proposal was inappropriate because the voting had been conducted at the scheduled time, and there were no grounds for reformulating the proposal and conducting subsequent votes more than once after the initial voting process was completed. The ruling also addressed whether the trustee was justified in relying on

Paragraph 4 of Article 46 of the Implementing Regulations when it was impossible to hold the first vote. The court stated that this paragraph did not provide a basis for the petition since voting had already occurred. The First Circuit of the Dammam Commercial Court also aligned with this reasoning in Decision No. 214 of 2020, thereby affirming the consistency of these principles in this jurisdiction and elsewhere.

5) *Debtor's Cease to Manage Assets Supersedes the Requirement for Temporary Seizure of Assets in His Custody or Held by Third Parties*

One consequence of commencing liquidation is the loss of the debtor's legal authority to manage and decide the fate of the property, which is transferred to the bankruptcy trustee. This is outlined in Bankruptcy Law Articles 96, 100, and 210, the Bankruptcy Law Implementing Regulations Article 5, and the Regulatory Rules for Trustees and Experts' Work Article 27. Accordingly, when the bankruptcy trustee petitioned the Circuit to issue an order of precautionary attachment of the debtor's property in his possession or with third-party debtors under Article 96 of the Bankruptcy Law, which authorizes the court to take precautionary measures against the debtor, Judicial Decision No. 1879 of 2021 from the Ninth Circuit of the Riyadh Commercial Court stated that once liquidation procedures are initiated, the law strips the debtor of asset management and appoints a trustee; these procedures give the trustee control over the debtor's assets without the need for the precautionary attachment outlined in Article 100 of the bankruptcy law.

6) *Debtor's Debts Arising After the Expiration of a Commercial Activity License*

Any natural debtor is subject to bankruptcy law if they meet statutory requirements, such as having a valid commercial activity license. This requirement helps verify whether the debtor is engaged in a lawful business and protects creditors. The need for this requirement is clearly explained by Judicial Decision No. 195 of 2021 of the Fourth Circuit of the Jeddah Commercial Court, which states that the debts in question were incurred after the commercial activity license had ceased to be active. The debtor's conduct was considered inconsistent with protecting regulatory interests and creditors' funds and therefore lacked good faith. According to Article 99 of the bankruptcy law, the court may dismiss the petition for the debtor's misconduct and failure to comply with the applicable regulations. This decision demonstrates that the court continues to support regulatory requirements and protect creditors' interests.

7) *Enforcement Court Decision Mandating Debt Payment Does Not Constitute Payment Notification nor Substitute for Creditor's Demand to Debtor*

A procedural requirement for starting bankruptcy proceedings is the creditor's official request for payment, following the specified legal process. Other activities, even if recognised by official entities like an enforcement court, do not serve as valid substitutes. Therefore, Judicial Ruling No. 826 of 2021 and Ruling No. 3262 of 2020, issued by the First Division of the Commercial Court in Dammam, stress the importance of adhering to the

legal notification process. This process requires the creditor to provide documented proof requesting the debtor to pay the debt at least 28 days before submitting the formal request to start the procedure. The decision was based on Article 93 of the bankruptcy law and Article 48 of its implementing regulations.

8) *Permissibility of Plaintiff's Withdrawal of Bankruptcy Procedure Commencement Petition*

One of the principles of bankruptcy is that filing for it is optional, not mandatory. Therefore, bankruptcy proceedings can be initiated by a debtor, a creditor, or any interested party, and the petition can be modified or withdrawn based on the petitioner's or interested party's situation or needs. This principle is demonstrated by judicial decision No. 660 of 2021, issued by the Ninth Circuit of the Riyadh Commercial Court, in which a creditor requested the initiation of liquidation procedures and, a few weeks later, withdrew its petition. The court approved the petition's withdrawal under Article 92 of the Civil Procedure Law. This decision confirms that bankruptcy matters are discretionary, and a petitioner has the right to halt the process if they choose to do so.

7 CONCLUSIONS

This study provides a comprehensive analysis of the judicial application of bankruptcy law within Saudi courts, delineating the adjudicative approaches to insolvency and commercial disputes. Judicial interpretation serves as a critical mechanism in dispute resolution, and this research highlights its pivotal role in elucidating the practical implementation of statutory provisions. The codification of Saudi legal sources into binding, systematically structured articles has significantly enhanced procedural applicability and fostered standardized judicial reasoning. Consequently, the key findings underscore the critical importance of uniform statutory application and the indispensable role of specialized bankruptcy courts in promoting procedural efficiency and adjudicative consistency.

Based on these findings, this study advances the following recommendations:

- 1) Established judicial interpretations of the Bankruptcy Law and its implementing regulations should be formally integrated into future legislative amendments. This will ensure alignment between statutory objectives and actual adjudicative practice.
- 2) The Supreme Court should leverage the unified judicial application of the Bankruptcy Law to issue authoritative bankruptcy principles. These principles would establish binding precedents for emerging cases and serve as an essential doctrinal guide for legal practitioners and scholars.
- 3) The bankruptcy framework should undergo systematic and regular revisions to remain responsive to evolving economic realities, market conditions, and novel judicial precedents.

- 4) The sustained publication and widespread dissemination of bankruptcy-related court decisions across multiple official channels must be prioritized to clarify the applicable law and promote jurisprudential predictability.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАКТИКА ЗАКОНОДАВСТВА ПРО БАНКРУТСТВО В СУДАХ САУДІВСЬКОЇ АРАВІЇ

Ахмед Фагехі

АНОТАЦІЯ

Вступ. Останніми роками спостерігається зростання інтересу до законодавства про банкрутство як усередині країни Королівства Саудівська Аравія, так і в усьому світі. Значним і конкретним кроком у масштабніших правових та економічних змінах у Королівстві Саудівська Аравія стало ухвалення закону про банкрутство у 2018 році.

Ключовим є розуміння того, як ці відносно нові правила застосовуються в судах Саудівської Аравії, оскільки це дає уявлення про практику, яку повинні враховувати компанії, що прагнуть вийти на ринок Королівства, та науковці, що вивчають комерційне право. У цій статті досліджується, як законодавство про банкрутство реалізується в практиці судів Саудівської Аравії, та окреслюються стратегії, які використовують саудівські судді для його тлумачення та застосування під час вирішення спорів.

Методи. У дослідженні використовується індуктивний та аналітичний підходи для вивчення судової практики та рішень згідно із законодавством Саудівської Аравії про банкрутство. Ці методи дозволили зібрати та систематизувати відповідні матеріали справ про банкрутство, що зберігаються на Судовому науковому порталі, які були переглянуті вищими судовими органами. В результаті було розділено справи про банкрутство на дві окремі групи, які зфокусовані на процесуальних та матеріальних питаннях і спираються на систему, що лежить в основі Закону Саудівської Аравії про банкрутство. Перевагою такого підходу є те, що в результаті узагальнюються обґрунтування як у процесуальній, так і в матеріальній сферах, для подальшого застосування під час розробки рекомендацій.

Результати та висновки. Проведене дослідження судової практики в справах, що розглядаються в судах Саудівської Аравії, підтверджує важливість єдиних підходів до застосування судами законодавства про банкрутство та вирішальну роль спеціалізованих палат з питань банкрутства у сприянні процесуальній ефективності. У дослідженні підкреслюється, що єдині підходи до застосування судами законодавства про банкрутство мають бути відображені в майбутніх реформах для забезпечення узгодженості із судовим тлумаченням та цілями правової системи країни. Результати дослідження демонструють, що продовження публікації судових рішень у справах про банкрутство сприяють належному застосуванню чинного законодавства та більш ефективному процесу вирішення справ про банкрутство.

Ключові слова. Саудівське законодавство, спеціалізована судова система, тлумачення права, подвійне судочинство, застосовне право, матеріальні та процесуальні положення про банкрутство.

ABSTRACT IN ARABIC*

مقال بحثي

المعمول به في قضاء الإفلاس السعودي

أحمد حسين أحمد فقيهي

الخلفية:

الأحكام التي تصدرها المحاكم المختصة في النزاعات الناشئة عن تطبيق نظام الإفلاس ولوائحه، تقوم في الأساس على اجتهاد من قضاة تلك المحاكم في تنزيل الملائم من نصوص النظام على القضايا والنزاعات المعروضة.

وذلك الاجتهاد القضائي في تنزيل النصوص على النزاعات أو في تفسيرها قبل تنزيلها على الوقائع، يمكن أن يعتمد عليه ووصفه بالتفسير الواقعي لأحكام النظام، والاستئناس به كسوابق قضائية فيما قد يجد من نزاعات ونوازل ذات علاقة بالنظام ولوائحه.

وحيث إن معرفة المعمول به يحتاج إلى جمع وإطلاع على الأحكام القضائية المنشورة ثم تحليلها واستخراج المتكرر منها، لذا جاء هذا البحث ليعرض بعضاً من مما استقر قضاء الإفلاس السعودي على الأخذ به تجاه النزاعات الناشئة عن تطبيق النظام ولوائحه، سواء في الجوانب الشكلية والإجرائية أو في الجوانب الموضوعية مع التركيز على الأحكام التي غاب تفسيرها في لوائح النظام أو كان تفسيرها محل اختلاف واجتهاد.

المنهجية:

يعتمد البحث على المنهج الاستقرائي والتحليلي وذلك من خلال جرد الأحكام القضائية المنشورة في موقع البوابة العلمية القضائية، واستخراج المواد التي تشابه حكم القضاة فيها، وجمع مستندهم في أخذهم بتلك الأحكام.

*. The publication metadata in Arabic is presented as submitted by the authors.

يلي ذلك حصر المواد التي تكرر الحكم بمقتضاها في عدة سنوات، لكي يتم الاعتماد على المتأخر منها تاريخياً، لكونه أقرب للمراجعة أو التأييد من قبل الدرجات القضائية العليا.
وأخيراً تصنيف المواد الشكلي منها والموضوعي وفق تقسيم النظام مع مراعاة التقسيمات القضائية.

النتائج والاستنتاجات

يمكن تلخيص نتائج البحث فيما يلي:

المعمول به أو ما جرى به العمل في قضاء الإفلاس يراد به معرفة التطبيق القضائي على النزاعات والمخالفات الناشئة عن تطبيق أحكام نظام الإفلاس ولوائحه.
ومعرفة المعمول به يفيد في إدراك نصوص النظام وأهدافه من خلال تفسير وتطبيق السلطة القضائية لتلك النصوص وإنفاذها في الواقع.
وحيث إن كثيراً من الأحكام القضائية منشورة في البوابة العلمية القضائية التابعة لوزارة العدل؛ فذلك يساعد المهتمين على استشراف الأحكام القضائية على نوازل الإفلاس المستقبلية.
حرر النظام المصطلحات المهمة المتعلقة بالإفلاس، كالإفلاس والمدين والمفلس ونحوها، ونص على تعريفها وإيضاحها في المادة الأولى من النظام، دفعاً للاختلاف الذي قد ينشأ أثناء إطلاقها على أشخاص الإفلاس، وتسهيلاً للجهات التنفيذية والقضائية في إنفاذ الأحكام.
واستكمالاً للجهود التنظيمية المتميز في إصدار النظام وفق احتياجات المجتمع وتطلعات المستقبل، عمدت السلطة القضائية لإكمال المسيرة بتخصيص دوائر قضائية مختصة بالإفلاس والنظر في نزاعاته تحت مظلة المحاكم التجارية، ثم اتبعت ذلك بقواعد إجرائية تنظم العمل في تلك الدوائر.
المعمول به في قضاء الإفلاس يركز على حصر ما استقر الاجتهاد القضائي على العمل به سواء في الإجراءات الشكلية التي جرى العرف القضائي على اعتبارها والتأكد من استكمالها أولاً قبل النظر في موضوع النزاع أو المخالفة.
ونظراً لتعدد دوائر الإفلاس في عدد من مناطق المملكة، مما قد ينتج عنه اختلاف في وجهات النظر، لذا كان التركيز على القضايا التي نالت الاعتماد والمصادقة من قبل أعلى درجة قضائية في قضاء الإفلاس وهي دوائر الاستئناف في المحكمة التجارية بالرياض.

التوصيات

تعاون السلطتين التنظيمية والقضائية في الاستفادة من الاجتهاد القضائي الناشئ من الفصل في منازعات نظام الإفلاس ولوائحه في تعديل النظام وتطويره بما يتوافق مع متطلبات الواقع وتطلعات المستقبل.

استكمال السلطة القضائية مشروعها في نشر الأحكام القضائية المتعلقة بالإفلاس ولوائحه ليعم الاستفادة منها في معرفة المعمول به قضاءً وإدراك التفسير القضائي لنصوص النظام، ويستشرف من خلالها الأحكام القضائية في النوازل المستقبلية.

مبادرة المحكمة العليا لإصدار مبادئ قضائية متعلقة بالإفلاس وأحكامه في ضوء السوابق القضائية الناشئة عن تطبيق نظام الإفلاس ولوائحه.

:الكلمات المفتاحية

المعمول به قضاء، الإفلاس، نظام الإفلاس، السلطة القضائية، ما جرى به العمل

Research Article

OBJECTIVE LIABILITY IN THE JORDANIAN CIVIL CODE AND ISLAMIC JURISPRUDENCE: A COMPARATIVE STUDY

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and Khaldoun Said Saleh Qtaishat

ABSTRACT

Background: This study examines the position of the Jordanian Civil Code (JCC) regarding the adoption of objective liability in the context of non-contractual liability, and the extent to which this legal regulation has been influenced by the provisions of Islamic jurisprudence and contemporary Western legislation, with the French Civil Code (FCC) as a model.

Method: The research adopted descriptive, analytical, and comparative methodologies, analyzing the provisions of the JCC and comparing them with those of the FCC to determine the extent to which the concept of objective liability is embodied in both legal systems.

Results and Conclusions: The research demonstrated that liability in tort in Jordanian law has an objective character that focuses on compensating for the damage suffered by the injured party rather than evaluating the conduct of the person causing the act (the element of fault), and that the JCC has consolidated

this characteristic through the concept of “causing harm” and the liability of the direct perpetrator and the person causing the harm. Objective liability also takes multiple forms, such as the liability of the keeper of things and the principal for the acts of his subordinates. This legal regulation approximates the FCC’s approach in some respects and differs from it in others, particularly regarding liability forms. The research recommends developing judicial jurisprudence to address damages arising from the use of modern technological means, such as artificial intelligence tools, and amending legal provisions to address the objective character of liability and expand the scope of compensatory protection.

1 INTRODUCTION

Objective liability, also called “liability by operation of law” and “presumed liability”¹ is a term used recently to indicate cases in which the existence of fault on the part of the person causing the harm is not required to establish their liability.² Liability is determined by objective questions regarding the search for a causal link, without assessing the conduct of the person causing the harm. Thus, objective liability differs from tortious liability in its traditional concept, as established in French law, which is based on fault.³ For personal fault-based liability to arise, three conditions must be fulfilled: fault, damage, and a causal link.⁴ The strictness of objective liability is not limited to the absence of a fault requirement on the part of the person causing the harm; it is also reflected in the defenses against such liability.⁵ This liability, in all its forms, cannot be avoided except by proving a foreign cause that satisfies the conditions of force majeure.⁶

The emergence of the concept of objective liability in French law and in some European laws is regarded as a means of addressing the many shortcomings resulting from the establishment of tortious liability on the basis of fault, in light of the complexity of contemporary economic and technological activities and the risks they have produced,

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- 1 Mauro Bussani and Anthony James Sebok (eds), *Comparative Tort Law: Global Perspectives* (2nd edn, Edward Elgar Publishing 2021) 469, doi:10.4337/9781789905984.
 - 2 Raphaël Briguët-Lamarre, ‘La responsabilité de plein droit (ou “objective”)’ (*Aide-aux TD*, 9 March 2026) <<https://aideauxtd.com/responsabilite-de-plein-droit/>> accessed 12 March 2026.
 - 3 *ibid*
 - 4 Mahmoud I Fayyad and Ahmad M Hayajneh, ‘Reconsidering the Special Rules of Mitigation of Damages for Breach of Contract for the Sale of Goods in UAE Law’ (2022) 38(1-2) *Arab Law Quarterly* 80, doi:10.1163/15730255-bja10101.
 - 5 Mona Munir Mohammed Ali Al-Sharida, ‘The Limits of Recompense in the Contractual Liability in Jordanian Civil Law’ (2024) 18(4) *Revista de Gestão Social e Ambiental* e06462, doi:10.24857/rgsa.v18n4-111; Mahmoud M Dodeen, ‘Compensability of Moral Damage in Islamic Contract Law: A Comparative Analysis of the Palestinian, Jordanian and Qatari Civil Codes’ (2019) 34(2) *Arab Law Quarterly* 167, doi:10.1163/15730255-12341041.
 - 6 Briguët-Lamarre (n 2).

which are often difficult to attribute to specific personal fault.⁷ Moreover, placing the burden of proving fault on the injured party effectively undermines his right to compensation, in a manner inconsistent with the requirements of corrective justice and the protection of the weaker party in the legal relationship.⁸

The Jordanian Civil Code (JCC)⁹ addressed non-contractual (tortious) liability in the part devoted to sources of obligation, under the title 'harmful act' (Arts. 256 to 292). With regard to the nature and basis of this liability, it is noted that the JCC adopted an objective concept similar to the concept generally established by Islamic jurisprudence.¹⁰ Although the JCC did not use the term "objective liability," the idea of this liability has been embodied in it since its enactment, in a clearer and more precise manner than in French law.

This can be attributed to the fact that the law, passed in 1976, did not use the term 'fault' or treat it as a basis for non-contractual liability. It explicitly provided for the possibility of such liability even where the person causing the damage lacks discernment (Art. 256). This position can be explained by the fact that it draws primarily on Islamic jurisprudence and the principles of Islamic Sharia, under which non-contractual liability aims, in the first place, to ensure that every injured party obtains compensation that repairs the damage inflicted upon him without lawful justification.

This study examines the extent to which the JCC adopts the objective concept of non-contractual liability developed by French jurisprudence and legislation, or whether it embodies a distinct concept of this liability and, if so, what its scope is. To answer this question, the study examines the relevant legislative provisions in the JCC and compares them with those in the French Civil Code (FCC),¹¹ which serves as a model of European legislation. In contrast, the study will not address cases of objective liability covered by special legislation or by French case law, with the aim of contributing to the improvement and development of the relevant provisions of the JCC.

Achieving the objectives of this research first requires analyzing the position of French law as a model of European legislation for regulating this liability (Section One). The research then proceeds to examine the JCC to determine the extent to which it adopts the objective concept of non-contractual liability, which is reflected in the foundation of liability on the

7 Ahmet Akman, 'Ücret İle Tazminat Sorumluluğu Birlikteligi' (2022) 26(1) Cumhuriyet İlahiyat Dergisi 45, doi:10.18505/cuid.1058871.

8 Philippe Pierre, 'La Place De La Responsabilité: Notion Et Rôle De La Faute En Droit Français' (2010) 23(4) Revue Juridique de l'Ouest 403, doi:10.3406/juro.2010.4149

9 Jordanian Law No 43 of 1976 'Jordanian Civil Code (JCC)' (adopted 1 January 1977) <<https://www.eastlaws.com/legislation-full-text/ar/jordan/law/01-08-1976/no-43?type=1&id=74782>> accessed 10 December 2025.

10 *Explanatory Memorandum of the Jordanian Civil Code, Law No 43 of 1976* (Jordan Bar Association 2000) 75.

11 French Civil Code of 1804 'Code civil' (FCC) (amended 1 December 2025) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/> accessed 10 December 2025.

idea of damage (Section Two), and the incorporation of this concept in the legislator's regulation of personal liability in both direct liability and liability for causing damage, as well as certain forms of liability for non-personal acts (Section Three).

2 OBJECTIVE LIABILITY IN EUROPEAN LEGISLATION: THE FRENCH MODEL

Historically, liability in tort in the Latin legal system, represented by the FCC of 1804 as amended by Decree No. 131 of 2016, and by the legislation of Arab states that derived their provisions from this Code, was founded on fault in its personal sense, whether intentional or merely negligent, and lack of due care. This approach was justified primarily by considerations of justice and societal values, on the basis that whoever commits a fault must bear its consequences by paying compensation.¹² Thus, this legislation gave precedence to the individual's interest in acting freely over his interest in living in security, and prioritized sanctioning the person at fault over ensuring that the injured party obtains compensation that makes good the damage suffered. The idea of fault as the basis of tortious liability, although initially widely accepted, did not retain the position it had long enjoyed. One began to witness its retreat, and this decline is attributed to the lack of harmony between the standard upon which this liability was based and to doubts regarding the necessity of such a standard, particularly where it is impossible to determine the fault of the person causing the harm.¹³

2.1. Fault as the Basis of Tortious Liability

From a theoretical perspective, jurists have differed in their definitions of fault. Previously, French jurist Planiol defined fault as "the breach of a pre-existing obligation," while French jurist Carbonnier defined it as an unlawful act.¹⁴ However, both definitions were criticized for conflating civil liability and criminal liability, which is based on the principle that "there is no crime and no punishment except by law." Consequently, the prevailing view in jurisprudence has held that the concept of fault should not be limited to the violation of obligations; it must be defined by a general standard, leaving the judge with the authority to assess whether the harmful act amounts to fault.¹⁵

The material element of fault includes any illegal behavior that constitutes a violation of a duty owed or an infringement of others' rights. In general, it encompasses any deviation from the conduct of the average person, whether by exceeding the limits of what the actor

12 Briguet-Lamarre (n 2).

13 Husayn Amir, *Civil Liability, Tortious and Contractual* (Misr Press 1956) 168 [in Arabic].

14 Pierre (n 8) 403.

15 Yvonne Lambert-Faivre, 'L'évolution De La Responsabilité Civile, D'une Dette De Responsabilité À Une Créance D'indemnisation' (1987) 1 *Revue trimestrielle de droit civil*.

was obliged to observe or by failing to perform an act they were required to perform.¹⁶ The moral element refers to conscious intent or awareness; it requires that the person causing the harm possess awareness and discernment,¹⁷ which is necessary to achieve the punitive function of fault-based liability.¹⁸ Although this concept of fault initially seemed clear, its practical application yielded illogical results, particularly concerning the moral element of fault.¹⁹ Consequently, jurisprudence began referring to the movement of “civil liability localization”, indicating the abandonment of the fault element, which represents a fundamental change in the philosophy and objectives of establishing this liability.²⁰

The early signs of this movement emerged when leading French jurists, most notably the eminent jurist Starck, adopted the idea of ‘objective fault,’²¹ developed by Professors H and L Mazeaud in the 1960s.²² Starck also laid the foundation for the theory of guarantee (La théorie de la garantie), according to which non-contractual liability is not based on the idea of punishment or sanction, as in the fault theory, but rather on ensuring the protection of individuals’ fundamental rights, particularly their right to the integrity of their bodies and property. Every person has a right to safety and security, and any infringement of this right gives rise to a legal obligation to guarantee compensation for the damage, regardless of whether fault is established. The French legislator also codified this idea, albeit as an exception and with limited scope, when establishing liability for the mentally impaired under Article 414/3 of the Civil Code. Furthermore, the French Court of Cassation embraced this idea when it ruled that the trial court is not obliged to investigate whether a minor is capable of discernment to determine the liability of the minor's parents for the minor’s harmful acts.²³ Subsequently, the jurisprudence of the French Court of Cassation expanded to establish the objective character of objective liability under existing provisions, particularly paragraph one of Article 1242 of the Civil Code, which governs liability for acts of others, and several special laws were enacted to regulate certain forms of objective liability.²⁴

16 Jacques Flour, Jean-Louis Aubert and Eric Savaux, *Droit Civil: Les Obligations*, t 2: *Le Fait Juridique* (7th edn, Armand Colin 1997) 84.

17 Ahmad M Al-Badawi, ‘Scope of Civil Liability for Environmental Damage in Jordanian Legislation’ in Haitham M Alzoubi, Yuvaraj Ganesan and Daher R Alqurashi (eds), *Strategies for Environmental Risk Management: Challenges and Solutions (SERM)* (Springer 2025) 141, doi:10.1007/978-3-031-90534-6_16.

18 Abd al-Razzaq Al-Sanhuri, *Al-Wasit in the Explanation of Civil Law: The Theory of Obligations and the Sources of Obligations*, vol 1 (3rd edn, Manshurat al-Halabi al-Huquqiyyah 1993) 796 [in Arabic].

19 Hassan Ali Al-Dhanoun, *Al-Mabsut on Civil Liability: Fault* (Without Publisher 2001) 143 [in Arabic].

20 Boris Starck, *Essai D’une Théorie Générale de la Responsabilité Civile Considérée en sa Double Fonction de Garantie et de Peine Privée* (Librairie Rudesienne 1947) 7.

21 *ibid*

22 Henri Mazeaud, Léon Mazeaud and André Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle*, t 3 (3e éd, Montchrestien 1998) 416.

23 *Arrêt Fullenwarth* No 83-12.235 (Cour de Cassation, 2e civ, 14 Déc 1984).

24 Pierre (n 8) 403-4.

2.2. Objective Liability in Civil Law Systems

French civil law is currently preparing substantial reforms to the rules of civil liability, aimed at completing the broader process of its fundamental modernization. This modernization movement began with Decree No. 131/2016 and the law confirming it, issued in 2018, both of which relate to contract law and the rules of evidence. However, this reform did not affect the core principles governing civil liability and was limited to certain formal amendments. The most notable of these is that, since 2016, the French legislator has abandoned the term ‘tort liability’ in favor of ‘non-contractual liability,’ thereby ending the confusion between its criminal and civil dimensions and giving precedence to the latter.²⁵ Several draft reforms have been prepared to amend the provisions on non-contractual liability in French civil law, with the aim of achieving a clearer, more predictable law, improving the handling of victims’ situations, and preventing unlawful conduct, thereby enhancing legal certainty and developing the functions of civil liability. The most recent of these initiatives was the draft amending law on the civil liability system and the improvement of compensation for victims, No. 1829 of 2025,²⁶ which is considered an extension of the Civil Liability Reform Bill (PLRRC Urvoas) submitted to the French government in 2017. This draft is referred to in the study as one of the most significant proposed aspects of modernizing the traditional rules of civil liability, and it reflects the accumulated doctrinal and judicial efforts to analyze and refine French civil law over more than two centuries.

The FCC’s position in establishing the objective character of non-contractual liability is consistent with modern European trends. The theory of civil liability in European legal thought has undergone a profound structural transformation, marked by a shift from a traditional model based on the centrality of fault to a modern model grounded in the “theory of risk” as an independent basis of liability alongside fault. This is clearly reflected in the general European systems of civil liability, which have influenced certain national legislations.²⁷ By virtue of this transformation, fault is no longer a necessary condition for liability in all its forms.

Instead, multiple models of objective liability have been recognized that arise solely from the occurrence of damage and the existence of a causal relationship, without requiring proof of wrongful conduct by the person held liable.²⁸

25 Muhammad Al-Khatib, ‘Future Prospects for the Principle of the Unity of Civil Liability in Modern French Civil Law: A Reading of the Philosophy of the Draft Law on Reforming the Theory of Liability (PLRRC Urvoas 2017): An In-Depth Analytical Study’ (2020) 31(3) Kuwait International Law School Journal 304 [in Arabic].

26 Assemblée nationale, Proposition de Loi no 1829 ‘Réformer le régime de la responsabilité civile et à améliorer l’indemnisation des victimes’ (16 September 2025) <https://www.assemblee-nationale.fr/dyn/17/textes/117b1829_proposition-loi> accessed 10 December 2025.

27 Pierre (n 8) 405.

28 Christian von Bar and others, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier 2009) 292.

The theory of objective liability has resulted in several forms of tortious liability, such as liability for damage attributed to a source of risk under the control of a particular person; liability for damages caused by materials or emissions of special risk; objective liability for damages arising from motor vehicles; liability for damages caused by animals; and liability arising from buildings and structures.²⁹ These forms exist in the theory of risk and include a person's liability for damages arising from persons or things under his actual authority or control, without requiring proof of personal fault. The primary objective of civil liability under this framework is to repair the damage and restore social balance, not to punish the person causing the harm.³⁰ This trend also appeared in the Principles of European Tort Law (PETL),³¹ where objective liability is based on bearing the consequences of damage resulting from an abnormal risk, regardless of proof of fault. The principles emphasize that the injured party need not always prove fault.³² Also, these principles recognized several forms of objective liability, including liability for activities of an abnormally dangerous nature and liability for inherently dangerous things and activities

On the other hand, the Council of Europe played a pivotal role in formulating influential European standards through the interpretation and application of the European Convention on Human Rights³³ by the European Court of Human Rights (ECtHR). According to ECtHR case law (2021),³⁴ these standards led to a reorientation of the concept of civil liability from its traditional fault-based logic toward a functional logic focused on repairing damage and ensuring effective compensation for victims. The shift prioritizes effective compensation and fairness to the victim, especially when fault-based liability is difficult to establish. The standards of the Council of Europe favor objective liability to enhance compensatory justice and protect rights, ensuring appropriate redress, particularly where risks are high or proof is complex.³⁵

Also, the ECtHR has adopted a functional standard for attributing liability, based on control, regulation, or supervision of the source of risk. In cases involving serious risks or regulatory failures, liability is attributed to the entity that possesses actual authority over the activity or the relevant field, even in the absence of proof of individual fault.³⁶ The Court's jurisprudence has also established that compensation aims to repair actual harm, not to punish or award punitive damages.³⁷ This is also reflected in the European Court of Human

29 ibid 205.

30 ibid 120-3.

31 Francesco D Busnelli and others, *Principles of European Tort Law: Text and Commentary* (Springer 2005) doi:10.1007/3-211-27751-X.

32 ibid 120.

33 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).

34 ECtHR, *Overview of the Court's Case-Law 2021* (Council of Europe 2022).

35 Veronika Fikfak, 'Changing State Behavior: Damages Before the European Court of Human Rights' (2018) 29(4) *European Journal of International Law* 1091, doi:10.1093/ejil/chy064.

36 ECtHR, *Case-Law Overview 2024* (Council of Europe 2025).

37 ibid

Rights' interpretation and application of Article 41 of the European Convention on Human Rights concerning "just satisfaction".

At the level of European national legislation, non-contractual liability under the German Civil Code (BGB)³⁸ is generally based on fault, unlike in French law. Under German law, unlawfulness is considered an independent element of liability rather than a constituent of fault. The German legislator grants the judge less discretionary power in determining fault, as it did not establish a general principle of non-contractual liability comparable to Article 1242 of the FCC; instead, it specified certain forms of this liability through particular provisions (Sections 823 et seq. BGB). However, the German legislator departed from this rule and regulated certain special forms of objective liability, such as the liability of the keeper of an animal not used for a profession or economic activity, which is based on the theory of risk. Several forms of objective liability also appear in other special laws, such as the Railway Law, the Road Traffic Law, the Aviation Law, the Environmental Liability Law, and the Nuclear Energy Law (Sections 833 et seq. BGB).

3 THE OBJECTIVE NATURE OF LIABILITY IN JORDANIAN LAW

Unlike some Arab legislation derived from French law, the JCC established non-contractual liability for "harm" (Idrar) rather than for fault (Art. 256), thus reflecting the philosophy of Islamic jurisprudence. What, however, is the meaning and notion of the harm as the basis of liability for a harmful act in the JCC, and when does this description not apply?

3.1. Harm (Idrar) as the Basis of Liability in the JCC

Scholars of Jordanian civil law differ regarding the legal basis of liability for a harmful act. Some commentators considered damage (Darar) as the basis of this liability,³⁹ while others considered fault as the basis of this liability.⁴⁰ Although the Jordanian Court of Cassation has affirmed the second view in some of its decisions,⁴¹ the prevailing opinion considers

38 German Civil Code 'Bürgerliches Gesetzbuch' (BGB) (amended 1 December 2025) <<https://www.gesetze-im-internet.de/bgb/>> accessed 10 December 2025.

39 'Abd al-'Aziz Al-Lassasmeh, *Non-Contractual Civil Liability: The Harmful Act* (Dar al-Thaqafah 2002) 55-7 [in Arabic]; Muhammad Suwwar, *General Trends in the Jordanian Civil Law: A Comparative Study with Islamic Jurisprudence and Arab Legal Codes* (Dar al-Thaqafah lil-Nashr wa al-Tawzi' 1996) 133 [in Arabic].

40 Israa Mustafa Muhammad Bani Mustafa and Muhammad Awad Ayed Al-Sukkar, 'The Study's Savior: The basis of Responsibility for the Harmful Act between Islamic Jurisprudence and Jordanian Civil Law' (2021) 8(1) *Journal of the Al-Mizan Institute of Legal Studies* 426 [in Arabic]; Muhammad Siraj, *Liability for Unlawful Aggression in Islamic Jurisprudence: A Comparative Juristic Study with the Rules of Non-Contractual Liability in Law* (Dar al-Thaqafah lil-Nashr wa al-Tawzi' 1990) 47 [in Arabic].

41 Civil Appeal No 1696 [1999] Court of Cassation (Jordan); Civil Appeal No 619 [2004] Court of Cassation (Jordan); Civil Appeal No 263 [2010] Court of Cassation (Jordan).

harm (Idrar) as the basis of this liability.⁴² This view aligns with the wording of the JCC, its explanatory memoranda, its origins in Islamic jurisprudence, and the principles of Sharia.

Harm is an objective element, not linked to the behavior of the person causing it, unlike the FCC, which established non-contractual liability on fault (Art. 1240), thereby founding the personal theory. It is noted that the Jordanian legislator did not define this term. Nor did it define what is meant by the term 'harm.' The philosophy of civil liability in Islamic jurisprudence and the JCC provisions indicate that harm refers to unlawful acts and omissions, as inferred from the JCC's explanatory memoranda and its commentators.

3.1.1. Harm in the Explanatory Memoranda of the JCC

The explanatory memoranda of the JCC began their commentary on Article 256 by noting that any act causing harm to others demands compensation, and the source of this rule is the Majalla al-Ahkam al-Adliya (the Majalla) (Arts. 19, 20, & 53).⁴³ These memoranda defined the elements of liability for a harmful act as harm, damage, and the causal link, indicating that harm refers to the act or omission that causes the damage.⁴⁴ This explanatory memorandum also emphasized that using the word "harm" is due to the legislator's preference for this term over other terms used in some legislation and by some jurists, such as "unlawful act," "act contrary to the law," or "act prohibited by law," because it is impossible to exhaustively specify the acts that meet this description. This approach leaves matters of harm to the judiciary, given the general obligation on all persons not to cause harm to others.

After establishing this rule, the explanatory memoranda indicated that harm means either exceeding the limit that should have been observed or falling short of the limit that should

42 Ahmad Al-Hayari, *Non-Contractual Liability for the Acts of Others: A Critical, Analytical, and Historical Comparative Study with the Jordanian Civil Code and the French Civil Code* (Dar Wa'il 2003) 40-4 [in Arabic]; Yasin Al-Juburi, *The General Theory of Obligations and Personal Rights*, vol 1 (Dar al-Thaqafah lil-Nashr wa al-Tawzi' 2023) 322 [in Arabic]; Adnan Al-Sarhan and Nuri Khater, *Commentary on the Civil Law: Sources of Personal Rights (Obligations): A Comparative Study* (6th edn, Dar al-Thaqafah lil-Nashr wa al-Tawzi' 2006) 357-66 [in Arabic]; Sulayman Marqus, *Al-Wafi in the Explanation of the Civil Law: On Obligations, Tortious Acts, and Civil Liability* (Without Publisher 1992) 103 [in Arabic]; Yusuf 'Ubaydat, *Sources of Obligation in Civil Law* (Dar al-Thaqafah lil-Nashr wa al-Tawzi' 2021) 277 [in Arabic].

43 The *Majalla al-Ahkam al-Adliyyah* is a collection of legal rules comprising sixteen books, the first of which concerns sales and the last judicial matters. The final edition was issued during the Ottoman Caliphate in Sha'ban 1293 AH (1876 CE). Alongside its function as a codification of Islamic jurisprudence, it also regulated civil and personal status matters for all religions and sects within the Ottoman Empire. It remains in force in some Arab countries, such as Palestine and Jordan, provided it does not conflict with the Jordanian Civil Code, and continues to serve as a reference for jurists, lawyers, and judges.

44 Omar Erekat, 'The Legal Regulation of the Civil Liability Insurance Contract for the Arbitrator in Palestinian Legislation' (2025) 39(7) An-Najah University Journal for Research - B (Humanities) 493, doi:10.35552/0247.39.7.2397.

have been reached, whether by action or omission, resulting in damage regardless of the nature of the act or the intention of the person who committed it. In explaining the requirement of the connection between the harmful act and the object of harm, the memoranda described the harmful act as an “unlawful act”, citing the Prophetic hadith: “No harm and no reciprocating harm.”

3.1.2. Harm According to JCC Commentators

Some jurists⁴⁵ inferred from the explanatory memoranda that, by “harm,” the lawmaker intended the concept of transgression. This view does not align with the provisions of the JCC, as Article 256 of this Code considers harm as the basis of liability in all cases. Also, Article 257 distinguished two types of harm: direct (Mubashir) and causative (Mutasabbib), and considered transgression as one form of causative harm.⁴⁶ On the other hand, some jurists defined harm as “causing damage as a result of an unlawful act or causing it in a manner contrary to the law.”⁴⁷ The Court of Cassation also adopted this view, relying in its judgments on the wording of the explanatory memoranda.⁴⁸ The authors believe that this view is consistent with the philosophy of liability for a harmful act and the principles underlying it in Islamic jurisprudence. However, it has been criticized for failing to clarify what is meant by the unlawfulness of harm; that is, whether this description applies to the act or omission of the person causing the harm by violating a general rule or statutory provision, or whether unlawfulness refers to the result arising from that act or omission.

Some jurists hold that the unlawfulness of harm is linked to the act or omission causing the damage being a transgression. Consequently, they define harm as “any act that constitutes a transgression beyond the limits of the right assigned, whether by law, custom, or usage, resulting in damage to another’s body, feelings, or property.”⁴⁹ However, this view can be criticized. It began with the act’s unlawfulness in origin and equated custom and usage, so that violating either renders the act unlawful, despite their differences in meaning and scope of obligation. Also, the definition does not include acts that are lawful in their origin but whose results are unlawful, ignoring Article 257, which establishes the liability of the direct doer (Mubashir) without condition, merely for causing damage to others, unless the act is based on a right or permission. The legislator focused on the unlawfulness of the result

45 Muhammad Al-Jundi, *Non-Contractual Liability for Harmful Acts: A Study in Western Jurisprudence, Islamic Jurisprudence, and the Jordanian Civil Law* (Dar al-Thaqafah lil-Nashr wa al-Tawzi’ 2015) 111-21 [in Arabic]; Mustafa Al-Zarqa, *The Harmful Act and the Resulting Liability Thereof* (Dar al-Qalam 1988) 71 [in Arabic].

46 Khudayr Al-‘Isawi, *The Objective Nature of Liability for Harmful Acts in the Jordanian Civil Law* (Master Thesis, Yarmouk University 2016) 11 [in Arabic].

47 Al-Sarhan and Khater (n 42) 18; ‘Ubaydat (n 42) 277.

48 Civil Appeal No 4250 [2004] Court of Cassation (Jordan); Civil Appeal No 321 [1999] Court of Cassation (Jordan).

49 Al-‘Isawi (n 46) 139.

rather than the act itself, as Islamic jurisprudence considers any infringement of others' rights unlawful. Therefore, harm as intended by Article 256 of the JCC is not limited to an inherently unlawful harmful act, but also includes any act that results in damage to others, provided the actor is not exercising a right or permission.⁵⁰

Thus, the JCC resembles the FCC in considering the unlawfulness of the act as the material element of fault on which non-contractual liability is based, while the difference between the two laws lies in the moral element of fault, namely awareness and discernment. However, the gap between the two systems has begun to narrow with recent developments in French civil law and anticipated amendments to its civil liability provisions. French jurisprudence has recognized objective fault, and the French legislator has consolidated this concept in regulating the liability of mentally incapacitated persons. Moreover, the jurisprudence of the French Court of Cassation has affirmed the liability of a minor as a condition for establishing the liability of the parents, regardless of the minor's level of discernment, thereby stripping fault of its moral element.⁵¹ It appears that the French legislator is moving towards consolidating this principle and introducing substantial changes to the role of fault in establishing non-contractual liability, as well as modernizing its concept. The draft law amending the civil liability system and improving compensation for victims (2025) does not restrict the forms of conduct giving rise to non-contractual liability to fault alone.⁵² It also broadened the concept of fault to include any violation of a specific legal obligation or breach of the general duty of care and caution (Art. 1242 of the 2017 draft reform of the liability provisions of the French Civil Code), in a manner similar to the concept of causing harm in the JCC.

3.2. Absence of the Description of Harm

The concept of harm encompasses all harmful acts and omissions that are unlawful. If this characteristic is absent, the harmful act cannot serve as a basis for establishing non-contractual liability under Jordanian law. In this regard, Islamic jurisprudence summarized the cases in which liability does not arise despite damage into three situations: destruction for the repair of bodies and preservation of lives, self-defense, and deterrence.⁵³ Accordingly, the actor's liability does not arise when exercising a right, when the harmful act is permitted, or when it is performed in execution of an order; civil liability also does not arise in cases of legitimate defense, even when there is a dispute over necessity.⁵⁴ Fundamentally, it can be

50 Ali Al-Khafif, *Liability in Islamic Jurisprudence* (Dar al-Fiqh al-Qawmi 2000) 38 [in Arabic]; Wahbah Al-Zuhayli, *The Theory of Liability, or the Rules of Civil and Criminal Responsibility: A Comparative Study* (Dar al-Fikr 2003) 23 [in Arabic].

51 *Arrêt Fullenwarth* (n 23).

52 *Assemblée nationale* (n 26).

53 Al-Zarqa (n 45).

54 'Ubaydat (n 42) 285-7.

said that the act does not constitute harm in the sense intended by Article 256 of the JCC if it does not involve an infringement on the rights of others or if the act is justified by preventing harm to the actor.

3.2.1. Absence of Infringement on the Rights of Others

Infringement of others' rights is considered one of the most prominent forms of unlawful harm; a harmful act does not give rise to liability if it occurs in the exercise of a right or with the authority's or the harmed party's permission.

First: Exercise of a Right: A right is a privilege granted specifically to a person. Based on the Sharia ruling "lawful permissibility negates liability," if the exercise of the right is accompanied by this power within the limits set by law and without abuse, liability does not arise even if the exercise of this right causes damage to others (Art. 91 of the Majalla and Art. 61 of the JCC).⁵⁵ The JCC applies this principle in provisions regulating harmful acts concerning the "right to public safety":⁵⁶ Article 292 provides that exercising a right must not harm the safety of others. A person who exercises their right and causes avoidable damage is liable, establishing a legal principle inspired by Islamic jurisprudence underpinning objective liability.

Second: Permission from the Authority or the Right Holder: A person's disposition of another's property is prohibited by law and Sharia, as it constitutes an infringement on the rights of others. However, an exception to this rule occurs when the disposition is authorized by the right holder or the competent authority.

1) Permission from the Right Holder: A person's inviolability makes infringement on the property or rights of others a basis for liability. However, this rule does not apply when the right holder or owner grants permission, as such permission constitutes a waiver of this inviolability, making the destruction of property or harm to the body lawful,⁵⁷ whether the permission is express or implied, provided that the will of the person granting it is verified (Art. 771 and 772 of the Majalla and Art. 277 of the JCC).⁵⁸ This rule is also justified by the absence of a benefit to imposing liability in such cases,⁵⁹ since the authorized person causing harm may seek reimbursement from the right holder for any payments made under the liability, whether the permission was express or implied.

55 Subhi Al-Mahmassani, *The General Theory of Obligations and Contracts* (3rd edn, Dar al-'Ilm lil-Malayin 1983) 35 [in Arabic].

56 Al-Jundi (n 45) 517-8.

57 Al-Khafif (n 50) 296-7; Al-Mahmassani (n 55) 36; Ahmad Sulayman, *Liability for Destroyed Property in Islamic Jurisprudence* (Matba'at al-Sa'adah 1992) 303 [in Arabic].

58 Al-Jundi (n 45) 521.

59 'Ala' al-Din Al-Kasani, *The Masterpieces of Legal Art in the Arrangement of Islamic Laws* (3rd edn, Dar al-Kutub al-'Ilmiyyah 1986) 168 [in Arabic].

2) The Authority Permission (Wali al-Amr): Permission granted by the competent authority (Wali al-Amr) prevents liability, as the authority has general guardianship over the interests and rights of individuals.⁶⁰ Permission issued by someone without such authority does not remove the harmful character of the act performed under that permission. This principle is reflected in Article 919 of the Majalla, which provides that a person who destroys another's property without the owner's permission due to a fire in the area is liable for the damage caused, unless the destruction occurs pursuant to an order from the competent authority, in which case liability is nullified. This indicates that liability is linked to the lawfulness of the act and the existence of a justification. The JCC does not provide a similar provision: it relies on the rule established in the Majalla, which remains in force in Jordan so long as it does not conflict with the JCC.

3.2.1. Defense of Necessity (Daf' al-Darar)

Liability of the actor does not arise in Islamic and legal jurisprudence in certain cases where the indirect causer (Mutasabbib) is compelled to commit the harmful act to prevent damage (Daf' al-Darar) to themselves or due to the constraint of their will. This scenario applies in the following cases:

First: Execution of an Order Issued by Another: This case includes orders issued by the authority (Wali al-Amr) and orders issued by a coercer. Obedience to authority is mandatory in Islamic jurisprudence unless the order involves committing a sin; if this obedience causes harm to others, the person giving the order is liable. Similarly, if a person is coerced to cause harm to others, the coercer is liable (Daman), provided that the coercion was unavoidable (Art. 1007 of the Majalla and Art. 263 of the JCC).

Second: Legitimate Defense: The Qur'an and the Prophetic Sunnah permit legitimate defense of oneself, one's property, and honor. Allah Almighty said: "So whoever attacks you, then attack him in the same way he attacked you."⁶¹ The Prophet (ﷺ) also said: "Whoever enters a person's house without their permission, it is lawful for them to gouge out his eye". Islamic jurisprudence obliges a person to protect their body, property, religion, mind, and honor and to defend them by means that prevent damage (Daf' al-Darar), to the extent necessary without excess or exaggeration.⁶² However, the JCC emphasizes this right in its Article 262.

Third: State of Necessity: Article 33 of the Majalla established a general rule that the state of necessity does not nullify others' rights. This Article allows the destruction of another's property in cases of necessity without considering the actor a usurper, yet it does not exempt them from liability for the destruction, as permission cannot justify the loss of rights. For

60 Al-Mahmassani (n 55) 177; Sulayman (n 57) 340

61 The Holy Quran, Surah Al-Baqarah: 194.

62 Sulayman (n 57) 343.

example, a person compelled to consume another's property must bear liability for what is consumed, or if one kills a raging camel that threatens their life.⁶³ It is noteworthy that Article 63 of the JCC adopted the principle stated in Article 33 of the Majalla when providing that "compulsion does not nullify the rights of others". Also, Article 222 of the JCC states that "necessities permit what is otherwise prohibited". Therefore, the JCC implicitly recognized the state of necessity, since the tortfeasor is not fully exempt from compensation, but only to the extent of necessity, subject to the discretion of the trial judge.⁶⁴

The above shows the similarity between the JCC and the FCC; the latter has enshrined the inviolability of human beings in Articles 9 to 16, prohibiting any assault on human life or bodily integrity, and any infringement of rights inherent to personality. Similarly, non-contractual liability for causing harm does not arise in French civil law, as in Jordanian civil law, if the act occurs in one of the situations considered by law to justify the act, as provided in Articles 122-4 to 122-7 of the French Penal Code, such as the lawful exercise of a right, an act committed by a subordinate in execution of an order issued by a superior whose orders must be obeyed, a state of necessity, or legitimate self-defense of person or property.⁶⁵

4 CONSOLIDATION OF THE OBJECTIVE CONCEPT OF LIABILITY FOR HARMFUL ACTS

Article 257 of the JCC regulates the forms of harm that give rise to non-contractual liability and the conditions under which such liability arises, and adopts the distinction established by Islamic jurisprudence and the Mejlle between the direct perpetrator of the harm and the person who merely causes it. It states: "1- Harm may occur by direct action or by causation. 2- If it occurs by direct action, liability is established without any additional condition; and if it occurs by causation, liability is conditioned upon transgression or intent, or that the act be conducive to the harm." Thus, unlike the French legislator, who did not distinguish between types of fault as a condition for non-contractual liability, the Jordanian legislator distinguished between several forms of causing harm, which are predominantly objective in nature, as set out in the Majalla (Arts. 887 and 888).⁶⁶ The liability of the direct perpetrator of the harm represents the application of the objective character of liability for the harmful act in the JCC. Likewise, the liability of the person who causes the harm is objective.

63 Ali Haydar, *Durar al-Hukkam: Commentary on the Majalla al-Ahkam al-'Adliyyah*, vol 2 (Dar 'Ilm al-Kutub lil-Tiba'ah wa al-Nashr wa al-Tawzi' 2003) 34 [in Arabic].

64 Al-Sarhan and Khater (n 42) 388-9.

65 Hajer Roudi, 'Une Notion Pénale À L'épreuve De La Responsabilité Civile: Les Faits Justificatifs' (2016) 1(1) *Revue de science criminelle et de droit pénal comparé* 17, doi:10.3917/rsc.1601.0017.

66 Al-Kasani (n 59) 165; Muhammad Al-Tuwaijri, *Encyclopedia of Islamic Jurisprudence*, vol 3 (2nd edn, 1985) 740 [in Arabic].

4.1. Liability of the Direct Doer (Mubashir) for Damage

The liability of the direct doer (Mubashir) for damage illustrates the objective nature of liability for harmful acts in the JCC. This is evident from how the Jordanian legislator organizes this liability. However, before discussing this, it is necessary to clarify the meaning of the direct doer and explain why it is the most prominent application of objective liability in the JCC.

4.1.1. Directness as the Most Prominent Application of Objective Liability

The JCC adopted the objective liability in Article 257, which distinguishes between “direct harm (Idrar bil-Mubasharah)” and “harm by indirect causation (Idrar bi-al-Tasabbub)”; it facilitated establishing the liability of the direct doer (Mubashir) by requiring only the unlawfulness of the act in light of its result, without any other condition.⁶⁷ This rule is derived from the principle “the direct doer is liable even if not intentional or excessive”, as stated in the explanatory memorandum of the Civil Code.

In defining the term “directness (Mubasharah)” in Article 887 of the Majalla, the direct doer of harm is the one who causes the harm directly and personally, with the destructive instrument in direct contact with its object;⁶⁸ the harm is incorporated into the act of the direct doer (Mubashir) and becomes inseparable from it.⁶⁹ Therefore, anyone who causes harm to a person’s body, property, or feelings is considered a direct doer. The direct link between the actor and the harm is sufficient to establish liability, as jurists considered the harmful act itself sufficient. This principle is based on the tradition: “Every Muslim’s life, property, and honor are inviolable” (Sahih Muslim (Muslim), 1991, p. 233).⁷⁰

Regarding the nature of this liability, Article 912 of the Majalla provides that “anyone who damages another’s property, intentionally or unintentionally...is obligated to compensate for the loss,” and Article 92 establishes the liability of the direct doer even if there is no intent. Therefore, liability of the direct doer in Islamic jurisprudence is objective in the sense intended by positive law; once the act causes harm, the direct doer becomes liable for the damage unless this act is based on a legal right.

67 Civil Appeal No 1488 [2005] Court of Cassation (Jordan).

68 Sulayman (n 57) 343.

69 Emile Tyan, ‘Le système de responsabilité délictuelle en droit musulman’ (Thèses, Université de Lyon, Faculté de Droit 1926) 203.

70 Muslim ibn al-Hajjaj, *Sahih Muslim: The Book of Virtue, Enjoining Good Manners, and Joining of the Ties of Kinship*, Hadith 2564 <<https://sunnah.com/muslim:2564a>> accessed 12 March 2026.

4.1.2. Legal Regime of the Direct Doer's (Mubashir) Liability

Establishing the liability of the direct doer for harmful acts in Islamic jurisprudence and the JCC maintains the principle of human dignity and the protection of one's body and property.⁷¹ A person is not permitted to infringe upon another's life or property except in cases of legitimate defense, as the Qur'an and the Prophetic Sunnah emphasize. A violation of this principle gives rise to liability without requiring any mental element related to the intent of the direct doer or their mental capacity (Article 257/1 of the JCC). The occurrence of damage establishes the liability of the direct doer (Mubashir), unless a legitimate legal or religious justification applies; no mental element is considered, as neither the intent nor the level of awareness is required to establish the liability.⁷² Thus, anyone who stumbles and damages another's property is liable (Article 913 of the Majalla). Also, anyone who damages another's property is liable even if they believe it to be their own (Article 914).

In this regard, Art. 278 of the JCC provides that any damage caused to another's property by a minor, whether discerning or not, or a person treated as a child, gives rise to liability. The damage caused by an insane person is subject to the same rule (Article 128). Thus, the JCC is similar to the FCC in this respect, albeit as an exception: Article 414/3 of the FCC established liability for the mentally impaired, and this principle can also be applied to minors and all persons with diminished capacity. Also, the liability of the keeper of things that require special care to prevent their harm is considered a form of direct liability for harm in the JCC, and this position aligns with the FCC (Art. 1242/1). Likewise, the JCC (Art. 288/1) and the FCC (Art. 1242/5) agreed to treat the principal's liability for his subordinate's acts as objective liability. It is not required to prove the principal's fault for such liability to arise, and the principal cannot evade it except by proving a foreign cause that meets the conditions of force majeure.⁷³ By contrast, it is noted that the German Civil Code establishes the liability of a principal for the acts of his subordinate on the basis of presumed fault (Art. 831 BGB).

4.2. Liability of the Indirect Causer (Mutasabbib)

The main rules governing liability for harmful acts in Jordanian law are based on the distinction established by the Majalla between the liability of the direct doer and that of the indirect cause of harm. While Article 92 of the Majalla provides that "the direct doer, even if acting without intent, is obliged to compensate," Article 93 does not hold the indirect causer liable for damages except for those intended to be caused. The Jordanian legislator

71 Explanatory Memoranda of the JCC (n 10).

72 Chafik Chehata, 'La théorie de la responsabilité civile dans les systèmes juridiques des pays du Proche-Orient' (1967) 19(4) *Revue internationale de droit comparé* 883.

73 Al-Hayari (n 42) 324; Anwar Sultan, *Sources of Obligation in the Jordanian Civil Law: Comparative Study with Islamic Jurisprudence* (14th edn, Dar al-Thaqafah lil-Nashr wa al-Tawzi') 371 [in Arabic].

enshrined these provisions in Articles 257 and 258 of the JCC.⁷⁴ The explanatory memoranda of the JCC indicate that the distinction between directness and causation is based on the principle that the former constitutes an independent cause of damage and does not require intent or excess, whereas the latter is not considered an independent cause and requires intent or transgression to give rise to liability.⁷⁵

This is to say that the act of the indirect causer does not always result in damage, but rather makes the occurrence of such damage possible, as another act must intervene for the damage to materialize.⁷⁶ For example, a person who cuts the rope from which a lamp hangs is an indirect cause of the damage that subsequently occurs to the lamp. For indirect causation to create liability, it must be characterized by unlawfulness, which occurs in three cases: intent (Ta'ammud), transgression (Ta'addi), or the act leading to harm. Therefore, for the indirect causer to be liable, the act must involve intent, transgression, or result in harm.⁷⁷

4.2.1. Conditions of Indirect Liability in Islamic and Jordanian Law

Both the JCC and Islamic jurisprudence consider the indirect cause liable for the damage they cause in cases of transgression (Ta'addi) and intent (Ta'ammud). Both affirmed the objective nature of liability for the harmful act in cases of causation, while the JCC, like French law, which bases non-contractual liability on fault, considered the condition of intent.

First: Transgression (Ta'addi): The term transgression (Ta'addi) is linguistically used to mean unlawfulness or injustice (Zulm). Among Muslim jurists, it carries two distinct meanings. Some define it as any infringement of others' rights,⁷⁸ while others emphasize the unlawfulness of the act itself.⁷⁹ According to this view, transgression occurs when a person exceeds a lawful right or commits an unlawful act; using one's right without intent to cause harm does not render the person liable. Liability arises only when the consequences exceed the lawful bounds of exercising the right. Transgression refers to acting without a right, and the indirect cause is not liable unless the act is impermissible.⁸⁰ The Explanatory Memorandum states that the JCC follows the second approach: it considers transgression to occur when the actor lacks the right to perform the act that causes the damage, thereby constituting the material element of fault, or objective fault.⁸¹

74 Al-Hayari (n 42) 40-4.

75 Explanatory Memoranda of the JCC (n 10) 282.

76 El-Hassan (n 68) 35.

77 Civil Appeal No 658 [1991] Court of Cassation (Jordan).

78 Al-Zarqa (n 45) 78.

79 Muhammad Fadlallah, *The Theory of Liability in Islamic Law*, (Matba'at al-Sadah 1983) 92 [in Arabic]; Fakhri Mahna, *The Basis of Civil Liability and the Liability of a Person Lacking Legal Capacity* (Maktabat al-Sha'b 1974) 44 [in Arabic]; Sulayman (n 57) 227.

80 Al-Zarqa (n 45) 78.

81 Khalil Al-Jama'in, 'The Legal Basis of Liability for Harmful Acts between the Provisions of the Jordanian Civil Code and the Decisions of the Jordanian Court of Cassation' (PhD Thesis, Aman Arab University 2008) 178 [in Arabic].

This interpretation is supported by Article 924 of the Majalla,⁸² closely resembling the concept of objective fault in French law.⁸³

Second: Intent (Ta'ammud): The term intent refers to preparation and deliberate purpose; it denotes intending the harm, not merely performing the act (Explanatory Memorandum of the JCC). It does not refer to a hidden motive, but rather that the act itself is unlawful (even if only in its consequence). In other words, the act performed by the indirect causer is done to cause harm, such as poisoning another's food or digging a hidden pit in someone's path.⁸⁴ This condition is grounded in Article 93 of the Majalla; it moves beyond strict liability and approaches the concept of personal fault, on which tortious liability in the FCC and its derivative legislation is founded. When a harmful act is accompanied by the intent to cause damage to another, both elements of fault in French law are met: the material element is satisfied by the act itself. On the other hand, in Islamic jurisprudence, merely causing harm without right suffices for the material element, and the mental element is satisfied by the intention to cause harm, which is a personal (psychological) requirement that necessitates the perpetrator's awareness.⁸⁵

The liability of the keeper of an animal is considered one of the applications of liability for causing harm through an act of trespass, given that an animal possesses autonomous movement. However, the Jordanian legislator has based this liability on proven fault (Art. 289), whereas it has established the liability of the person responsible for supervision and liability for the collapse of a building on presumed fault, which may be rebutted by evidence to the contrary (Arts. 288 and 290), while the French legislator has treated both of these liabilities as forms of strict liability (Arts. 1243 and 1244). As for the German legislator, its position is similar to that of Jordanian law with regard to the liability of the supervisor (Art. 832 BGB) and liability for building collapse (Art. 836 BGB), as both are based on presumed fault, while it considers the liability of the keeper of an animal to be, as a general rule, strict. However, it excludes from this rule damage caused by an animal used for professional purposes, in which case the keeper's liability is based on presumed fault (Art. 833 BGB).

It should be noted that the JCC's liability for the supervisor of a person under guardianship extends to anyone legally or contractually obliged to supervise a person in need of supervision due to their minority or mental or physical condition. This liability includes the parents' liability for the acts of their minor children (Art. 1242/4 of the FCC), although the FCC has regarded it as objective liability. Moreover, the liability of the guardian under Article 288/1/a of the JCC encompasses most forms of liability for the acts of others developed by French case law and attributed to Article 1242, and subsequently consolidated

82 Al-Jundi (n 45) 115-6; Mustafa Halilu, 'Elements of Civil Liability in Jordanian and Algerian Law: Comparative Study' (Master Thesis, University of Jordan 1991) 21 [in Arabic].

83 Al-Hayari (n 42) 42.

84 Al-Sarhan and Khater (n 42) 373; Al-Zarqa (n 45) 79.

85 Mahna (n 79) 93-4.

by the 2017 draft reform of civil liability. This draft reorganized the forms of liability for acts of others in Article 1242, assigning each form a separate provision, and added the forms introduced by the French Court of Cassation starting with the *Blieck* decision of 1991.⁸⁶ It also considered non-contractual liability for the acts of others as objective liability

4.2.2. The Particularity of the Jordanian Civil Code

The third scenario of the indirect actor's liability appears ambiguous. Article 257 of the JCC, in the context of the indirect actor's responsibility, provides for the scenario in which the act leads to harm. However, the fact that harm results from the actor's conduct is not new, as it is connected to the existence of a causal link, which is an independent requirement for liability. This has generated disagreement among scholars regarding this condition. In this regard, a clear jurisprudential disagreement has arisen regarding the significance of this legal provision. Many scholars⁸⁷ consider this condition redundant and, therefore, suggest its removal. The authors believe that the Jordanian legislator's adoption of the form of causing harm constitutes an addition to the two forms of transgression and intent; it appears that the civil code added this case to ensure the liability of the actor even when the two forms of transgression and intent are not realized, when the damage is an inevitable and unavoidable consequence of the act. The judge will not search for any subjective element in the perpetrator of the harmful act; therefore, legal liability is considered objective liability.⁸⁸ Also, this interpretation helps the judge in addressing liability for damages caused by artificial intelligence, pending the legislator's enactment of new provisions governing such liability.

Showing the legal framework of direct and contributory liability demonstrates that the scope of objective liability for personal acts under the JCC is broader than that of objective liability for non-personal acts in the same Code. Conversely, the scope of objective liability for non-personal acts is broader in the FCC, while fault remains the basis of liability for personal acts in that Code. The FCC also organizes other forms of objective liability not found in the JCC, such as liability for defective products (Art. 1245) and environmental damage (Art. 1246), or addressed elsewhere in the Jordanian Civil Code, such as liability for unusual neighborhood harms, which the FCC regulates under tortious liability (Art. 1253), whereas the JCC regulates it under property restrictions (Arts. 1024 to 1027).

86 *Arrêt Blieck* No 89-15.231 (Cour de cassation, Ass Plén, 29 Mars 1991).

87 Al-Jama'in (n 81) 178; Al-Zarqa (n 45) 73-4; Halilu (n 82) 21; Ubaydat (n 42) 282.

88 Al-Hayari (n 42) 43-4.

5 CONCLUSIONS

This research examined the JCC's position on regulating objective liability provisions and compared it with Islamic jurisprudence and the FCC. Objective liability arises merely from the commission of a harmful act that caused the damage, even if that act is lawful in origin, and it contradicts the philosophy of traditional civil liability under the FCC. Tortious liability in French law, as a general principle, is based on the idea of personal fault with its material and moral elements. A section of jurisprudence has sought to mitigate the negative consequences of adhering to the moral element of fault by proposing the idea of objective fault, which does not require the person causing the damage to possess awareness and discernment. The proposed amendments to reform the provisions on civil liability in the FCC (Draft of 2017) pave the way for recognizing a broader scope of objective liability, in line with the principles of European tort law and the Council of Europe's standards on compensatory justice.

Conversely, the JCC, since its issuance, has established the objective character of liability for the harmful act in several respects: (1) establishing this liability on harm represented by any unlawful act or omission resulting in causing damage to others, unless such infringement is lawful. (2) sufficing with the occurrence of a harmful act by the direct actor for the establishment of his liability without any other condition, such as discernment or the possession of mental capacity. (3) establishing the liability of the contributory party in cases of transgression, intent, or when the act, by its nature, leads to damage. Within the framework of liability for non-personal acts, the Jordanian legislator considered both the liability of the guardian of mechanical machines and things that require special care to prevent harm, and the liability of the principal for the acts of his subordinate, as forms of objective liability.

This study recommended the following: (A) amending Article 256 of the JCC to remove any confusion between damage and harm, and to clarify the concept of harm to include any act or omission that results in causing damage to others without right or legal justification. The proposed Article shall read as follows: "1- Any act causing harm to others shall obligate its perpetrator, even if he is not discerning, to compensate for the damage. 2- Harm is established merely by causing damage to another, provided that the act of the perpetrator is not based on a right or legal justification." (B) amending Article 257 of the JCC by limiting the concept of transgression to an act or omission that is unlawful in its origin; and abolishing the state of intent as a condition for the liability of the contributory party. The proposed Article shall read as follows: "1- Harm may be caused directly or indirectly. 2- If it is direct, liability for compensation arises without condition. If it is indirect, liability arises when the act of the person causing the harm constitutes a transgression, either by violating a statutory provision, public order, or public morals, or by being likely to lead to harm".(C) The Jordanian judiciary's consolidation of the provisions on objective liability in the JCC and their use to address liability for new damages arising from innovations in scientific progress, particularly in artificial intelligence, until special legislation is enacted to regulate this liability.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ОБ'ЄКТИВНА ВІДПОВІДАЛЬНІСТЬ У ЦИВІЛЬНОМУ КОДЕКСІ ЙОРДАНІЇ ТА ІСЛАМСЬКІЙ ЮРИСПРЕДУКЦІЇ – ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ

**Ахмед Ібрагім Аль-Хіарі, Махмуд Файяд, Башар Талал Момані*,
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АНОТАЦІЯ

Вступ. У цьому дослідженні розглядається позиція Цивільного кодексу Йорданії (JCC) щодо утвердження об'єктивної відповідальності в контексті позадоговірної відповідальності, а також ступінь, до якого на це правове регулювання вплинули положення ісламської правової системи та сучасного західного законодавства, де за взірця було взято Цивільний кодекс Франції (FCC).

Методи. У дослідженні було використано описову, аналітичну та порівняльну методологію для аналізу положень JCC та порівняння їх з положеннями FCC, щоб визначити, якою мірою концепція об'єктивної відповідальності втілена в обох правових системах.

Результати та висновки. Дослідження показало, що деліктна відповідальність у системі права Йорданії має об'єктивний характер, який зосереджений на відшкодуванні шкоди, завданої потерпілою стороною, а не на оцінці поведінки особи, яка спричинила діяння (елемент вини), і що йорданський Суд закріпив цей характер через концепцію «заподіяння шкоди» та відповідальність безпосереднього винуватця та особи, яка спричинила шкоду. Об'єктивна відповідальність також має кілька форм, таких як відповідальність зберігача речей та відповідальність довірителя за дії його підлеглих. Це правове регулювання наближається до підходу FCC у деяких аспектах та відрізняється від нього в інших, зокрема щодо форм відповідальності. Дослідження рекомендує розробити судову практику для вирішення питань шкоди, що виникла внаслідок використання сучасних технологічних засобів, таких як інструменти штучного інтелекту, та внести зміни до законодавчих положень, щоб врахувати об'єктивний характер відповідальності та розширити сферу компенсаційного захисту.

Ключові слова. Об'єктивна відповідальність, ісламське право, деліктне право, правова система Йорданії, європейське право, правова система Франції, порівняльне правознавство.

ABSTRACT IN ARABIC*

مقال بحثي

المسؤولية الموضوعية في القانون المدني الأردني والفقہ الإسلامي: دراسة مقارنة

أحمد إبراهيم الحباري، محمود فياض، بشار طلال مومني*، زيد محمود العقابلة، خلدون سعيد صالح قطيشات

المخلص:

الخلفية:

بحثت هذه الدراسة في موقف القانون المدني الأردني من تبني نظرية المسؤولية الموضوعية في نطاق المسؤولية غير العقدية، ومدى تأثير هذا التنظيم القانوني بأحكام الفقه الإسلامي والتشريعات الغربية المعاصرة (مع اتخاذ القانون الفرنسي نموذجاً).

المنهجية:

لتحقيق أهداف البحث، استخدم المؤلفون المنهج الوصفي والتحليلي والمقارن، من خلال تحليل أحكام القانون المدني الأردني ومقارنتها بأحكام الفقه الإسلامي والقانون المدني الفرنسي، وذلك لتحديد مدى تجسيد مفهوم المسؤولية الموضوعية في هذه النظم القانونية محل البحث.

النتائج والاستنتاجات:

النتائج والاستنتاجات خلصت البحث إلى أن المسؤولية عن الفعل الضار في القانون الأردني تتسم بطابع موضوعي، يعتمد على تعويض الضرر الذي يلحق بالمضرور أكثر من اهتمامه بتقييم سلوك مرتكب الفعل (عنصر الخطأ)، كما أن القانون المدني الأردني قد عزز هذا الطابع من خلال الأخذ بمفهوم "التسبب في الضرر" ومسؤولية الفاعل المباشر والمتسبب. كما تتخذ المسؤولية الموضوعية في القانون

*. The publication metadata in Arabic is presented as submitted by the authors.

المدني الأردني صوراً متعددة، مثل مسؤولية حارس الأشياء ومسؤولية المتبوع عن أعمال تابعيه، ويقترب هذا التنظيم القانوني من منهج القانون المدني الفرنسي في بعض الجوانب، ويختلف عنه في جوانب أخرى، خاصة فيما يتعلق بصور المسؤولية غير العقدية. في الختام، أوصت هذه الدراسة بضرورة تطوير الاجتهاد القضائي لمعالجة الأضرار الناشئة عن استخدام الوسائل التكنولوجية الحديثة، مثل أدوات الذكاء الاصطناعي، وتعديل النصوص القانونية بما يعزز الطابع الموضوعي للمسؤولية ويوسع نطاق الحماية التعويضية.

:الكلمات المفتاحية

المسؤولية الموضوعية، الفقه الإسلامي، المسؤولية التقصيرية، القانون الأردني، القانون الأوروبي، القانون الفرنسي، القانون المقارن

Research Article

DIGITAL RIGHTS OF LABOUR MIGRANTS IN KAZAKHSTAN: INTERNATIONAL STANDARDS, DIGITAL GOVERNANCE AND REGULATORY SAFEGUARDS

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and Aigerim Zhumabayeva

ABSTRACT

Background: *The digitalisation of migration governance and labour regulation has fundamentally changed the conditions under which labour migrants exercise their rights. In Kazakhstan, migrants increasingly depend on electronic public services, digital identification, biometric verification, interoperable databases, and platform-based labour intermediation. While these technologies may improve administrative efficiency, they also generate new legal risks, including opaque processing of personal and biometric data, excessive data collection, identification errors, digital exclusion, and limited access to effective remedies. These developments require a clearer conceptualisation of the digital rights of labour migrants and a more precise assessment of whether existing legal mechanisms in Kazakhstan are sufficient to protect them.*

Method: *The study employs a doctrinal and comparative legal methodology. It examines the legal content of digital rights of labour migrants through the analysis of international human rights and data protection standards, including Convention 108+, the case law of the European Court of Human Rights, Regulation (EU) 2024/1689 (the EU AI Act), and the Council of Europe Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law. These standards are compared with the legislation of the Republic of Kazakhstan in the fields of migration, labour, and personal data protection. The study also employs a risk-oriented analytical framework to identify regulatory gaps related to biometric processing, inter-agency data exchange, automated decision-making, and digital service delivery.*

Results and Conclusions: *The research demonstrates that Kazakhstan's legal framework contains important baseline guarantees but remains fragmented in its approach to digital risks affecting labour migrants. The law does not sufficiently articulate the principles of proportionality, purpose limitation, storage limitation, transparency, and accountability as operative legal standards. It also lacks explicit obligations concerning privacy-by-design, privacy-by-default, and data protection impact assessment for high-risk processing, particularly where biometric data or algorithmically supported decisions are involved. Procedural safeguards are also underdeveloped, particularly regarding the right to information, the correction of inaccurate data, the explanation of adverse digital outcomes, and the effective contestation of decisions.*

The article argues that the digital rights of labour migrants should be understood as a structured set of guarantees that ensure lawful, proportionate, and transparent data processing, non-discriminatory access to digital services, and procedural protections against harmful digital decisions. It proposes strengthening Kazakhstan's legal framework through clearer data protection principles, mandatory impact assessment for high-risk systems, enhanced safeguards for biometric data, and stronger procedural rights in digitally mediated migration governance.

1 INTRODUCTION

In recent years, migration policy and administration in many states, including the Republic of Kazakhstan, have increasingly relied on digital tools, including electronic public services, interagency information systems, biometric identification, online procedures for submitting and tracking applications, and digital employment platforms. This transformation enhances the manageability of migration processes and accelerates service delivery; however, it simultaneously creates new vulnerabilities for labour migrants as a group who are in an asymmetrical position vis-à-vis the state and employers. In practice, these vulnerabilities manifest in risks of non-transparent processing of personal and biometric data, identification errors, restricted access to services due to a lack of digital skills or infrastructure, and more complex access to effective legal remedies when challenging digital decisions.

In this context, the scholarly and normative conceptualisation of the category of “digital rights of labour migrants” is becoming increasingly relevant. Although international human rights instruments do not generally recognise “digital rights of labour migrants” as a standalone legal category, its substance can be derived from a set of fundamental rights and freedoms, including the right to respect for private life and protection against arbitrary interference, the right to equality and non-discrimination, the right to a fair procedure and an effective remedy, and the access to public services and administrative procedures without unjustified or discriminatory barriers. In the digital environment, these guarantees acquire a concrete legal dimension: requirements for the lawfulness and foreseeability of data processing, data minimisation, transparency regarding purposes and retention periods, security safeguards, as well as procedural mechanisms for appealing decisions and correcting errors in digital registers.

For the purposes of this article, the digital rights of labour migrants are understood as a specific set of legal guarantees protecting migrants in digital environments where access to migration status, employment, residence, public services, and remedies is mediated by data processing, digital identification, biometric verification, inter-agency data exchange, and platform-based labour intermediation. Their specificity lies in the fact that labour migrants are not merely data subjects in the abstract; they are persons whose legal status and access to work may depend directly on the accuracy, transparency, and contestability of digital systems. This creates migrant-specific vulnerabilities, including dependence on migration status, cross-border data flows, linguistic and procedural barriers, asymmetry vis-à-vis public authorities and employers, exposure to biometric identification, and reliance on digital labour platforms.

The research problem lies in the fact that the current legislation of Kazakhstan in the fields of migration, labour, and personal data - while providing basic legal frameworks - does not always contain sufficient detail on the principles and procedures necessary to protect migrants in the context of digitalisation. Of particular importance are issues related to the processing of biometric data, interagency data exchange, cross-border data transfers, and the use of automated and algorithmic tools in risk assessment and administrative decision-making. Accordingly, there is a need to compare national regulation with international standards and to develop practice-oriented proposals to strengthen legal protection mechanisms.

The purpose of this article is to identify the content of digital rights for labour migrants and to assess the adequacy of the legal mechanisms for their implementation and protection in the Republic of Kazakhstan, in light of international approaches to data protection and procedural guarantees. To achieve this purpose, the article addresses the following objectives: (1) conceptualising the digital rights of migrants and their key components; (2) analysing the risks associated with the digitalisation of migration procedures; (3) conducting a comparative legal assessment of international data protection standards and

Kazakhstan's national legislation; and (4) formulating proposals for improving legislation and law enforcement practice. The scientific novelty of the study lies in integrating data protection approaches (including risk-based governance and privacy-by-design) into the framework of migration regulation and substantiating the need for procedural safeguards for migrants affected by digital decisions made by the state and platforms.

2 LITERATURE REVIEW

In the early stages of research on digital rights, scholarship in information ethics played a key role. In *The Ethics of Information*, Floridi develops the idea that the informational space ("infosphere") is becoming an autonomous environment of human existence, and therefore traditional ethics and human rights must be rethought in light of the fact that an individual acts not only as a physical but also as an informational subject.¹ The further development of the concept of digital rights is linked to studies of "techno-regulation of law" and the transformation of legal autonomy in the context of "smart" technologies. In "Smart Technologies and the End(s) of Law", Hildebrandt shows how big data processing systems and predictive analytics gradually shift the centre of decision-making from humans to algorithms, undermining the classical guarantees of the rule of law, legal certainty, and procedural fairness.² Within digital citizenship research, digital rights are associated with internet access, digital inclusion, online freedom of expression, and equal participation in digital ecosystems.³ Studies on digital identity and data governance conceptualise digital rights as an individual's capacity to control their own data, protect privacy, and resist unwanted digital practices.⁴ In addition, research on digital surveillance and algorithmic systems highlights the importance of rights to explainability and algorithmic transparency, protection against automated discrimination, and mechanisms for appealing data-driven decisions.⁵

Taken together, this body of research demonstrates that digital rights emerge at the intersection of information ethics, techno-regulation, and digital citizenship, reflecting increasingly complex relationships between individuals, data, and algorithms. This understanding provides a methodological foundation for analysing more specific phenomena arising from the digitalisation of social processes, including the transformation of migration as a domain shaped by digital technologies.

- 1 Luciano Floridi, *The Ethics of Information* (OUP 2013) doi:10.1093/acprof:oso/9780199641321.001.0001.
- 2 Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Edward Elgar Publishing 2016).
- 3 Karen Mossberger, Caroline J Tolbert and Ramona S McNeal, *Digital Citizenship: The Internet, Society, and Participation* (MIT Press 2007) doi:10.7551/mitpress/7428.001.0001.
- 4 Engin Isin and Evelyn Ruppert, *Being Digital Citizens* (Rowman & Littlefield Publishers, 2015).
- 5 Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books Ltd 2019).

In contemporary academic and practitioner-oriented literature, “digital migration” is not an established legal or socio-demographic category but rather a broad theoretical construct describing new forms of mobility and transnational connections mediated by digital technologies. Across studies, this phenomenon is articulated through related notions, such as “electronic diaspora,” “cyber-diaspora,” “networked diaspora,” and others, reflecting the diversity of approaches to conceptualising migrants’ digital connectivity and the transformation of traditional migration experiences. Marino, for example, characterises it as “digital togetherness”⁶, while Baldassar et al. describe it as “virtual proximity.”⁷ Leurs and Smets propose viewing digital migration as an analytical framework in which migration processes and digital practices mutually shape one another, generating new channels for communication, social inclusion, and access to services.⁸ In empirical research, Alencar suggests that digital migration can be understood through the everyday digital practices of migrants and refugees, particularly the use of mobile communication, social media, and online platforms to obtain information, maintain transnational ties, and interact with humanitarian and other organisations.⁹ The author shows that the digital environment simultaneously creates new opportunities (access to information, support, and navigation) and produces vulnerabilities related to digital inequality, misinformation, and the risk of digital control. Diminescu introduced the concept of the connected migrant, according to which the migrant is no longer defined primarily by physical distance but by digital connectedness that enables “presence-at-a-distance” and shapes a new form of transnational subjectivity.¹⁰

Thus, in contemporary academic literature, the concept of “digital migration” serves primarily as a flexible theoretical construct that captures the transformation of the migration experience in the wake of digital technologies. Across different studies, this phenomenon is described in diverse ways, including the maintenance of transnational ties, the formation of online identities, participation in networked communities, and the use of digital tools to obtain information and navigate host societies. The existence of multiple related labels, such as electronic, cyber, or networked diasporas, indicates the phenomenon's multidimensional character and the ongoing conceptual search in this field. Taken together,

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- 6 Sara Marino, ‘Making Space, Making Place: Digital Togetherness and the Redefinition of Migrant Identities Online’ (2016) 1(2) *Social Media + Society* 1, doi:10.1177/2056305115622479.
 - 7 Loretta Baldassar and others, ‘ICT-Based Co-Presence in Transnational Families and Communities: Challenging the Premise of Face-to-Face Proximity in Sustaining Relationships’ (2016) 16 *Global Networks* 133, doi:10.1111/glob.12108.
 - 8 Koen H A Leurs and Kevin Smets, ‘Five Questions for Digital Migration Studies: Learning From Digital Connectivity and Forced Migration In(to) Europe’ (2018) 4(1) *Social Media + Society* 1, doi:10.1177/2056305118764425.
 - 9 Amanda Alencar, ‘Mobile Communication and Refugees: An Analytical Review of Academic Literature’ (2020) 14(8) *Sociology Compass* e12802, doi:10.1111/soc4.12802.
 - 10 Dana Diminescu, ‘The Connected Migrant: An Epistemological Manifesto’ (2008) 47(4) *Social Science Information* 565, doi:10.1177/0539018408096447.

this allows digital migration to be understood as a shift from mobility conceived mainly in physical terms toward an expanded, networked form of presence and interaction, in which digital technologies become an integral part of migration processes and migrants' social life.

As migrants become integrated into digital ecosystems, the analysis of digital migration inevitably raises the need to assess how technologies and regulatory mechanisms safeguard their digital rights and data security while simultaneously generating new risks and constraints. Hoang notes that in the digital era, migration should be facilitated and regulated through effective digital tools to ensure legitimacy and sustainability across migration corridors and within collaborative projects.¹¹ Recent scholarship shows that digital technologies and infrastructures (biometrics, databases, algorithmic control systems) significantly affect migrants' rights by shaping new regimes of inclusion and exclusion. These ideas are articulated most fully in Amelung et al., where technologies are examined as elements of the material politics of citizenship.¹² Similar conclusions regarding the risks of algorithmic discrimination, identification errors, intensified surveillance, and migrants' vulnerability can be found in Pelizza, Pollozek & Passoth, Milan, and others,¹³ as well as in research on the materiality of borders.¹⁴ Taken together, this body of work demonstrates that digital technologies are no longer merely instruments of migration governance; they are key factors shaping migrants' access to rights and services, while also increasing vulnerability to algorithmic control, identification errors, and digital exclusion.

An important contribution to understanding the role of digital technologies in migration is provided by the study by Dekker and Engbersen,¹⁵ which shows that social networks radically transform migration networks, thereby facilitating the migration process itself.

- 11 Lan Anh Hoang, 'Migration Infrastructure, Digital Connectivity and Porous Borders: Vietnamese Migration to Australia' (2025) 31(1) *Population, Space and Place* e2868, doi:10.1002/psp.2868.
- 12 Nina Amelung and others, 'Technologies, Infrastructures and Migrations: Material Citizenship Politics' (2020) 24(5) *Citizenship Studies* 587, doi:10.1080/13621025.2020.1784636.
- 13 Annalisa Pelizza, 'Processing Alterity, Enacting Europe: Migrant Registration and Identification as Co-Construction of Individuals and Polities' (2020) 45(2) *Science, Technology, & Human Values* 262, doi:10.1177/0162243919827927; Silvan Pollozek and Jan-Hendrik Passoth, 'Infrastructuring European Migration and Border Control: The Logistics of Registration and Identification at Moria Hotspot' (2019) 37(4) *Environment and Planning D: Society and Space* 606, doi:10.1177/0263775819835819; Stefania Milan, Annalisa Pelizza and Yoren Lausberg, 'Making Migrants Visible to COVID-19 Counting: The Dilemma' (*OpenDemocracy*, 28 April 2020) <<https://www.opendemocracy.net/en/making-migrants-visible-covid-19-counting-dilemma/>> accessed 18 May 2026.
- 14 Francesca Esposito and others, 'Ecology of Sites of Confinement: Everyday Life in a Detention Center for Illegalized Non-Citizens' (2019) 63(1-2) *American Journal of Community Psychology* 190, doi:10.1002/ajcp.12313; Kim Rygiel, 'Bordering Solidarities: Migrant Activism and the Politics of Movement and Camps at Calais' (2011) 15(1) *Citizenship Studies* 1, doi:10.1080/13621025.2011.534911.
- 15 Rianne Dekker and Godfried Engbersen, 'How Social Media Transform Migrant Networks and Facilitate Migration' (2014) 14(4) *Global Networks* 401, doi:10.1111/glob.12040.

The authors identify four mechanisms of influence: maintaining strong family ties, activating weak ties, forming latent networks, and creating channels for obtaining insider, informal information about migration that increases potential migrants' "awareness" and lowers the threshold for relocation. These findings underscore that digital platforms not only accompany migration but also actively generate new forms of mobility, social capital, and migrants' digital agency.

A further contribution to the study of labour migrants' digital rights is offered by the report "Digital Labour Platforms and Migrant Workers", which analyses the impact of platform work on migrants' position in the digital economy.¹⁶ The report shows that digital labour platforms are becoming a key employment space for migrants, while simultaneously expanding access to income and increasing vulnerability. The authors stress that algorithmic systems for task allocation, ratings, and digital profiles create a new structure of labour relations in which migrants face algorithmic opacity, dependence on digital identity, a lack of social protections, and a high risk of discrimination. As a result, digital platforms produce an ambivalent effect: while lowering barriers to labour market entry, they also reproduce structural inequalities and intensify violations of migrants' digital and labour rights.

The study of digital migration has advanced significantly in scholarship addressing the digitalisation of border and migration governance. Among the most important contributions in this field are the analytical reports of the European Union Agency for Fundamental Rights. In its report *Under Watchful Eyes*,¹⁷ the FRA demonstrates that the legal significance of biometrics and large-scale information systems in the fields of asylum, migration, and border control extends far beyond questions of administrative efficiency. Rather, these systems constitute a data processing architecture that directly affects the right to respect for private life, the protection of personal data, non-discrimination, human dignity, and access to effective remedies. Of value is the report's emphasis that the risks arise not only from the mere collection of biometric data, but also from data quality, the accuracy of identification, the conditions governing access to such data, the expansion of the circle of system users, and the growing interoperability between different databases. The FRA stresses that increased interconnectedness of systems enhances not only the speed and completeness of information exchange, but also the likelihood of function creep, that is, the gradual use of data beyond the purposes originally declared, as well as the risks of misidentification, secondary use of information, and weakened control by data subjects themselves. In this way, the digital infrastructure of migration governance is revealed not as a neutral technical mechanism, but as a legal and institutional environment in which decisions concerning status, movement, and access to procedures are increasingly mediated

16 Wouter Zwysen and Agnieszka Piasna, *Digital Labour Platforms and Migrant Workers: Analysing Migrants' Working Conditions and (Over)Representation in Platform Work in Europe* (Working Paper, ETUI 2024) doi:10.2139/ssrn.4798982.

17 European Union Agency for Fundamental Rights, *Under Watchful Eyes: Biometrics, EU IT Systems and Fundamental Rights* (Publications Office of the EU 2018).

through data processing. From this perspective, the digital vulnerability of labour migrants is associated not only with the use of commercial platforms or everyday digital services, but also with their inclusion in state systems of identification, registration, and control, the functioning of which increasingly depends on the realisation and protection of their rights.

Petra Molnar's work has significantly deepened the critical analysis of migration control technologies by showing that the digitalisation of this field does not amount to neutral administrative modernisation, but rather constitutes the institutional entrenchment of an infrastructure of surveillance, classification, and exclusion.¹⁸ Its analytical value lies in shifting attention away from the technical efficiency of such tools and towards their embeddedness in power relations that shape the conditions of identification, categorisation, and assessment of mobile persons. From this perspective, migrants and refugees appear not merely as users of digital services or participants in administrative procedures, but as subjects of technological intervention under conditions of limited transparency, insufficient accountability, and weakened mechanisms of contestability. This applies both to surveillance and identification tools and to systems of risk assessment, prediction, and profiling that can mediate decisions on legal status, access to procedures, and the scope of guarantees. Such an approach makes it possible to conceptualise digital vulnerability as deriving not only from the migrant's social position, but also from the very architecture of digital governance, which is grounded in asymmetries of information and institutional control. In these circumstances, the legal significance lies not only in questions concerning the lawfulness of data processing but also in the ways in which technological systems redistribute power within the administrative process, impede understanding of the logic of decision-making, restrict the effective contestation of such decisions, and thereby reinforce structural inequality.

No less important are the works of Niovi Vavoula,¹⁹ which examine the use of artificial intelligence, automated data processing, algorithmic profiling, and facial recognition technologies at the external borders of the Schengen area. In these studies, such tools are understood not as autonomous technological solutions, but as components of a single infrastructure of interoperable large-scale IT systems. Accordingly, the source of legal risk is associated not only with a particular algorithm or a specific biometric identification procedure, but also with the cumulative effect of a digital ecosystem in which data are successively collected, matched, circulated across systems, and used in procedures of verification, categorisation, and risk assessment. This perspective makes it possible to analyse interferences with migrants' rights not as the result of isolated episodes of unlawful

18 Petra Molnar, 'Surveillance Sovereignty: Migration Management Technologies and the Politics of Privatization' in Idil Atak and Graham Hudson (eds), *Migration, Security, and Resistance: Global and Local Perspectives* (Routledge 2021) 66.

19 Niovi Vavoula, 'Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism' (2021) 23(4) *European Journal of Migration and Law* 457, doi:10.1163/15718166-12340114.

data processing, but rather as a result of the very architecture of digital mobility governance. In conditions of interconnected registries and automated procedures, the data subject becomes increasingly dependent on opaque logics of information processing, while their ability to understand the grounds for a decision, verify the accuracy of the data used, and obtain an effective review is substantially narrowed. In this sense, the literature on smart borders and algorithmic profiling demonstrates that a migrant's digital vulnerability is shaped not only at the level of individual technological tools, but also at the level of the entire environment of digital border governance, within which mobility is from the outset placed under a regime of heightened surveillance and predictive assessment.

The analysis of the digitalisation of migration governance shows that the category of personal data protection alone does not fully capture the range of legal risks that arise in this context. In this respect, the concept of data justice proves particularly productive, as it enables assessment of digital systems not only in terms of the lawfulness of data processing but also in terms of how they shape regimes of visibility, control, and the unequal distribution of vulnerability. In Linnet Taylor's classic formulation, justice in the digital society is linked not merely to compliance with data-processing requirements but also to the ways in which individuals are represented, classified, and governed through data.²⁰ This is of particular importance in the migration context, where migrants are more frequently subjected to intensive biometric identification, inter-agency data sharing, algorithmic profiling, and digital status verification. A closely related approach can also be found in the works of Razmetaeva, Barabash, and Lukianov,²¹ who emphasise that, in the digital age, the substance of human rights cannot be reduced to the classical guarantees of privacy alone but requires consideration of how technological systems reshape the very structure of access to rights, justice, and effective protection. This makes it possible to demonstrate more precisely that the digital vulnerability of labour migrants is formed not only through discrete violations of personal data protection rules, but within the broader digital infrastructure through which identity, migration status, the right to work, access to services, and the possibility of challenging decisions are established and mediated.

Region-specific scholarship also confirms the relevance of these issues for Kazakhstan and the broader Central Asian context. Recent studies on the digitalisation of labour migration within the EAEU point to the limited effectiveness of existing digital platforms, low user engagement, the absence of unified electronic document management standards, and the lack of a coordinated personal data protection policy.²² Research on digital transformation

20 Linnet Taylor, 'What Is Data Justice? The Case for Connecting Digital Rights and Freedoms Globally' (2017) 4(2) *Big Data & Society* 1, doi:10.1177/2053951717736335.

21 Yuliia Razmetaeva, Yurii Barabash and Dmytro Lukianov, 'The Concept of Human Rights in the Digital Era: Changes and Consequences for Judicial Practice' (2022) 5(3) *Access to Justice in Eastern Europe* 41, doi:10.33327/AJEE-18-5.3-a000327.

22 Zhanar Kadyrbek and Kalybek Koblandin, 'Digitalisation of Labour Migration within the EAEU Digital Agenda' (2025) 109(1) *International Relations and International Law Journal* 126, doi:10.26577/IRILJ2025109111.

in migration governance in Central Asia similarly emphasises that the impact of digital technologies on migration processes remains underexplored, despite their growing role in regulation and service delivery.²³ Kazakhstani studies on migration policy further show that Kazakhstan is increasingly positioned as a country of reception and transit, particularly for migrants from Central Asia and the CIS,²⁴ while national scholarship on personal data protection stresses that the current legal framework remains general and insufficiently specific with regard to data processing in information systems.²⁵ These regional sources support the article's central argument that international standards should be used not as abstract external models but as comparative tools to address concrete regulatory gaps in Kazakhstan's digital migration governance.

Thus, the existing scholarship shows that digitalisation is transforming migration not only in everyday communication and transnational connectivity but also in governance, identification, and access to rights. Digital technologies function simultaneously as infrastructures of mobility, employment, and communication and as mechanisms of classification, surveillance, and status control. Accordingly, the legal significance of digital migration lies not merely in the emergence of new opportunities for access to work, services, and transnational networks, but also in the production of new forms of vulnerability linked to biometric identification, interoperable databases, algorithmic profiling, platform dependence, and opaque decision-making. Taken together, this literature demonstrates that the digital rights of labour migrants cannot be reduced to questions of privacy or the formal lawfulness of data processing alone. They must also be examined through the broader structure of digital governance in which access to employment, legal status, services, and effective remedies is increasingly mediated by data-driven systems. This, in turn, requires a systematic analysis of technological transparency, contestability, non-discriminatory access to digital infrastructures, and the adequacy of legal safeguards against digital exclusion, structural inequality, and rights-restrictive uses of data.

23 Arsen Maltabarov and Meiram Sarybayev, 'Digital Transformation as a New Stage in Regulating Migration Processes in Central Asia' (2024) 88(1) *Public Administration and Civil Service* 106, doi:10.52123/1994-2370-2024-1164.

24 Leila Delovarova, 'Kazakhstan's Migration Policy: An Overview of the External Vector' (2024) 105(1) *International Relations and International Law Journal* 50, doi:10.26577/IRILJ.2024.v105.i1.05.

25 E Yerbolatov and others, 'Personal Data in the Republic of Kazakhstan: Problems of Ensuring Confidentiality in the Context of Digitalisation' (2020) 79(3) *Bulletin of Innovative Eurasian University* 49, doi:10.37788/2020-3/49-58; Saule Akhmetova, 'Some Aspects of Personal Data Protection Legislation' [2023] *Kazakhstan Law Review* <<https://kazlawreview.kz/nekotorye-aspekty-zakonodatelstva-o-zashhite-personalnyh-dannyh/>> accessed 18 May 2026.

3 METHODOLOGY

The methodological framework of the study combines doctrinal and comparative legal analysis with a risk-oriented assessment of digital migration governance. The research employs the comparative legal method to juxtapose international human rights and data protection standards, including the principles of lawfulness, proportionality, transparency, data minimisation, and purpose limitation, as well as the privacy-by-design/privacy-by-default approach, with the existing legislation of the Republic of Kazakhstan in the areas of migration, labour, and personal data protection. To ensure comparability, the study applies functional comparative analysis: it compares not only the wording of legal norms but also their regulatory function, namely, which risk in digital environments they are intended to prevent and what safeguards they provide for labour migrants.

A key component of the methodology is formal-legal (doctrinal) analysis, which examines the normative structures governing the rights and obligations of data processing actors (operators/database owners, competent authorities, and digital service providers), as well as the legal mechanisms for implementing and protecting migrants' rights within digital processes, including notification, access to data, rectification, restriction/cessation of processing, and the appeal of decisions and actions. In addition, a systems approach is used to consider migration regulation and personal data regulation as interconnected subsystems operating through interagency data exchanges, digital identification, and electronic services.

To identify “bottlenecks” in rights protection, the study incorporates elements of a risk-based approach (legal risk assessment). Specifically, it examines typical risks associated with the digitalisation of migration procedures, including digital exclusion, identification and verification errors, excessive data collection, opacity in interagency data exchange, information security vulnerabilities, and limited access to effective remedies for adverse digital outcomes. The identified risks are then mapped against the presence or absence of specific legal requirements and procedural safeguards in Kazakhstan's national legislation (for example, an obligation to assess the impact of data processing on data subjects' rights, document risk-mitigation measures, ensure accountability, and enable audits).

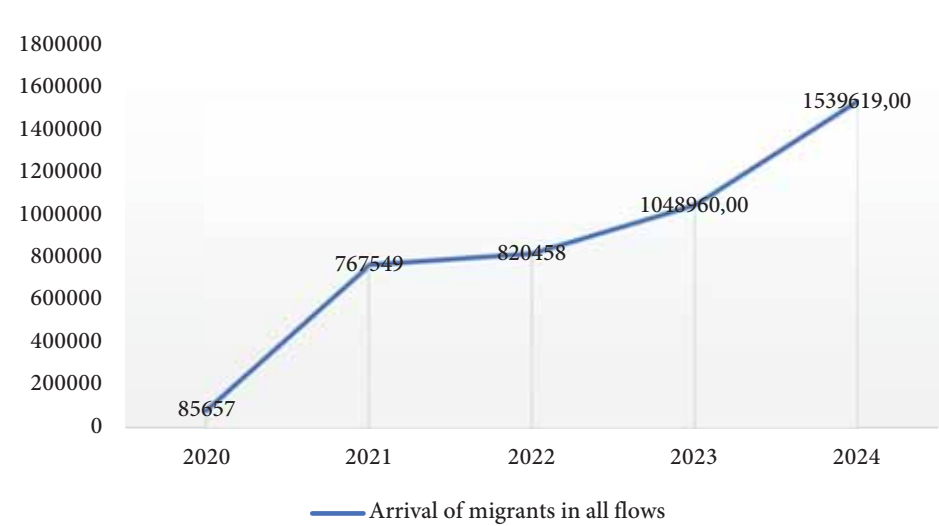
The study's source base consists of publicly available legal, regulatory, and official materials, including legislation, subordinate regulations, official statistical data, policy materials, international standards, and relevant case law. These sources are analysed qualitatively to identify regulatory gaps and formulate normatively grounded proposals to improve Kazakhstan's legal framework.

4 DISCUSSION

4.1. General Analysis of the Migration Situation in Kazakhstan
Based on Statistical Data

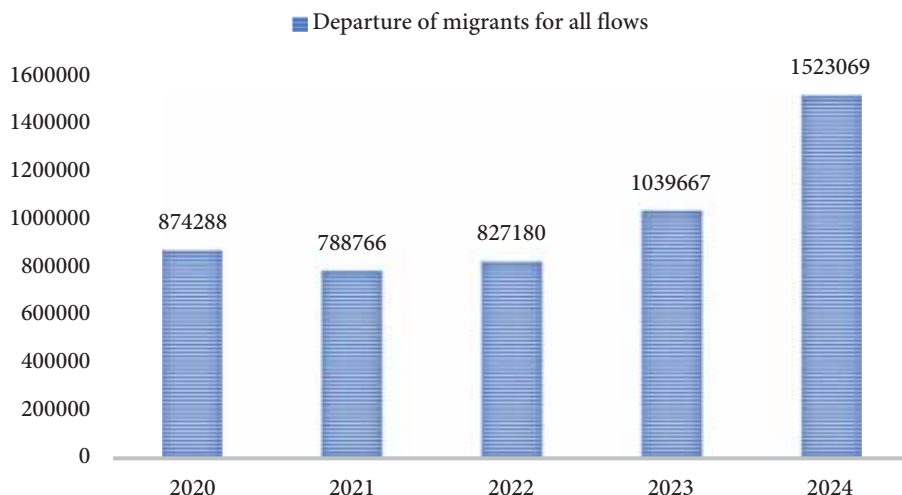
Data presented in Tables 1 and 2, reflecting migrant arrivals and departures across all migration flows in 2020–2024, indicate a substantial increase in the overall volume of migration turnover in Kazakhstan.

Table 1. Arrival of migrants in all flows²⁶



26 Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan, 'Arrival of Migrants in All Flows' (*Information-Analytical System of the Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan*, 2025) <<https://taldau.stat.gov.kz/en/NewIndex/GetIndex/703870?regionId=741880&periodId=7>> accessed 18 May 2026.

Table 2. Departure of migrants for all flows²⁷



Over the period under review, arrivals rose from 85,657 persons in 2020 to 1,539,619 persons in 2024. The most significant increase occurred in 2021, when the number of arrivals grew severalfold compared to the previous year, marking a shift to a qualitatively different migration pattern. In the following years, the upward trend persisted: after reaching 767,549 persons in 2021, arrivals increased further to 820,458 in 2022, 1,048,960 in 2023, and 1,539,619 in 2024. This makes it possible to speak of a consistent expansion in the scale of migration mobility and a growing intensity of migration exchange.

Migrant departures over the same period demonstrated a different, yet equally revealing, trend. While in 2020 the number of departures stood at 874,288, it declined to 788,766 in 2021, after which growth resumed: 827,180 in 2022, 1,039,667 in 2023, and 1,523,069 in 2024. Thus, while departures remained quantitatively significant throughout the period under consideration, by its end they had also reached a substantially higher level than at the beginning of the observation period.

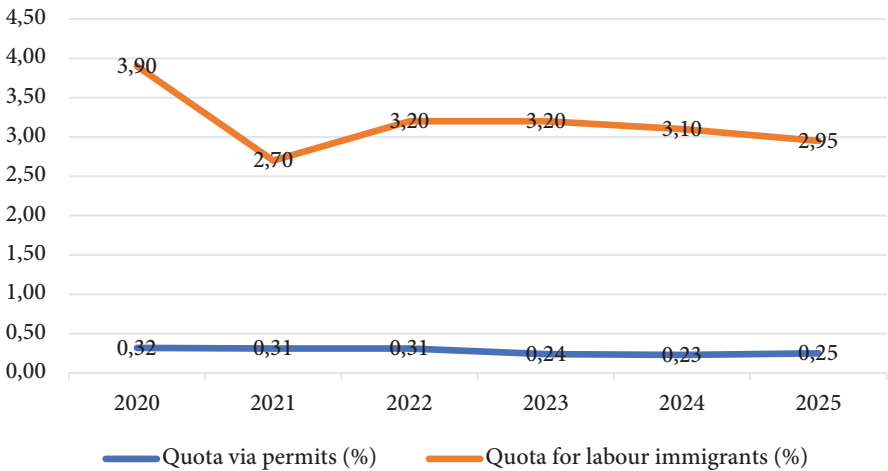
A comparison of arrivals and departures shows that in 2021–2024 migration flows gradually converged in volume. Whereas in 2020 there remained a significant gap between departures and arrivals, beginning in 2021 the scales of both became more proportionate, and in 2023–2024 they virtually reached quantitative equilibrium, with arrivals only slightly exceeding

²⁷ Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan, 'Departure of Migrants for All Flows' (*Information-Analytical System of the Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan*, 2025) <<https://taldau.stat.gov.kz/en/NewIndex/GetIndex/703871>> accessed 18 May 2026.

departures. In 2023, arrivals amounted to 1,048,960 persons, while departures totalled 1,039,667; in 2024, the corresponding figures reached 1,539,619 and 1,523,069, respectively. This trend indicates a high intensity of migration exchange and the growing importance of Kazakhstan as a space of attraction and redistribution of migration flows.

According to the Ministry of Labour and Social Protection of the Population of the Republic of Kazakhstan,²⁸ as of 1 April 2025, 13,891 foreign nationals were employed in Kazakhstan under permits issued by local executive authorities. Compared with 1 December 2024, when Kazakhstan recorded 13,743 such migrants, this change indicates that the quota- and permit-based system operates predictably, ensuring the inflow of labour strictly within labour market needs and avoiding sharp fluctuations in the number of migrants.

Table 3. Dynamics of quotas for attracting foreign labour in Kazakhstan (2020–2025)



Over the period 2020–2025, quotas for attracting foreign labour show a trend of gradual decline. The quota for permits issued by local executive authorities decreased from 0.32% in 2020 to 0.23% in 2024, then increased slightly to 0.25% in 2025. The quota for attracting labour immigrants also fell—from 3.9% in 2020 to 2.95% in 2025—although a short-term increase to 3.2% was observed in 2022–2023. These data reflect a strategic

28 Ministry of Labour and Social Protection of the Population of the Republic of Kazakhstan, 'Nearly 14 Thousand Foreign Citizens Are Engaged in Labour Activity in Kazakhstan' (*Official Website of the Government of the Republic of Kazakhstan*, 22 April 2025) <<https://www.gov.kz/memleket/entities/enbek/press/news/details/980686?lang=kk>> accessed 18 May 2026.

policy shift toward more targeted regulation of migration flows and a reduced reliance on foreign labour.²⁹

Taken together, the statistical analysis indicates that the scale and structure of migration flows are changing rapidly, increasing the pressure on the labour migration regulatory system. These trends heighten the importance of digital mechanisms in migration governance, since digital infrastructure is becoming increasingly relevant for access to services, identity verification, migration control, and the protection of labour rights.

At the same time, despite the substantial volume of demographic and economic migration statistics, Kazakhstan does not publish official data capturing the digital dimensions of labour migrants' situation, such as their access to e-government services, levels of digital literacy, use of digital employment platforms, frequency of errors in digital or algorithmic identification, or violations of digital rights.

This gap appears to be linked to the absence of a developed methodology and relevant indicators, the fragmentation of data across different agencies, and the uneven digitalisation of migration procedures. Legislation also does not impose a clear obligation to collect and regularly publish such data, while personal data protection concerns may further limit public disclosure. As a result, government monitoring remains largely focused on general migration indicators and does not fully reflect the digital accessibility of services or the barriers faced by labour migrants in the digital environment. In several jurisdictions, migration governance is increasingly assessed not only through applications and registration procedures, but also through digital traces, platform data, and big-data-based indicators. The absence of such statistics in Kazakhstan makes it more difficult to assess the effectiveness of digital regulatory mechanisms and identify the barriers that migrants face when exercising their rights online. This points to the need to develop a state system for monitoring migrants' digital rights that ensures comprehensive coverage, transparency, and regular publication of relevant data.

4.2. Comparative Analysis of Labour Migrants' Digital Rights and Their Protection in the Context of International and Kazakhstani Legal Regulation

The digitalisation of migration processes, along with states' transition to electronic databases, biometric identification, online employment platforms, and algorithmic decision-making systems, has contributed to the emergence of a new legal category:

29 Orders of the Minister of Labour and Social Protection of the Population of the Republic of Kazakhstan on Establishing Quotas for the Employment of Foreign Labour in the Republic of Kazakhstan for 2020–2025, including Order No 300 of 12 August 2020, Order No 560 of 31 December 2020, Order No 15 of 18 January 2022, Order No 540 of 30 December 2022, Order No 532 of 28 December 2023 and Order No 505 of 30 December 2024.

migrants' digital rights. Although this category has not yet been explicitly enshrined as a standalone concept in universal international treaties, its substance derives from general norms of international human rights law,³⁰ specialised instruments in the field of migration,³¹ data protection and digital privacy standards,³² as well as specific acts regulating digital platforms and artificial intelligence.³³

The International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interference with a person's privacy and guarantees the right to protection against such interference.³⁴ As clarified by the UN Human Rights Committee,³⁵ the protection under Article 17 of the ICCPR extends to the collection, storage, use, and disclosure of information about an individual's private life by both public and private actors—an understanding that, in contemporary doctrine, encompasses the processing of migrants' digital and biometric data. Similar fundamental guarantees are set out in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, including the right to privacy, protection against arbitrary interference with private life by public authorities, and procedural safeguards, including access to information.³⁶ Notably, the Republic of Kazakhstan has not ratified this Convention to date.

30 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 18 May 2026; International Covenant on Civil and Political Rights (adopted 16 December 1966) [1983] UNTS 999/171.

31 Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018 UNGA Res 73/195) UN Doc A/RES/73/19; Convention (No 97) Concerning Migration for Employment (Revised 1949) (adopted 1 July 1949) [1952] UNTS 120/71; *Convention (No 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (adopted 24 June 1975) [1978] UNTS 1120/323 *etc.*

32 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted 28 January 1981) [1981] ETS 108; Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted 10 October 2018) [2018] CETS 223; 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 [2016] OJ L 119/1.

33 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1; Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence [2024] OJ L 2024/1689.

34 International Covenant on Civil and Political Rights (adopted 16 December 1966) [1983] UNTS 999/171, art 17.

35 UN Human Rights Committee, *General Comment No 16: Article 17, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (UN Doc HRI/GEN/1/Rev.1, 8 April 1988).

36 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990 UNGA Res 45/158) [2004] UNTS 2220/3, Arts. 14, 16 and 18.

Overall, the above fundamental rights and freedoms are enshrined in Kazakhstan's legal framework, including the Constitution of the Republic of Kazakhstan³⁷ and the laws of the Republic of Kazakhstan on the Legal Status of Foreigners,³⁸ on Population Migration,³⁹ and On Personal Data and Their Protection.⁴⁰

More narrowly tailored, specialised provisions on the protection of personal and biometric data can be found in several regional and sector-specific international instruments.

The Council of Europe Convention 108+⁴¹ establishes core data protection principles, including proportionality and fair balance (Art. 5(1)); explicit, specific and informed consent (Art. 5(2)); data minimisation, purpose limitation, accuracy, and storage limitation (Art. 5(4)); and privacy-by-design / privacy-by-default, i.e., an obligation to take risks into account when designing systems (Art. 10(2–3)). By contrast, the Law of the Republic of Kazakhstan “On Personal Data and Their Protection” is limited to the following principles: (1) observance of the constitutional rights and freedoms of the individual and citizen; (2) lawfulness; (3) confidentiality of personal data with restricted access; (4) equality of rights of data subjects, owners, and operators; and (5) ensuring the security of the individual, society, and the state. These principles are general and declaratory in nature and do not articulate either the principle of proportionality, requirements for the quality of consent, or a risk-based approach. At the same time, many of the Convention 108+ “substantive” principles are already dispersed throughout Kazakhstani law as technical rules. For example, only “necessary and sufficient” data may be collected (an element of data minimisation), and retention periods are linked to the achievement of the stated purpose of processing, after which the data must be destroyed; processing is permitted only for previously declared purposes, and any departure from those purposes requires consent; and the law provides for the rectification, blocking, and destruction of data where processing is carried out in violation of legal requirements. However, these requirements are not formulated as autonomous principles that courts and supervisory authorities can use as interpretive standards to assess the permissibility of interference.

Thus, in *S. and Marper v. the United Kingdom*,⁴² the European Court of Human Rights held that the indefinite retention of DNA profiles and fingerprints of persons not

37 Constitution of the Republic of Kazakhstan (adopted 30 August 1995) Art. 18 <<https://www.parlam.kz/en/Home/OpenFile?speechId=&culture=en&npld=1>> accessed 18 May 2026.

38 Law of the Republic of Kazakhstan No 2337 ‘On the Legal Status of Foreigners’ (adopted 19 June 1995) Art. 9 <https://adilet.zan.kz/eng/docs/U950002337_> accessed 18 May 2026.

39 Law of the Republic of Kazakhstan No 477-IV ‘On Population Migration’ (adopted 22 July 2011) <<https://adilet.zan.kz/eng/docs/Z1100000477>> accessed 18 May 2026.

40 Law of the Republic of Kazakhstan No 94-V ‘On Personal Data and Their Protection’ (adopted 21 May 2013) <<https://adilet.zan.kz/eng/docs/Z1300000094>> accessed 18 May 2026.

41 Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (n 32).

42 *S and Marper v United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) <<https://hudoc.echr.coe.int/fre?i=001-90051>> accessed 18 May 2026.

convicted of a crime violated Article 8 of the European Convention on Human Rights, precisely because such interference was disproportionate to the aim of combating crime: it was “blanket and indiscriminate” and failed to take into account either the seriousness of the offence or the necessity of continued data retention. In other words, the principles of proportionality and fair balance operate in practice as concrete assessment criteria for information systems (e.g., police DNA databases, mass interception systems, and large-scale state databases), rather than as abstract declarations.

The proportionality test developed in *S. and Marper v. the United Kingdom* may be applied to Kazakhstan’s biometric migration system, particularly to mandatory dactyloscopic registration of foreigners and stateless persons. In Kazakhstan, dactyloscopic information is used for personal identification and is collected from foreigners and stateless persons in cases such as obtaining temporary or permanent residence permits, residence documents, refugee-related documents, visas, as well as in expulsion and readmission procedures. This makes it a concrete example of biometric processing in migration governance.

Such processing may pursue legitimate aims, including identity verification, migration control, public security, and prevention of unlawful stay or document fraud. However, under the proportionality test, a legitimate aim is not sufficient. The legal framework should clearly define the purpose of processing, the categories of biometric data collected, retention periods, authorities authorised to access the data, grounds for inter-agency transfer, and remedies for correcting inaccurate records. Without these safeguards, biometric registration may create risks of excessive retention, secondary use, misidentification, and disproportionate interference with migrants’ private lives.

Therefore, *S. and Marper* is relevant not only as a case on biometric data retention but as a doctrinal basis for requiring clearer safeguards in Kazakhstan’s digital migration infrastructure.

Convention 108+ treats consent as an independent substantive safeguard: processing is permitted either on the basis of “free, specific, informed and unambiguous consent” or on another lawful ground. In Kazakhstani legislation, consent is regulated primarily in procedural terms (written/electronic form, the possibility of withdrawal, including via the e-government platform and SMS code verification), but it does not clarify that consent must be freely given (without coercion or being imposed as a condition for a service where it is not objectively necessary), specific (linked to clearly defined purposes), informed, and unambiguous. In practice, this leads to operators “embedding” consent into a general contract or user agreement, while courts tend to verify mainly the formal existence of a signature/checkbox rather than the data subject’s genuine awareness and freedom of choice, as evidenced by law enforcement and judicial practice.⁴³

43 ‘Review of Judicial Practice on Personal Data in Kazakhstan’ (*Revera Kazakhstan*, 6 March 2025) <<https://kazakhstan.revera.legal/en/info-centr/news-and-analytical-materials/229-obzor-sudebnoj-praktiki-po-personalnym-dannym-v-kazaxstane/>> accessed 18 May 2026.

Article 10 of Convention 108+ requires controllers, prior to commencing processing, to assess the likely impact on data subjects' rights and freedoms and to ensure that systems and processes are designed with data protection requirements embedded at all stages of processing.⁴⁴ In Kazakhstan's national legislation, there is an obligation to adopt "necessary organisational and technical measures" (Article 25) to protect data and prevent unauthorised access, as well as general duties to ensure the integrity, confidentiality, and destruction of data once the purpose of processing has been achieved.⁴⁵ It should be noted that Kazakhstan has experienced instances of major data leaks involving databases held by both public and private operators, including the Central Election Commission, Kazpost, and Yandex.Eda, Sportmaster, and others. Recent amendments introduced in 2023–2024 additionally incorporated the concept of a "personal data security breach," established a duty to notify the competent authority of breaches, prohibited the collection and storage of paper copies of identity documents, and empowered the competent authority to conduct unscheduled inspections and to apply a 33-item checklist of data processing requirements. However, the Law "On Personal Data and Their Protection" still does not impose a general obligation to carry out an *ex ante* impact assessment for high-risk processing (such as biometrics, large state registers, scoring and profiling systems, and algorithmic decision-making), nor does it include a "privacy-by-default" principle requiring, by default, the minimisation of the data collected, retention periods, and the scope of access.

It should be clarified, however, that Convention 108+ is not directly binding on Kazakhstan, since Kazakhstan is not a party to this instrument. Therefore, the relevance of Convention 108+ for the present study is not based on its direct applicability, but on its value as a comparative and normative benchmark for assessing the adequacy of national data protection rules. This distinction is important: the article does not suggest a mechanical legal transplant of Convention 108+ into Kazakhstani law, but rather a selective and functional adaptation of those principles that address the risks posed by digital migration governance. This approach is also supported by the Council of Europe's earlier assessment of Kazakhstan's data protection framework, which identified several areas requiring clarification or strengthening, including the application of data protection guarantees to all individuals regardless of nationality or residence, the prevention of excessive data processing, data accuracy, safeguards for special categories of data, and independent supervisory oversight.

43 'Results of Public Discussion of Amendments on Issues of Rapid Response to Personal Data Leakage' (*Eurasian Digital Foundation*, 21 December 2023) <<https://digitalrights.asia/analytic/public-hearings-results-on-prompt-response-to-data-leakage/>> accessed 18 May 2026.

44 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (n 32).

45 Law of the Republic of Kazakhstan No 94-V (n 40).

In this regard, it is proposed to amend the article on the principles of personal data processing by expressly adding, alongside the existing principles, the following:

- the “principle of proportionality and fair balance of interests,” under which the scope and nature of processing must be necessary and proportionate to the purpose, taking into account the rights and freedoms of data subjects;
- the “principle of data minimisation and purpose limitation,” under which only data that are necessary and sufficient for specifically defined and legitimate purposes may be collected, and processing incompatible with those purposes is not permitted, except in cases expressly provided for by law;
- the “principle of storage limitation,” requiring the destruction or anonymisation of data once the purpose has been achieved or the lawful retention period has expired;
- the “principle of transparency of processing,” establishing an obligation for operators to provide data subjects with clear information on the purposes, legal grounds, and recipients of the data;
- the “principle of accountability and data protection by design and by default,” obliging operators both to demonstrate compliance of processing with the law and to design processes and systems from the outset to minimise risks to data subjects’ rights.

We consider it necessary to clarify the rules on data subject consent. In the provisions governing the conditions for collection and the form of consent, it should be specified that consent must be “freely given, specific, informed, and unambiguous,” may be withdrawn as easily as it was given, and may not be made a condition for the provision of a service beyond the extent of processing that is objectively necessary to deliver that service. This would enable courts and the competent authority, when assessing individual cases, to examine not only the existence of a formal document but also the data subject’s genuine awareness, voluntariness, and the specificity of the consent.

We also consider it necessary to introduce into the Law “On Personal Data and Their Protection” a specific provision on a “personal data protection impact assessment” (data protection impact assessment). Such an assessment could be made mandatory for categories of processing that inherently entail elevated risks, including large-scale state databases (tax, migration, electoral registers), biometric data processing, profiling and automated decision-making, and cross-border transfers to jurisdictions that do not provide an adequate level of protection.

Further development of these approaches is evident in the latest European instruments governing the use of artificial intelligence. Whereas Convention 108+ is concerned primarily with the protection of personal data and with safeguards for lawful, proportionate,

and secure processing, Regulation (EU) 2024/1689 (the EU AI Act)⁴⁶ and the Council of Europe Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law⁴⁷ shift the focus to a broader question: how digital and algorithmic systems capable of significantly affecting human rights should be legally constrained, including where they interfere with the right to privacy, the protection of personal data, non-discrimination, procedural fairness, and effective remedies. The European Commission expressly characterises the AI Act as the first comprehensive legal framework for artificial intelligence based on a risk-based approach, while the Council of Europe describes its Convention as the first legally binding international treaty in this field, aimed at ensuring that the use of AI remains compatible with human rights, democracy, and the rule of law.

Of particular importance in the fields of migration, asylum, and border management is the fact that the AI Act does not treat the use of AI in this area as a form of technically neutral administrative automation, but rather as the deployment of high-risk systems capable of directly affecting the fundamental rights of persons in vulnerable situations who are dependent on decisions taken by public authorities. In this regard, Recital 60 emphasises the requirements of accuracy, transparency, and non-discrimination applicable to such systems, since it is through these safeguards that compliance with freedom of movement, the right to privacy, the protection of personal data, non-discrimination, the right to international protection, and the right to good administration is to be ensured. At the same time, the Act expressly provides that the use of AI in migration, asylum, and border management must not serve to circumvent the international obligations of states, including those arising under the 1951 Convention relating to the Status of Refugees.⁴⁸

Normatively, this is reflected in the fact that Annex III of the AI Act classifies as high-risk AI systems a number of systems used in migration, asylum, and border control, including tools for risk assessment, the recognition and identification of persons, as well as systems used in the examination of applications for asylum, visas, and residence permits. Such classification means that the risk to human rights in this field is understood to be structural, since digital systems can directly affect access to status, procedure, territory, documentation, or protection.

A more operational reading of the EU AI Act shows that its relevance for Kazakhstan lies not only in classifying AI systems for migration, asylum, and border management as high-risk, but also in the specific obligations attached to that classification. Article 6 provides the entry point by determining when an AI system is considered high-risk. For migration governance, this approach is important because systems used for risk assessment, identity

46 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence [2024] OJ L 2024/1689.

47 Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law (adopted 17 May 2024) [2024] CETS 225.

48 Convention Relating to the Status of Refugees (adopted 28 July 1951) [1954] UNTS 189/137.

verification, profiling, or support in decisions on visas, residence, or access to employment may directly affect a person's legal status and access to rights.

The most transferable elements for Kazakhstan are not the EU market-access mechanisms or CE conformity procedures, but rather the substantive safeguards applicable to high-risk systems. Article 9 requires a lifecycle risk management system; Article 10 requires data governance, including attention to data quality, representativeness, errors, gaps, and bias; Article 13 requires transparency and sufficient information on the system's intended purpose, accuracy, limitations, risks, and interpretation of outputs; and Article 14 requires effective human oversight, including the ability to understand, disregard, override, or stop the system's output where necessary. These obligations are directly relevant to migration procedures because inaccurate data, biased datasets, or over-reliance on automated outputs may result in wrongful refusal, delay, misidentification, or restriction of a migrant's access to work and residence.

Articles 26 and 27 are particularly important for legislative adaptation because they concern the duties of deployers, including public authorities. A Kazakhstani model could require public bodies using high-risk AI or algorithmically supported systems in migration and labour regulation to use such systems only for legally defined purposes, appoint responsible officials for human oversight, maintain logs, monitor accuracy and discriminatory effects, suspend use where serious risks are identified, and conduct a prior fundamental rights impact assessment before deployment. Such an assessment should describe the purpose and context of use, categories of affected persons, types of data processed, foreseeable risks, safeguards, human oversight measures, and remedies available to the person concerned.

Accordingly, the EU AI Act should not be understood as a model to be transposed mechanically. Rather, it provides a regulatory toolkit that Kazakhstan could adapt selectively: classification of high-risk digital systems in migration and employment of foreigners; mandatory risk and rights impact assessment; data quality and bias-control duties; transparency obligations; human review of adverse digital outcomes; logging and audit mechanisms; and institutional accountability of public authorities deploying such systems.

The Council of Europe Framework Convention on Artificial Intelligence complements this sector-specific and risk-based approach by establishing a broader regulatory model grounded in human rights, democracy, and the rule of law. Unlike the EU AI Act, it is not limited to classifying high-risk systems but also establishes general obligations for public authorities and, where appropriate, for private actors involved in the design or use of AI systems. Of particular importance are its requirements concerning transparency, accountability, non-discrimination, protection of private life and personal data, effective remedies, procedural safeguards, and the assessment and mitigation of AI-related risks and impacts. Against this background, Kazakhstan's regulatory framework still appears fragmented: while it focuses primarily on the security of data processing, it does not yet provide for a general category of high-risk digital or AI-supported systems, mandatory prior assessment of impacts on rights, or developed requirements concerning transparency, human oversight, contestability, and institutional accountability in algorithmically supported decision-making.

5 RESULTS

The analysis identifies four key problem areas: labour migrants' growing dependence on digital identification and interagency registers; insufficient legal articulation of data minimisation, purpose limitation, transparency, accountability, privacy-by-design and privacy-by-default; heightened risks linked to biometric processing and interagency data exchange, as illustrated by mandatory dactyloscopic registration of foreigners and stateless persons; and the need for procedural safeguards in algorithmically supported decision-making, including risk assessment, data governance, transparency, human review, logging, explanation, correction and appeal.

These findings are set out below as a proposed set of digital rights and regulatory safeguards for labour migrants.

Table 4. A Framework of digital rights and regulatory safeguards for labour migrants

Digital right of a labour migrant	Digital Rights of a Labour Migrant
The labour migrant's digital right to proportionate and purpose-limited processing of personal and migration-related data.	The processing of labour migrants' personal and migration-related data shall be permitted only to the extent and by the means that are necessary and proportionate to specifically defined and legitimate purposes of processing. The collection and use of personal data that have no direct relevance to the purpose of processing, as well as any subsequent processing incompatible with the initially stated purposes, shall not be permitted, except in cases expressly provided for by the laws of the Republic of Kazakhstan
The labour migrant's digital right to freely given, specific, and informed consent to data processing.	A data subject's consent to the processing of their personal and biometric data shall be freely given, specific, informed, and unambiguous. Consent shall not be considered freely given where the processing of personal data is not objectively necessary for the provision of the relevant public service, the performance of labour or migration procedures, or is imposed as a mandatory condition for access to such services without lawful grounds.
The labour migrant's digital right to enhanced protection of biometric data.	The processing of labour migrants' biometric data shall be permitted exclusively based on a specific legal ground established by law or the data subject's separate explicit consent. The storage of biometric data shall be allowed only for the period objectively necessary to achieve the purpose of processing, followed by the mandatory destruction or anonymisation of such data

Digital right of a labour migrant	Digital Rights of a Labour Migrant
The labour migrant's digital right to data protection.	Operators processing labour migrants' personal and biometric data through information systems shall ensure data protection by design and by default, including the minimisation of the volume of processed data, limitation of retention periods, and restriction of the circle of persons having access to the data. For types of processing that create heightened risks to the rights and freedoms of data subjects, a prior assessment of the impact of processing on the rights and freedoms of data subjects shall be carried out.
The right to a prior risk assessment in high-risk digital data processing.	In cases where labour migrants' personal and biometric data are processed using information systems that pose heightened risks to the rights and freedoms of data subjects, the operator shall, prior to commencing the processing, conduct a personal data processing impact assessment, document its results, implement risk-mitigation measures, and provide such assessment to the competent authority upon request.
The labour migrant's digital right to proportionate safeguards in biometric registration.	Mandatory biometric registration of labour migrants, including dactyloscopic registration, shall be permitted only based on a clear legal ground and for specifically defined legitimate purposes. The law shall establish the categories of biometric data collected, retention periods, competent authorities entitled to access the data, grounds for inter-agency transfer, audit mechanisms, and remedies for correcting inaccurate records or challenging adverse outcomes.
The labour migrant's digital right to human oversight and contestation of algorithmically supported decisions.	Where digital or AI-supported systems are used in migration or labour-related decision-making, labour migrants shall have the right to meaningful human review, information on the role of the system, correction of inaccurate data, and access to effective appeal mechanisms. Public authorities and private platforms deploying such systems shall ensure risk management, data quality control, transparency, logging, monitoring of discriminatory effects, and prior assessment of impacts on rights.

6 CONCLUSION

The study confirms that the digitalisation of migration administration and the labour market is transforming the position of the labour migrant: the exercise of key rights increasingly depends on the quality of digital procedures, the architecture of information systems, and the rules governing the processing of personal and biometric data. In this context, the “digital rights of labour migrants” should be understood not as an abstract doctrinal construct, but as a practice-oriented set of guarantees ensuring: (1) the lawfulness, proportionality, and transparency of data processing; (2) access to digital public services without discriminatory barriers; and (3) procedural fairness and effective remedies in cases of register errors, digital identification failures, and adverse digital decisions.

The comparative legal analysis of international approaches and Kazakhstan’s national legislation indicates normative insufficiency in relation to the principles and procedures of data processing, especially regarding biometrics, interagency data exchange, and potential algorithmic components of decision-making. Clearer legal requirements are needed for data minimisation, purpose and storage limitation, transparency, accountability, and the mandatory integration of risk considerations into the design of digital services (privacy-by-design/privacy-by-default). At the same time, procedural safeguards require strengthening, including access to information about digital processes, the ability to promptly correct errors, clear and rapid appeal mechanisms, and institutional accountability of operators and public authorities for data quality and processing security.

Beyond purely legal compliance, the responsible use of migrants’ data should be treated as an ethical and institutional requirement of digital migration governance. Biometric data, inter-agency data exchange, and algorithmic profiling may directly affect a migrant’s legal status, access to work, residence, and public services. Therefore, such data should not be used as a general-purpose instrument of surveillance or control, but only for clearly defined, lawful, necessary, and proportionate purposes. Safeguards against misuse should include purpose limitation, strict access control, retention limits, audit trails, independent oversight, prohibition of unjustified secondary use, mechanisms for correcting inaccurate data, and effective remedies against adverse digital outcomes. These obligations should apply not only to public authorities, but also to private digital platforms involved in labour intermediation, rating systems, digital profiling, or algorithmic management of migrant work.

The analysis indicates that Kazakhstan’s existing data protection framework should be further specified in the context of labour migration. In this sphere, digital data are not merely an object of privacy protection, but a legal precondition for access to migration registration, residence, lawful employment, employer reporting procedures, and, increasingly, platform-mediated work. Errors, omissions, or non-transparent data exchanges in migration, labour, or biometric systems may therefore directly affect a labour migrant’s legal status, access to work, and ability to obtain an effective remedy. For this

reason, the article distinguishes between general safeguards applicable to all data subjects and additional guarantees required in labour migration governance. General safeguards should include data minimisation, purpose limitation, transparency, storage limitation, security, and accountability. Labour-migration-specific safeguards should include accelerated correction of inaccurate records affecting residence or work authorisation, notification and explanation of adverse digital outcomes, meaningful human review of decisions supported by digital or algorithmic systems, clear rules on employer and platform data reporting, and effective complaint and appeal procedures where digital data influence access to lawful employment or migration-related procedures.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЦИФРОВІ ПРАВА ТРУДОВИХ МІГРАНТІВ У КАЗАХСТАНІ: МІЖНАРОДНІ СТАНДАРТИ, ЦИФРОВЕ УПРАВЛІННЯ ТА РЕГУЛЯТОРНІ ЗАХОДИ

**Мадіна Абдраманова*, Аманжол Нурмагамбетов ст.,
Ануар Нурмагамбетов ст. та Айгерім Жумабаєва**

АНОТАЦІЯ

Вступ. Цифровізація управління міграцією та регулювання праці докорінно змінила умови, за яких трудові мігранти реалізують свої права. У Казахстані мігранти дедалі більше залежать від електронних державних послуг, цифрової ідентифікації, біометричної верифікації, сумісних баз даних та посередництва у сфері праці на основі платформ. Хоча ці технології можуть підвищити адміністративну ефективність, вони також створюють нові правові ризики, зокрема непрозору обробку персональних та

біометричних даних, надмірний збір даних, помилки ідентифікації, цифрову ізоляцію та обмежений доступ до ефективних засобів правового захисту. Ці тенденції вимагають чіткішої концептуалізації цифрових прав трудових мігрантів та точнішої оцінки того, чи є наявні правові механізми в Казахстані достатніми для їх захисту.

Методи. У дослідженні використовується доктринальна та порівняльно-правова методологія. Воно розглядає правовий зміст цифрових прав трудових мігрантів за допомогою аналізу міжнародних стандартів у сфері прав людини та захисту даних, зокрема Конвенції 108+, практики Європейського суду з прав людини, Регламенту (ЄС) 2024/1689 (Акту ЄС про штучний інтелект) та Рамкової конвенції Ради Європи про штучний інтелект, права людини, демократію та верховенство права. Ці стандарти порівнюються із законодавством Республіки Казахстан у сферах міграції, праці та захисту персональних даних. У дослідженні також використовується ризик-орієнтований аналітичний підхід до виявлення регуляторних прогалів, пов'язаних з біометричною обробкою, міжвідомчим обміном даними, автоматизованим ухваленням рішень та наданням цифрових послуг.

Результати та висновки. Дослідження демонструє, що правова база Казахстану містить важливі базові гарантії, але залишається фрагментованою у своєму підході до цифрових ризиків, що впливають на трудових мігрантів. Законодавство недостатньо чітко формулює принципи пропорційності, обмеження мети, обмеження зберігання, прозорості та підзвітності як дієві правові стандарти. У ньому також бракує зазначення чітких зобов'язань щодо захисту приватності на етапі проектування, захисту приватності за замовчуванням та оцінки впливу на захист даних для обробки з високим рівнем ризику, особливо коли йдеться про біометричні дані або рішення, ухвалені за допомогою алгоритмів. Процедурні гарантії також недостатньо розвинені, зокрема щодо права на інформацію, виправлення неточних даних, пояснення несприятливих цифрових наслідків та ефективного оскарження рішень.

У статті стверджується, що цифрові права трудових мігрантів слід розуміти як структурований набір гарантій, що забезпечують законну, пропорційну та прозору обробку даних, недискримінаційний доступ до цифрових послуг та процесуальний захист від несприятливих цифрових рішень. У статті пропонується посилити правову базу Казахстану за допомогою чіткішого закріплення принципів захисту даних, запровадження обов'язкової оцінки впливу для систем високого ризику, посилення гарантій біометричних даних та розширення процесуальних прав у сфері цифрового управління міграцією.

Ключові слова. Трудові мігранти; біометричні дані; управління міграцією; рішення, ухвалені за допомогою алгоритмів; цифрові права.

Research Article

EUROPEAN UNION
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AND INDIRECT ACCESS
TO JUSTICE FOR VIETNAMESE EXPORTERS:
STANDING CONSTRAINTS
UNDER ARTICLE 263 TFEU AND LESSONS
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ABSTRACT

Background: *The European Union (EU) increasingly uses environmental conditionality as a market-access governance technique through border controls, traceability requirements, sustainability reporting, supply chain due diligence, and country-based risk assessment. Although many obligations are formally imposed on EU operators, compliance costs and evidentiary burdens are frequently borne upstream by third-country suppliers. For Vietnamese exporters, this creates a procedural gap: they may suffer commercial, reputational, and exclusionary harm while remaining peripheral to the decision-making and review structures that shape access to the EU market. The article examines that gap through access to justice, focusing on Article 263 TFEU and mediated safeguards.*

Method: *The article employs doctrinal legal analysis to examine standing and reviewability constraints under Article 263 TFEU and selected EU environmental market-access instruments. It uses law-in-context reasoning to assess how EU regulatory architectures operate through supply chains and affect Vietnamese exporters. The EU's yellow-card process for illegal, unreported, and unregulated (IUU) fishing against Vietnam is used as an illustrative case study because it clearly demonstrates the mismatch between the formal procedural addressee, the third-country state, and the private exporters who bear operational and economic burdens.*

Results and Conclusions: *The article finds that Vietnamese exporters operate in a structurally asymmetric procedural environment. Direct action before EU courts remains constrained by restrictive standing doctrine, while Article 267 TFEU offers only a contingent, indirect route that depends on proceedings before Member State courts. The IUU yellow card illustrates how reason-giving and participation are concentrated in Commission-state dialogue, while exporters bear intensified documentary, traceability, and reputational burdens. The article concludes that meaningful indirect access to justice depends on domestic institutional design. It proposes a single-window export spillover response mechanism, standardised evidence templates, time-bound reasoned responses, and interoperable compliance information systems linked to the EVFTA Trade and Sustainable Development dialogue and follow-up.*

1 INTRODUCTION

1.1. European Union Environmental Standards as Enforcement Tools Tied to Market Access Conditions

The EU increasingly operationalises environmental objectives as market-access conditions. Because obligations are often importer-facing while compliance evidence is generated upstream, the immediate procedural question is who can request reasons and seek review when market-access harm occurs.¹ The Carbon Border Adjustment Mechanism (CBAM) illustrates how border-facing regimes turn reporting and verification of embedded emissions into a practical gatekeeping condition for market access.² The deforestation-free regime similarly makes traceability central to access, with implementation timetables themselves shaping compliance costs.³

1 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020) doi:10.1093/oso/9780190088583.001.0001.

2 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism [2023] OJ L 130/52.

3 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 [2023] OJ L 150/206; Regulation (EU) 2024/3234 of the European Parliament and of the Council of 19 December 2024 amending Regulation (EU) 2023/1115 as Regards Provisions Relating to the Date of Application [2024] OJ L 2024/3234.

The Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD) further reinforce upstream data extraction by requiring value-chain information and due diligence across in-scope companies.⁴ A further salient development is the datafication of compliance through product passports. Regulation (EU) 2024/1781 establishes a framework for ecodesign requirements for sustainable products and provides the legal basis for the Digital Product Passport as a compliance-oriented information infrastructure, making lifecycle data and documentation central to the acceptance of goods on the EU market.⁵ In certain sectors, lifecycle-based obligations are specified in greater detail, for example, for batteries under Regulation (EU) 2023/1542.⁶

For exporters, the Digital Product Passport is not merely a technical tool. It creates a procedural problem: product-level data must be collected, verified, and corrected in formats recognised by EU operators, while non-EU suppliers may lack a channel to correct errors, contest rejections, or request reasons when documentation is treated as insufficient.⁷

These architectures convert compliance into a procedural problem: exporters may incur exclusionary effects without accessible channels to request reasons or trigger review.⁸

The procedural problem is visible in four needs: advance notice of data templates, a route to correct compliance information, explanations for inadequate documentation, and representative channels for sector-specific constraints before market exclusion becomes irreversible.

1.2. Vietnamese Enterprises as Indirectly Affected Actors under European Union Environmental Regulation

Although EU obligations are typically importer-facing, Vietnamese exporters are materially affected through value-chain transmission.

4 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting (CSRD) [2022] OJ L 322/15.

5 Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 Establishing a Framework for the Setting of Ecodesign Requirements for Sustainable Products, Amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and Repealing Directive 2009/125/EC [2024] OJ L 2024/1781.

6 Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 Concerning Batteries and Waste Batteries, Amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and Repealing Directive 2006/66/EC [2023] OJ L 191/1.

7 Regulation (EU) 2024/1781 (n 5) arts 9-12, on product passports, data carriers, access to information and product passport service providers.

8 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998) (Aarhus Convention) [2003] UNTS 2161/447, art 9.

First, importers translate EU duties into contracts, audits, and termination rights, making exporters de facto compliance-bearers.⁹

Second, data gaps become exclusion risks as buyers demand traceable, auditable evidence.¹⁰

Third, competition shifts toward demonstrable capacity for compliance, disadvantaging firms with fragmented sourcing and weak documentation.¹¹

Exporters are expected to meet functional equivalents of EU requirements while remaining procedurally peripheral.

For the purposes of this article, a 'Vietnamese exporter' means a Vietnam-based enterprise, producer, processor, trader or supply-chain participant whose goods, data or compliance documentation are used for placing products on the EU market, whether the enterprise exports directly to an EU buyer or supplies upstream to an intermediary exporting chain. The object of the article is not the substantive legality of each EU environmental measure, but the procedural position of such exporters when EU environment-related market measures affect their access to information, participation, reason-giving, and review.¹²

The sources used here serve distinct functions: EU instruments identify formal duties; OECD and UNGP materials explain value-chain transmission; and Brussels Effect scholarship frames EU market influence. Firm-level effects are assessed through the IUU case study and sectoral evidence in Section 5.

1.3. Research Problem and Research Questions

Building on the foregoing discussion, this article approaches the problem through the lens of access to justice in circumstances where EU environmental standards generate cross-border effects. The core inquiry is to identify the pathways through which non-EU enterprises, with particular attention to Vietnamese enterprises, may obtain timely

9 Organisation for Economic Co-operation and Development, *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD Publishing 2018) doi:10.1787/15f5f4b3-en; John Gerard Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN Doc A/HRC/17/31, 21 March 2011) <<https://digitallibrary.un.org/record/705860?ln=en&v=pdf>> accessed 3 February 2026.

10 'Regulation on Deforestation-Free Products' (European Commission, 2025) <https://environment.ec.europa.eu/topics/forests/deforestation/regulation-deforestation-free-products_en> accessed 3 February 2026.

11 Bradford (n 1); Gary P Sampson, *The World Trade Organization and Global Governance: Future Directions* (UN UP 2009); Robert Howse and Joanna Langille, 'Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future' (2023) 117(1) *American Journal of International Law* 1, doi:10.1017/ajil.2022.82.

12 Distinguishing state-to-state foreign trade disputes from trader-to-trader disputes, see Law of the Socialist Republic of Vietnam No 05/2017/QH14 'On Foreign Trade Management (adopted 12 June 2017) arts 3, 108–110 <<https://thuvienphapluat.vn/van-ban/Thuong-mai/Luat-Quan-ly-ngoi-thuong-2017-322219.aspx>> accessed 18 May 2026.

information, participate in relevant processes, lodge submissions or complaints, seek review, and request reasons when they are affected by environmental requirements that operate in practice as conditions of entry to the EU market.

The literature explains EU regulatory diffusion, access to justice values, Article 263 TFEU standing and IUU trade effects. Less developed is the institutional position of third-country exporters who are not addressees of EU acts but must generate market-access evidence. This article fills that gap by framing their position as an indirect access to justice problem and proposing an EVFTA-linked mechanism for exporter evidence.

Indirect access to justice refers to mediated routes used when exporters cannot realistically appear in EU procedures. In practice, exporters rely on intermediaries such as EU counterparties, associations, domestic agencies, and treaty-based channels. The article asks whether EU conditionality structurally limits effective judicial protection for Vietnamese exporters and what domestic designs make mediated pathways rights-protective.

For conceptual clarity, indirect access to justice is not used here as a synonym for regulatory cooperation, diplomatic protection, or ordinary trade consultation. It refers to institutional pathways through which affected exporters may have their evidence, compliance burdens and claims of disproportionate impact received, standardised, transmitted, and answered through legally or procedurally recognisable channels. Its rights-protective quality therefore depends on accessibility, transparency, reason-giving, time-bound responsiveness, and the capacity to influence regulatory or administrative outcomes.

Four questions guide the analysis. First, which EU measures function as market-entry conditions and what bottlenecks do they create for non-EU enterprises? Second, which channels allow Vietnamese exporters to seek reasons, contest implementation, or mitigate harm? Third, what institutional lessons follow from the IUU carding process?¹³ Fourth, what domestic design can lower information asymmetries and make indirect access to justice operational?¹⁴

1.4. Research Methods and Structure of the Article

This article is primarily a doctrinal legal analysis, supplemented by law-in-context reasoning and an illustrative case study. Doctrinal analysis examines Article 263 TFEU and selected EU environmental market-access instruments. Law-in-context reasoning assesses how these instruments operate through supply-chain contracts, traceability systems, audits, and Vietnamese exporters' compliance capacities.

13 European Commission Decision of 23 October 2017 Notifying the Socialist Republic of Vietnam of the Possibility of Being Identified as a Non-Cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing [2017] OJ C 364/3.

14 Bryant G Garth and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181.

The article does not conduct a full comparative analysis of EU free trade agreements. It uses a limited functional comparison of mediated protection channels under EU law, the EVFTA, Vietnamese administrative law and commercial grievance routes. The IUU yellow-card process is selected because it clearly shows the mismatch between the state as procedural addressee and exporters as compliance burden-bearers.

Section 2 sets the access to justice framework; Sections 3-4 map EU spillovers and procedural limits; Section 5 examines the IUU case; Sections 6-7 identify domestic gaps and propose EVFTA-linked reforms.

2 THEORETICAL FRAMEWORK: ACCESS TO JUSTICE BEYOND TERRITORIAL BOUNDARIES

2.1. Effective Judicial Protection as the Baseline: Reviewability, Standing, and Procedural Voice

Access to justice in this article is assessed against the baseline of effective judicial protection, understood as a procedural architecture in which affected actors can (i) obtain reasons, (ii) challenge legality, and (iii) access review capable of influencing outcomes. In the EU legal order, this baseline is closely associated with the right to an effective remedy (as articulated in Article 47 of the EU Charter of Fundamental Rights) and the general principle of effective judicial protection developed in EU jurisprudence.

However, when EU environmental conditionality produces extraterritorial spillovers for third-country exporters, the baseline becomes structurally mediated by two interlocking constraints.

First, reviewability is narrowed by design: many EU instruments allocate formal obligations to EU-based actors, while third-country exporters experience the economic effect through contracts, data systems, and border implementation.

Second, standing is restricted doctrinally. Under Article 263 TFEU, private applicants can challenge EU acts only under narrow heads, and the individual-concern threshold associated with the Plaumann line of case law makes it difficult for exporters outside the EU to contest measures of general application.

Accordingly, this article treats “direct access to justice” (through EU administrative/judicial routes available to private actors) as structurally constrained for Vietnamese exporters not only as a matter of practical cost but as a function of the EU’s standing architecture and enforcement design. This diagnosis motivates the need to conceptualise and evaluate indirect access to justice as the predominant pathway for rights protection in cross-border environmental conditionality.

2.2. Environmental Accountability as a Procedural Legal Concept

Environmental accountability is treated here as a procedural legal concept. The issue is not only what environmental standards require¹⁵ but also whether decision-makers disclose information, provide reasons, allow meaningful participation, and accept review when environmental decisions affect legally protected interests.¹⁶ Principle 10 of the 1992 Rio Declaration anchors procedural environmental governance through access to information, participation, and review. The Aarhus Convention and UNEP Bali Guidelines operationalise these pillars by emphasising practical accessibility and reducing informational, technical, and cost barriers. They provide legislative and institutional guidance on designing access-to-information, participation, and access to justice frameworks, emphasising the reduction of informational, technical, and cost barriers that commonly undermine real-world exercisability. In this article, Rio/Aarhus/Bali therefore serve as benchmarks for evaluating whether cross-border conditionality regimes preserve minimum procedural entitlements, especially where the affected actors are exporters outside the regulating authority's territorial jurisdiction.

At the EU level, the Aarhus Convention is implemented through Regulation (EC) No 1367/2006, as amended by Regulation (EU) 2021/1767. This supports the article's procedural baseline because EU environmental governance accepts review, participation, and reason-giving as legality values. Its limits are also clear: Vietnamese exporters usually suffer commercial and value-chain effects that are not easily framed as EU environmental public-interest review.¹⁷

2.3. Distinguishing Direct and Indirect Access to Justice in Cross-Border Legal Enforcement

In cross-border legal enforcement, access to justice may be analytically distinguished as direct or indirect by reference to three criteria: the actor entitled to initiate the procedure, the forum in which review is conducted, and the procedural pathway through which a remedy can realistically be pursued.

15 Aarhus Convention (n 8) arts 4–6.

16 United Nations Environment Programme, *Putting Rio Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (UNEP 2015).

17 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L 264/13; Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2021] OJ L 356/1.

*Direct access to justice exists when the affected actor can trigger administrative review, a complaint mechanism, or judicial proceedings to contest measures that generate environmental and trade-related consequences. It depends on jurisdiction, standing, evidence, costs, and time limits.*¹⁸

Indirect access to justice captures the common situation in which the affected actor cannot realistically appear as a procedural party in the originating jurisdiction. Protection must then move through EU counterparties, industry associations, domestic agencies or treaty channels, and its quality depends on representation, openness, and responsiveness.

Third-country exporters and their representative bodies should be treated at least as structured procedural contributors where EU environmental measures create identifiable market-access burdens. They are both burden-bearers and information-holders; their input can improve factual accuracy, reveal disproportionate effects, and distinguish environmental risk from documentation or capacity failures.

To assess whether indirect access is rights-protective rather than merely consultative, this article applies five minimum criteria: accessibility (can exporters trigger the pathway?), transparency (reasons and criteria), responsiveness (time-bound duties), independence (impartial scrutiny), and effectiveness (capacity to influence outcomes or mitigate harm).¹⁹

3 EU ENVIRONMENTAL CONDITIONALITY AS MARKET-ACCESS GOVERNANCE: REGULATORY ARCHITECTURES AND SPILLOVER EFFECTS

This section is confined to the regulatory architecture of EU environmental conditionality. Its purpose is to explain how EU measures produce cross-border market-access effects through country assessment, risk tiering, due diligence, and data-based compliance infrastructures. The procedural consequences of these spillovers are addressed separately in Section 4.

3.1. EU Environmental Measures Operationalised Through Country-Level Assessment and Market Access Conditionality

A distinctive feature of contemporary EU environmental enforcement is the conversion of environmental protection objectives into market access conditions organised around country-level assessment or country-based risk tiering. This approach enables the EU to manage regulatory risk through differentiated compliance expectations and variable

18 Aarhus Convention (n 8) art 9.

19 Anne Altmayer, *Implementing the Aarhus Convention: Access to Justice in Environmental Matters* (Briefing PE 608.753, EPRS 2017) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2017\)608753](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2017)608753)> accessed 3 February 2026.

intensity of border controls. In turn, it generates spillover effects that extend beyond EU territory, shaping incentives and compliance practices in exporting States and among non-EU firms operating within relevant supply chains.²⁰

The EU IUU carding system illustrates country-level enforcement. The Commission may warn a third country considered non-cooperative and, if corrective action is inadequate, move toward import restrictions. Procedurally, the dialogue is Commission-state; economically, costs are borne by exporters through inspections, documentation burdens, and reputational risk. This is the core procedural addressee-economic bearer misalignment.²¹

A comparable logic operates in the context of deforestation. Regulation (EU) 2023/1115 is implemented not only through operator-level due diligence obligations but also through an explicit country-benchmarking system that assigns risk levels to producer countries (or parts thereof). Risk classification shapes the intensity of due diligence and the probability of checks, thereby shifting the enforcement centre of gravity from individual transactions to systemic risk management organised by country and supply-chain architecture.

Country-level assessment concentrates procedural leverage at the Commission-government level while dispersing economic burdens to exporters, increasing reliance on mediated protection.

3.2. Sustainability Due Diligence Obligations and Responsibility Across Supply Chains

EU environmental spillovers are amplified by sustainability due diligence and supply-chain responsibility. Compliance increasingly turns on continuous information gathering, verification and risk management across supply relationships rather than on the single act of importation.

First, Regulation (EU) 2023/1115 operationalises supply-chain due diligence by requiring operators and traders placing covered commodities and products on the EU market to conduct due diligence and submit a due diligence statement. Within this architecture, traceability data serves as decisive evidence that goods are deforestation-free and produced in accordance with the laws of the country of production.²²

20 Council Regulation (EC) No 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and Repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999 [2008] OJ L 286/1; European Commission Decision of 23 October 2017 (n 13).

21 Assia Baric and Jinhwan Oh, 'Effects of the EU's Carding System for IUU Fishing on Its Trading Partners' (2022) 27(6) Global Business and Finance Review 69, doi:10.17549/gbfr.2022.27.6.69.

22 Regulation (EU) 2023/1115 (n 3), including references to due diligence statements and geolocation data requirements.

Secondly, Directive (EU) 2024/1760 on corporate sustainability due diligence strengthens responsible business conduct by requiring in-scope companies to identify and address adverse human rights and environmental impacts in their operations and across their value chains.²³ The European Commission notes that the directive entered into force on 25 July 2024.²⁴

Recent EU simplification measures change, but do not remove, the procedural issue. Omnibus I postponed, and revised parts of the CSRD and CSDDD frameworks, and the CBAM simplification introduced burden-reduction measures. Third-country exporters may face fewer automatic data demands but also need clarity on whether buyer requests are legally required, voluntary or disproportionate.²⁵

Finally, the Ecodesign for Sustainable Products Regulation (ESPR) consolidates a broader trend towards datafied compliance. Regulation (EU) 2024/1781 establishes a framework for setting eco-design requirements and provides the legal basis for the Digital Product Passport, making life-cycle information and compliance data part of the practical infrastructure of EU market access.²⁶

23 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 2024/1760.

24 'Corporate Sustainability Due Diligence' (European Commission, 2026) <https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en> accessed 3 February 2026.

25 Directive (EU) 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as Regards the Dates from which Member States are to Apply Certain Corporate Sustainability Reporting and Due Diligence Requirements [2025] OJ L 2025/794; Directive (EU) 2026/470 of the European Parliament and of the Council of 24 February 2026 amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as Regards Certain Corporate Sustainability Reporting Requirements and Certain Corporate Sustainability Due Diligence Requirements [2026] OJ L 2026/470; Regulation (EU) 2025/2083 of the European Parliament and of the Council of 8 October 2025 amending Regulation (EU) 2023/956 as Regards Simplifying and Strengthening the Carbon Border Adjustment Mechanism [2025] OJ L 2025/2083; 'Omnibus I Package - Commission Simplifies Rules on Sustainability and EU Investments, Delivering over €6 billion in Administrative Relief' (European Commission, 26 February 2025) <https://finance.ec.europa.eu/publications/omnibus-i-package-commission-simplifies-rules-sustainability-and-eu-investments-delivering-over-eu6_en> accessed 18 May 2026; 'Omnibus Package' (European Commission, 1 April 2025) <https://finance.ec.europa.eu/news/omnibus-package-2025-04-01_en> accessed 18 May 2026.

26 Regulation (EU) 2024/1781 (n 5); 'Ecodesign for Sustainable Products Regulation' (European Commission, 9 February 2026) <https://commission.europa.eu/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/ecodesign-sustainable-products-regulation_en> accessed 18 May 2026.

4 PROCEDURAL PROTECTION GAPS AND MEDIATED ACCESS TO JUSTICE FOR VIETNAMESE EXPORTERS

Having mapped the regulatory architectures in Section 3, this section turns to the procedural question that follows from them: whether Vietnamese exporters affected by EU environmental conditionality have direct, indirect, or mediated routes for obtaining reasons, submitting evidence, requesting review, or influencing outcomes.

4.1. The State as an Indispensable Intermediary in EU Environmental Enforcement Architectures

Across several EU environmental enforcement architectures, the exporting State is not merely the territorial site of production. It operates as a procedurally decisive intermediary for maintaining market access, where the EU's compliance model is structured around country-level assessment, country-risk tiering, or public-authority assurances anchored in the exporting State's governance system. Here, 'indispensable' means the EU process is state-addressed and cannot be substituted by firm-level action.

The EU IUU framework illustrates this intermediation. The warning-and-dialogue stage focuses on the exporting state's monitoring, control, sanctioning, and catch-certification systems. Exporters may provide evidence but cannot replace official assurances; the state remains the conduit through which firm-level harm reaches the EU-facing forum.²⁷

A second form of intermediation arises under country benchmarking. Under the deforestation-free regime, risk classification shapes checks and EU operators' risk posture. Although duties fall on EU actors, upstream firms face contractual audits and documentation demands. Without state-enabled traceability and interoperable datasets, firms face higher transaction costs and the risk of exclusion.²⁸

Taken together, these patterns indicate a structural shift in cross-border access to justice. For Vietnamese exporters, the primary route to seek protection, clarification, and recalibration of externally imposed market conditions is frequently not direct engagement with EU adjudicatory mechanisms, but indirect access to justice mediated through the exporting State, understood as both (i) an interest-representation channel and (ii) a procedural infrastructure capable of reducing information and power asymmetries embedded in EU environmental conditionality.

27 Council Regulation (EC) No 1005/2008 (n 20) arts 31–34, 38 (provisions on non-cooperating third countries and related market consequences).

28 Regulation (EU) 2023/1115 (n 3) art 29 (benchmarking system and country risk classification).

4.2. The Procedural Interests of Vietnamese Enterprises Affected by EU Environmental Measures

Where the State performs an intermediary function, exporters' interests extend beyond immediate commercial outcomes to a set of procedural interests that determine whether market access conditions are predictable, contestable, and capable of being moderated through reason-giving and review.

First, exporters require access to usable information and early warning. This includes timely, accurate guidance on scope, data requirements, evidentiary thresholds, and implementation timetables, as well as notice of prospective changes in enforcement intensity (for example, shifts in country-risk profiling or inspection priorities). Procedurally, this interest translates into needs for (i) standardised dissemination of requirements, (ii) access to relevant datasets in a reusable form, and (iii) reason-giving practices that enable firms to anticipate compliance expectations rather than responding *ex post* to detentions, rejections, or buyer disengagement.²⁹

Second, exporters require participation and feedback mechanisms in the design and implementation of domestic policy. Because EU-facing compliance is often realised through domestic infrastructures (traceability systems, certification practice, data governance, inspection coordination), exporters' ability to communicate feasibility constraints, compliance costs, and sector-specific transition pathways becomes a component of access to justice.³⁰

Third, exporters require representation in international regulatory dialogue and in EU-linked commercial governance. In country-assessment settings, the State is the formal interlocutor. Exporters therefore need representative mechanisms that can (i) aggregate and validate firm-level evidence, (ii) document trade and compliance impacts, (iii) identify points where implementation appears unreasonable or disproportionate, and (iv) select an appropriate channel—technical dialogue, consultation, or other treaty-based processes—to request clarification or recalibration. In data-intensive regimes, representation also includes State-enabled standardisation and interoperability of datasets, which can lower transaction costs and reduce precautionary exclusion by EU partners based on perceived weaknesses in documentation.

29 'Commission Warns Vietnam over Insufficient Action to Fight Illegal Fishing: Press release' (*European Commission*, 23 October 2017) <https://ec.europa.eu/commission/presscorner/detail/en/ip_17_4064> accessed 3 February 2026.

30 UN Environment Programme, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines)* (UNEP 2010) <<https://www.unep.org/resources/publication/guidelines-development-national-legislation-access-information-public>> accessed 3 February 2026.

In short, the operative content of indirect access to justice for Vietnamese exporters focuses on being informed, able to participate, and represented through procedures that are timely, evidence-based, and responsive. These elements determine whether exporters can shape domestic compliance conditions and whether the State can credibly engage with external counterparts to reduce procedural asymmetries arising from EU market-conditional enforcement.

4.3. Limits of Direct and Preliminary Judicial Redress for Non-EU Undertakings

Direct judicial redress is structurally constrained by Article 263 TFEU admissibility, particularly the restrictive 'individual concern' threshold associated with Plaumann, and by the difficulty of identifying an exporter-addressed EU act in diffuse enforcement architectures.³¹

The restrictive character of Article 263(4) TFEU is not merely theoretical. In Plaumann, the Court of Justice established a narrow test of individual concern, requiring the applicant to be affected by reason of attributes peculiar to it or circumstances differentiating it from all other persons. This test makes it particularly difficult for exporters outside the EU to challenge applicable market-access measures, even where those measures generate serious economic effects.³²

The difficulty is reinforced by the Court's interpretation of the third limb of Article 263(4) TFEU. In *Inuit Tapiriit Kanatami*, the Court confirmed that "regulatory acts" do not include legislative acts. As a result, where EU environmental conditionality is embedded in legislative instruments, affected private applicants cannot avoid the direct and individual concern requirements merely by invoking the Lisbon amendment to Article 263(4).³³

Venezuela v Council shows that a non-EU public entity may, in principle, bring an action for annulment where the conditions of Article 263(4) are satisfied. Yet this does not solve the problem faced by private exporters. Vietnamese exporters are not the formal addressees of EU country-assessment procedures or importer-facing due diligence obligations. Their harm is usually mediated through state assessment, customs implementation, buyer risk management, or contractual exclusion. This makes identifying a directly challengeable EU act especially difficult.³⁴

31 Magdalena Kucko, 'The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon' (2017) 2 LSE Law Review 101, doi:10.61315/lseir.17.

32 Case 25/62 *Plaumann & Co v Commission of the European Economic Community* (ECJ, 15 July 1963) ECLI:EU:C:1963:17 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61962CJ0025>> accessed 3 February 2026.

33 Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the EU* (ECJ, 3 October 2013) ECLI:EU:C:2013:625 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62011CJ0583>> accessed 3 February 2026.

34 Case C-872/19 P *République bolivarienne du Venezuela v Council of the EU* (ECJ, 22 June 2021) ECLI:EU:C:2021:507 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62019CJ0872>> accessed 3 February 2026.

Article 267 TFEU offers a more indirect route to judicial protection. A question on the validity or interpretation of EU law may be referred by a Member State court to the Court of Justice. For Vietnamese exporters, however, this route is structurally contingent.³⁵ They cannot directly compel a preliminary reference; access depends on whether a dispute arises before a Member State court, usually through an EU importer, a customs proceeding, a contractual dispute, or an administrative enforcement measure. Article 267 TFEU therefore mitigates, but does not eliminate, the access to justice gap.³⁶

The problem is compounded by the institutional distance between exporters and the “reviewable act.” EU environmental conditionality often operates through (i) border implementation decisions, (ii) country-level assessments and risk categorisations, or (iii) private risk management decisions by EU operators triggered by regulatory liability concerns. In each scenario, the exporter experiences material consequences, yet may struggle to identify a directly challengeable EU act that is procedurally attributable to the exporter in a way that satisfies admissibility thresholds.³⁷

Practical barriers further intensify these structural limits: litigation costs, evidentiary asymmetries, and access-to-file constraints can render direct judicial routes unrealistic even when theoretically feasible. As a result, the practical locus of protection shifts to mediated pathways, which must be assessed against transparency, responsiveness, and effectiveness.³⁸

5 THE EU IUU “YELLOW CARD” AGAINST VIETNAM: AN ILLUSTRATIVE CASE STUDY

5.1. The legal character of the EU IUU yellow-card warning mechanism

The EU IUU yellow-card mechanism is grounded in the EU IUU Regulation, which establishes a structured process for assessing and inducing compliance by third countries through market-access conditionality for fisheries products.³⁹ Rather than operating as an immediate trade sanction imposed directly on individual exporters, the yellow card is best understood as an outward-facing administrative procedure through which the European Commission assigns responsibility at the state level for controlling, monitoring, and enforcing against IUU fishing, with regulatory consequences that cascade across the export chain.⁴⁰

35 Treaty on the Functioning of the European Union (Consolidated version) [2016] OJ C 202/164, art 267.

36 Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* (ECJ, 22 October 1987) ECLI:EU:C:1987:452 <<https://eur-lex.europa.eu/legal-content/DE/ALL/?uri=CELEX:61985CJ0314>> accessed 3 February 2026.

37 Treaty on the Functioning of the European Union (n 35) art 263.

38 Aarhus Convention (n 8) art 9(4).

39 Council Regulation (EC) No 1005/2008 (n 20).

40 *ibid*, structure on third-country cooperation and state-focused compliance logic.

Procedurally, the Commission initiates and steers the non-cooperation assessment. Where a third country is considered at risk of being identified as non-cooperating, the Commission communicates the grounds underpinning its concerns and opens a structured opportunity for written representations, supplementary information, and corrective action measures. In access to justice terms, the key structural feature is that the dialogue is conducted formally between public authorities, the Commission, and the third country's competent authorities, rather than between the EU and the exporters who bear substantial compliance costs.⁴¹

If corrective action is deemed insufficient, the procedure may escalate to a formal identification of non-cooperation at Council level on the basis of a Commission proposal, thereby triggering the legal consequences attached to such a listing.⁴² Those consequences may include prohibitions on placing fisheries products caught by vessels flying the flag of the listed country on the EU market, the non-acceptance of catch certificates accompanying the relevant consignments, and related restrictive effects on EU operators.⁴³ Under the logic of the EU IUU framework, delisting is contingent upon an assessment that the third country has adopted and implemented measures capable of ensuring sustained and effective improvement.⁴⁴

In Vietnam's case, the European Commission issued a yellow card warning in October 2017, placing Vietnam under sustained monitoring and iterative assessment, with recommendations to strengthen the national anti-IUU regime.⁴⁵ Subsequent official communications in Vietnam have continued to frame the policy priority as achieving sufficient compliance to secure removal of the warning, indicating that the yellow card remains a baseline condition shaping EU–Vietnam engagement in fisheries governance and seafood trade.⁴⁶

The primary legal source for this warning is the Commission Decision of 23 October 2017, notifying the Socialist Republic of Vietnam of the possibility of being identified as a non-cooperating third country in the fight against illegal, unreported, and unregulated fishing.

41 *ibid*, procedural steps on notification, evidence, and opportunity to respond in the identification process for non-cooperating third countries.

42 *ibid*, decision-making and identification of a third country as non-cooperating.

43 *ibid*, consequences following identification, including market restrictions and catch-certificate effects.

44 *ibid*, conditions and logic for removal from the list following corrective action.

45 European Commission Decision of 23 October 2017 (n 13); 'Commission Warns Vietnam over Insufficient Action to Fight Illegal Fishing: Press Release' (*European Commission*, 23 October 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_4064> accessed 18 May 2026.

46 Kim Anh, 'Gov't Chief Receives EC Inspection Delegation on IUU' (*Socialist Republic of Vietnam. Government News*, 20 March 2026) <<https://en.baohinhphu.vn/govt-chief-receives-ec-inspection-delegation-on-iuu-111260320103845622.htm>> accessed 18 May 2026; 'Vietnam Intensifies Efforts to Have EC's IUU Yellow Card Lifted' (*VietnamPlus*, 4 March 2026) <<https://en.vietnamplus.vn/vietnam-intensifies-efforts-to-have-ecs-iuu-yellow-card-lifted-post342658.vnp>> accessed 18 May 2026.

This source is preferable to relying solely on press releases because it sets out the legal basis, procedural context and reasons underpinning the warning.⁴⁷

The yellow-card mechanism concentrates formal procedural participation and reasoning in an inter-authority channel, while exporters remain indirect economic bearers without an autonomous procedural position in the EU-facing process.⁴⁸

5.2. The Effects of the EU IUU Yellow Card on Vietnamese Seafood Exporters

The EU IUU yellow card affects Vietnamese seafood exporters primarily by intensifying scrutiny of legality and traceability, leading to higher transaction costs, longer lead times, and greater contractual uncertainty for individual consignments. In practice, the compliance burden materialises less as a single formal sanction against a particular firm and more as a sustained tightening of documentary verification and risk management across the import process, with adverse spillovers across commercial relationships.

Recent documentary evidence confirms continuing commercial relevance. VASEP reported seafood export turnover of about USD 11.3 billion in 2025 and noted continuing pressure from IUU requirements, traceability, environmental standards, and social responsibility.⁴⁹ In Q1/2026, exports reached USD 2.64 billion, while tuna remained exposed to fishing, traceability, and compliance requirements. This shows that the yellow card remains a source of documentary and reputational pressure.⁵⁰

Public data does not provide a single official count of each affected enterprise. The article therefore uses sectoral exposure indicators. VASEP states that its members account for about 80 per cent of Vietnam's seafood exports, and sectoral materials indicate systematic checks of catch origin for catch-origin products during the yellow-card period. The affected class is best understood as the wild-caught seafood export chain.⁵¹

47 European Commission Decision of 23 October 2017 (n 13).

48 *ibid*

49 Lê Hằng, 'VASEP Published Report on Vietnam Seafood Exports in 2025' (*Vietnam Association of Seafood Exporters and Producers*, 10 February 2026) <<https://seafood.vasep.com.vn/total-seafood-trade/news/vasep-published-report-on-vietnam-seafood-exports-in-2025-35997.html>> accessed 18 May 2026.

50 Lê Hằng, 'What Opportunities Lie Ahead for Vietnam's Seafood Exports in 2026?' (*Vietnam Association of Seafood Exporters and Producers*, 5 May 2026) <<https://seafood.vasep.com.vn/total-seafood-trade/news/what-opportunities-lie-ahead-for-vietnam-s-seafood-exports-in-2026-36703.html>> accessed 18 May 2026.

51 'VASEP Introduction' (*Vietnam Association of Seafood Exporters and Producers*, 2026) <<https://seafood.vasep.com.vn/vasep-introduction>> accessed 18 May 2026; Vietnam Association of Seafood Exporters and Producers, *White Book: On Combating IUU Fishing in Vietnam* (VASEP 2018); Nguyen Hoai Nam, Nguyen Tien Thong and Le Hang, *A Trade-Based Analysis of the Economic Impact of Non-Compliance with Illegal, Unreported and Unregulated Fishing: The Case of Vietnam* (World Bank 2021).

At the consignment level, industry reporting indicates that controls for relevant catch-origin products have been intensified, with clearance often contingent on source verification rather than routine customs processing. Vietnam Association of Seafood Exporters and Producers (VASEP) has documented containers being held for origin checks, release delays lasting several weeks, inspection-related charges per container, and additional losses from storage costs and delayed deliveries under supply contracts.⁵²

At the market level, the yellow card operates as a reputational signal that reshapes buyer behaviour and reallocates compliance risk. Even when shipments clear, heightened uncertainty incentivises EU importers to adopt precautionary sourcing strategies, including stricter contractual conditions, greater reliance on audits, and diversion of orders to alternative suppliers perceived as lower risk.⁵³

Macro-level estimates further suggest material welfare effects. A World Bank country environmental analysis summarises trade-based findings indicating a measurable contraction in export value to the EU after the yellow card, together with sizeable aggregate losses in the period following enforcement, reflecting both direct compliance costs and indirect commercial disruptions.⁵⁴

The distributional consequences are also salient. Firms with stronger traceability and sourcing control can withstand verification more easily, while firms relying on fragmented, small-scale supply networks face a higher risk of exclusion and marginal compliance costs.⁵⁵

The yellow card primarily harms through enforcement intensity and reputational risk rather than through firm-addressed EU acts, thereby complicating reviewability and pushing exporters toward preventive adaptation rather than remedial contestation.

5.3. The Absence of Complaint and Challenge Mechanisms for Affected Vietnamese Exporters

From an access to justice perspective, the core weakness of the EU IUU yellow card mechanism lies in a structural misalignment between the procedural addressee and the economic bearer of the consequences. The procedure is formally organised around the third country in question, while compliance costs and market disruption are, in practice, borne by exporters and supply-chain actors.

52 Vietnam Association of Seafood Exporters and Producers, *Vietnam Seafood Export to EU Markets: White Book* (VASEP 2018).

53 Nguyen Khac Giang, 'Assessing Vietnam's Challenges in Fighting IUU Fishing' (2024) 18 ISEAS Perspective <<https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2024-18-assessing-vietnams-challenges-in-fighting-iuu-fishing-by-nguyen-khac-giang>> accessed 18 May 2026.

54 World Bank, *Accelerating Clean, Green, and Climate-Resilient Growth in Vietnam: A Country Environmental Analysis* (World Bank 2022) doi:10.1596/37704.

55 Nguyen, Nguyen and Le (n 51).

By design, notification, response, and remedial steps operate through an inter-authority dialogue between the Commission and the third country. The Commission must provide reasons and allow the state to submit information and remedial measures, but exporters have no autonomous EU-level position to access the file or contest the assessment.⁵⁶

The resulting gap is institutional. Exporters may demonstrate concrete harm from intensified border controls, but the yellow-card mechanism does not give them an independent evidentiary role, a right to be heard, or a route to lodge a complaint against the assessment. They remain dependent on Vietnamese agencies or EU import partners.

The IUU yellow card illustrates a broader pattern of cross-border environmental enforcement through market-access conditionality: procedural leverage concentrates at the intergovernmental level, while economic burdens and operational disruption fall heavily on private actors. The case therefore supports the article's central implication for Vietnam: strengthening indirect access to justice requires domestic procedural infrastructure capable of standardising information flows, enabling evidence-based representation, and creating responsive, review-oriented accountability loops when EU conditionality generates market-access harm.⁵⁷

6 LEGAL GAPS IN VIETNAM AFFECTING ENTERPRISES' INDIRECT ACCESS TO JUSTICE

6.1. Absence of a Dedicated Domestic Procedural Framework for Representation and Articulation of Enterprises' Procedural Interests

Indirect access to justice depends on the exporting state's intermediary capacity to detect compliance-risk signals, receive exporter dossiers, select a suitable engagement channel, and represent affected interests in EU-facing or treaty-based processes. Vietnam's current framework still separates state-to-state disputes from trader-to-trader disputes and lacks a procedure for foreign market-conditionality spillovers.

This structural orientation is visible in the Law on Foreign Trade Management. Articles 108–110 distinguish disputes concerning the application of foreign trade management measures in the relationship between the Government of Vietnam and foreign governments (where the State participates pursuant to international treaties) from foreign trade disputes between traders, which are to be resolved by traders themselves. The same framework identifies the Government as the participant in such disputes, with the Ministry of Industry and Trade (MOIT) acting as the focal point assisting the Government.⁵⁸

56 Council Regulation (EC) No 1005/2008 (n 20) arts 31–34 (esp art 32).

57 Vietnam Association of Seafood Exporters and Producers, *White Book* (n 51).

58 Law of the Socialist Republic of Vietnam No 05/2017/QH14 (n 12) art 108.

This allocation is coherent for classic disputes but creates a gap for EU environmental conditionality. Exporters affected by CBAM-, EUDR-, or IUU-type architectures often suffer harm due to border controls and buyer risk management, even without a dispute that fits any of those categories. Their interests in petition receipt, reasoned response, escalation criteria, and traceable intervention are not yet codified.⁵⁹

6.2. Constraints in Environmental Impact Assessment and Public Disclosure of Environmental Information

Indirect access to justice in cross-border regulatory settings begins with the ability to obtain usable information and data. In terms of formal disclosure, Vietnam's Law on Environmental Protection expands publication duties that cover, *inter alia*,⁶⁰ the decision approving the results of appraisal of an environmental impact assessment report, the approved environmental impact assessment (EIA) report itself, and environmental permits, with implementation modalities further specified in subordinate legislation.⁶¹

First, there is a structural misalignment between domestically disclosed environmental management information and the evidence set required for supply-chain compliance. Export-related sustainability governance increasingly expects product- and shipment-specific, traceable, auditable, and standardised datasets that can be verified and reused across contracting, due diligence, and assurance cycles. This gap increases conversion costs, reduces interoperability, and weakens the functional value of disclosure for enterprises seeking to pre-empt exclusionary risk in international value chains.

Second, access to information remains narrow for legal persons. The Law on Access to Information frames the right as exercised by citizens, leaving enterprises without an equivalent statutory pathway to request and reuse state-held datasets for market-compliance purposes.⁶²

59 Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (EVFTA) (signed 30 June 2019, entered into force 1 August 2020) [2020] OJ L 186/3, ch 13 arts 13.15–13.16.

60 Law of the Socialist Republic of Vietnam No 72/2020/QH14 'On Environmental Protection' (adopted 17 November 2020) arts 37(5), 38(2), 47(2)(d), 48(2), 114 <<https://thuvienphapluat.vn/van-ban/Tai-nguyen-Moi-truong/Luat-so-72-2020-QH14-Bao-ve-moi-truong-2020-431147.aspx>> accessed 18 May 2026.

61 Decree Government of the Socialist Republic of Vietnam No 08/2022/ND-CP 'Detailed Regulations on a Number of Articles of the Law on Environmental Protection' (adopted 10 January 2022) <<https://thuvienphapluat.vn/van-ban/Tai-nguyen-Moi-truong/Nghi-dinh-08-2022-ND-CP-huong-dan-Luat-Bao-ve-moi-truong-479457.aspx>> accessed 18 May 2026.

62 Law of the Socialist Republic of Vietnam No 104/2016/QH13 'On Access to Information' (adopted 6 April 2016) arts 2, 4(1) <<https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Luat-tiep-can-thong-tin-2016-280116.aspx>> accessed 18 May 2026.

Third, frequent changes to implementing instruments generate adaptation costs.⁶³ Enterprises must recalibrate documentation and data governance while maintaining stable evidence over long audit and assurance cycles.⁶⁴

6.3. The Absence of Enterprise-Facing Complaint Mechanisms and Compliance Differentiation Tools

Vietnamese enterprises may invoke administrative complaint and administrative litigation mechanisms to protect their lawful rights and interests when an adverse impact stems from a domestic administrative decision or an administrative act. The Law on Complaints recognises complainants as including citizens, agencies, and organisations, and explicitly treats economic organisations as entities entitled to lodge complaints.⁶⁵ Likewise, the Law on Administrative Procedures defines plaintiffs in administrative cases as agencies, organisations, and individuals who bring administrative lawsuits.

A major gap is the absence of a specialised focal point for extraterritorial spillovers. A workable procedure would require receipt and acknowledgement, dossier standardisation, materiality screening, channel selection, and a reasoned response within a defined timeframe.

Vietnam also lacks an operational mechanism to differentiate enterprise compliance levels. Transparent recognition or accreditation could help high-performing firms reduce redundant audits and challenge country- or sector-level risk assumptions. Without it, even compliant firms may be treated as bearing average market risk.

6.4. Implications for the Effectiveness of Indirect Access to Justice under the EVFTA

Under the EVFTA, the Trade and Sustainable Development Chapter provides transparency, participation, government consultations, and a panel of experts. These mechanisms create space for stakeholder views and accountability pressure, but their

63 Decree Government of the Socialist Republic of Vietnam No 05/2025/ND-CP ‘Amending and Supplementing a Number of Articles of Decree No 08/2022/ND-CP’ (adopted 6 January 2025) <<https://thuvienphapluat.vn/van-ban/Tai-nguyen-Moi-truong/Nghi-dinh-05-2025-ND-CP-sua-doi-Nghi-dinh-08-2022-ND-CP-huong-dan-Luat-Bao-ve-moi-truong-583551.aspx>> accessed 18 May 2026.

64 Decree Government of the Socialist Republic of Vietnam No 48/2026/ND-CP ‘Amending and Supplementing a Number of Articles of Decree No 08/2022/ND-CP’ (adopted 29 January 2026) <<https://thuvienphapluat.vn/van-ban/Tai-nguyen-Moi-truong/Nghi-dinh-48-2026-ND-CP-sua-doi-Nghi-dinh-08-2022-ND-CP-huong-dan-Luat-Bao-ve-moi-truong-692989.aspx>> accessed 18 May 2026.

65 Law of the Socialist Republic of Vietnam No 02/2011/QH13 ‘On Complaints’ (adopted 11 November 2011) arts 2(2), 2(4) <<https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Luat-khieu-nai-2011-132446.aspx>> accessed 18 May 2026.

usefulness depends on Vietnam's capacity to translate dispersed firm-level evidence into credible consultation dossiers.⁶⁶

EVFTA-based channels are not adjudicatory mechanisms through which exporters can claim damages or case-specific relief. Their protective value depends on domestic 'procedural plumbing': single-window intake, reusable data, time-bound responses, and clear escalation criteria.

Indirect access to justice under the EVFTA is only as effective as the domestic procedural infrastructure that feeds it. That infrastructure must reduce information asymmetries, lower evidence-assembly costs, and organise representation in a traceable manner so that exporter concerns reach the appropriate EVFTA forum with clear follow-up and accountability.

6.5. A Reciprocal Perspective: EU Companies Affected by Vietnam's Market-Access Measures

A limited reciprocal perspective clarifies the argument without turning the article into a full comparative study. EU companies affected by Vietnamese market-access measures may, in principle,⁶⁷ use administrative complaint or litigation mechanisms where a Vietnamese administrative act directly affects their lawful interests.⁶⁸

This reciprocal route is also limited. Where harm results from general regulatory design, sectoral risk management or supply-chain implementation, foreign companies may face the same mediated-protection problem. The proposed single-window mechanism is therefore a reciprocal procedural infrastructure, not a one-sided diplomatic tool.

7 STRENGTHENING THE MECHANISM OF INDIRECT ACCESS TO JUSTICE WITHIN THE EVFTA FRAMEWORK

The reform proposal follows directly from Sections 3-6. EU conditionality operates through risk tiering, due diligence, and data systems; Articles 263 and 267 TFEU offer limited direct protection; the IUU case shows exporters bearing burdens without an EU complaint position; and Vietnamese law lacks a time-bound mechanism for receiving and escalating evidence from exporters.

66 EVFTA (n 59) ch 13, arts 13.12 (Transparency), 13.16 (Government consultations) and 13.17 (Panel of Experts).

67 Law of the Socialist Republic of Vietnam No 02/2011/QH13 (n 65) arts 2(2), 2(4).

68 Law of the Socialist Republic of Vietnam No 93/2015/QH13 'On Administrative Procedures' (adopted 25 November 2015) art 5 <<https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Luat-to-tung-hanh-chinh-2015-298372.aspx>> accessed 18 May 2026.

7.1. The Role of Vietnamese Domestic Law in Securing Procedural Representation for Enterprises

Domestic law is the site for converting indirect access to justice from ad hoc support into a predictable procedure. The core task is to give exporters a route to submit evidence, obtain acknowledgement, receive a reasoned answer, and know whether the matter will be escalated to technical dialogue, EVFTA follow-up or another channel.

Four elements are required: a single-window intake mechanism; standardised intervention-ready dossiers covering costs, delays, rejections, and compliance improvements; controlled access to reusable traceability and environmental datasets; and public-service legal or technical support for exporters, especially small and medium-sized enterprises. Together, these elements lower evidence-assembly costs and make stakeholder inputs usable in the EVFTA Trade and Sustainable Development processes.

This domestic design does not create a new right to challenge EU policy directly. It creates a procedural bridge: exporter evidence is recorded, standardised, filtered and transmitted through competent Vietnamese institutions so that mediated protection becomes transparent, time-bound, and review-oriented.

7.2. EVFTA Mechanisms as a Channel of Indirect Access to Justice

The EVFTA can be conceptualised as a channel of indirect access to justice in procedural and representative terms, particularly through its Trade and Sustainable Development (TSD) chapter. This architecture is not a compensation forum for businesses. Its value lies in structuring transparency, participation, expectations of reason-giving, and accountability loops, features that can partially compensate for the limited availability of direct EU judicial protection for third-country exporters.

Three EVFTA leverage points are particularly relevant:

a) Stakeholder participation and feedback loops.

Domestic Advisory Groups and the Joint Forum provide structured spaces for stakeholders to raise concerns and submit implementation recommendations. To make this channel rights-protective rather than merely consultative, Vietnam should institutionalise an “issue-tracking” and follow-up mechanism: each substantiated submission should receive a documented response, an indication of whether it is escalated to dialogue agendas, and a timeline for follow-up. Without such a loop, participation exists but lacks procedural effect.

b) Government consultations within the TSD framework.

Consultations can be used to seek clarification of implementation approaches, press for proportionate operationalisation, and request technical cooperation where external

spillovers become excessive or poorly calibrated. The feasibility of using this tool depends on the quality of the domestic dossier: consultations are most effective when supported by standardised evidence of impacts, rather than mere sectoral assertions.

c) Panel of Experts.

Although the Panel is not a damages mechanism, it can upgrade accountability by introducing independent assessment and interpretive discipline. In an access to justice lens, it functions as a review-oriented mechanism that can pressure policy adjustment. Its utility again depends on whether Vietnam can package exporter concerns into issues that fit the chapter's scope and are supported by credible evidence.

EVFTA channels become operationally relevant only when domestic procedures convert exporter impacts into timely, legible dossiers and maintain follow-up. 7.3. Lessons from the EU IUU yellow card for future EU environmental market measures

The IUU yellow card yields four lessons for future EU measures: traceability and data quality are decisive; state representation must be proceduralised; domestic compliance tiering is needed to avoid risk homogenisation; and EVFTA mechanisms should be used for cooperation and accountability rather than general messaging.

These lessons are directly transferable to CBAM, deforestation due diligence, product passports, and the implementation of sustainability due diligence. Technical cooperation should focus on data standards, traceability architecture, measurement methodologies, and verification capacity. Where implementation generates disproportionate or poorly explained burdens, Vietnam should be able to move from stakeholder submissions to government consultations and, where the EVFTA permits, independent expert assessment.

7.3. Concrete Implementation Proposals for Domestic and EU-Linked Legal Instruments

The reform proposal should be operationalised through specific legal and institutional instruments. First, Vietnam should adopt a government decree or a prime ministerial decision under the Law on Foreign Trade Management to establish a Single Window Export Spillover Response mechanism. The instrument should identify the responsible focal agency, inter-agency coordination duties, admissibility criteria for exporter submissions, standard dossier templates, confidentiality rules, timelines for acknowledgement and reasoned response, and escalation routes to EVFTA dialogue, technical consultation, or trade-remedy coordination where appropriate.⁶⁹

Second, Vietnam should create an enterprise-facing data access and traceability pathway by implementing the Law on Environmental Protection and the Law on Access to Information

69 Law of the Socialist Republic of Vietnam No 05/2017/QH14 (n 12) arts 108–110.

through sectoral data portals to support export compliance. These portals should provide reusable, auditable, and non-confidential data relevant to traceability, environmental permits, catch documentation and sustainability verification, while protecting confidential business information. This would turn public environmental information from a passive disclosure regime into a compliance-supporting infrastructure.⁷⁰

Third, the EU and Vietnam should adopt a non-binding EVFTA procedural note on exporter spillover submissions. It could explain how Domestic Advisory Groups, the Joint Forum and consultations receive aggregated evidence, publish non-confidential issue summaries, record follow-up, and identify when technical cooperation or expert assessment is justified.⁷¹

Fourth, EU implementing guidance for environmental market measures should recognise feedback from third-country suppliers in data-intensive regimes. In the context of product passports, deforestation due diligence, sustainability reporting and due diligence simplification, guidance should clarify how non-EU suppliers can correct data, document compliance improvements, and rely on proportionate information requests, especially where EU policy itself seeks to reduce excessive value chain burdens. This EU-side clarification would complement, rather than replace, the Vietnamese single-window mechanism.

8 CONCLUSION

This article reaches five conclusions. First, EU environment-related market measures increasingly operate as market-entry conditions through reporting, traceability, due diligence, risk assessment, and documentation. The exporter problem is therefore procedural as well as substantive: how to obtain reasons, correct data, participate and seek review when market access is affected.

Second, the article broadly defines Vietnamese exporters as Vietnam-based enterprises, processors, traders, and supply-chain participants whose goods or compliance data are used to place products on the EU market. This definition matters because the burden of EU environmental conditionality often falls on actors that are not formal addressees of EU law. The object of analysis is therefore the procedural position of these exporters, not the substantive validity of EU environmental policy.

Third, direct judicial redress before EU courts remains structurally limited. Article 263 TFEU, as interpreted through the Plaumann line of case law and the restricted meaning of regulatory acts, leaves most third-country private exporters without realistic direct standing. Article 267 TFEU and the EU Aarhus Regulation mitigate this gap only partially:

70 Law of the Socialist Republic of Vietnam No 72/2020/QH14 (n 60) arts 114 and 121; *Law of the Socialist Republic of Vietnam No 104/2016/QH13* (n 62) arts 8 and 16.

71 EVFTA (n 59) ch 13, arts 13.12 and 13.15-13.17.

the former depends on Member State proceedings, while the latter is primarily designed for environmental public-interest review within EU institutional law.

Fourth, the IUU yellow-card case confirms the procedural addressee-economic bearer misalignment. The EU procedure addresses the third-country state, but documentary burdens, delays, reputational effects, and compliance costs fall on exporters and supply-chain actors. Public sectoral evidence supports broad exposure across the wild-caught seafood export chain, while avoiding a claim that every affected firm can be individually counted.

Fifth, the appropriate response is institutional and procedural. Vietnam should establish a single-window export spillover mechanism, standardised dossiers, time-bound responses, data-access pathways, and EVFTA follow-up practices. These reforms would not create direct EU standing, but would make mediated access to justice more transparent, evidence-based, and accountable.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЕКОЛОГІЧНА ОБУМОВЛЕНІСТЬ ЄВРОПЕЙСЬКОГО СОЮЗУ
ТА ОПОСЕРЕДКОВАНИЙ ДОСТУП ДО ПРАВОСУДДЯ ДЛЯ В'ЄТНАМСЬКИХ ЕКСПОРТЕРІВ:
ОБМЕЖЕННЯ ЩОДО ПРАВА НА ПОЗОВ ВІДПОВІДНО ДО СТАТТІ 263 ДФЄС
ТА УРОКИ «ЖОВТОЇ КАРТКИ» ННН РИБАЛЬСТВА

Нгуєн Хуу Кхань Лінь

АНОТАЦІЯ

Вступ. Європейський Союз (ЄС) усе частіше використовує екологічну обумовленість як метод управління доступом до ринку через систему прикордонного контролю, вимоги щодо контролю походження продукції, звітність у сфері сталого розвитку, належну обачність (*due diligence*) у ланцюгах постачання, а також оцінку ризиків на рівні конкретних країн. Хоча більшість цих зобов'язань формально покладаються на операторів усередині ЄС, витрати на забезпечення відповідності та тягар доказування часто перекладаються на постачальників із третіх країн вище за ланцюгом постачання.

Для в'єтнамських експортерів це створює процедурний розрив: вони можуть зазнавати комерційної, репутаційної та дискримінаційної (пов'язаних із витісненням з ринку) шкоди, залишаючись при цьому на периферії процесів ухвалення рішень та механізмів перегляду, які визначають доступ до ринку ЄС. У статті цей розрив досліджується крізь

призму доступу до правосуддя, з наголосом на Статті 263 ДФЕС та опосередкованих правових гарантіях.

Методи. У статті застосовано доктринальний правовий аналіз для дослідження обмежень щодо права на позов та можливості судового перегляду відповідно до Статті 263 ДФЕС, а також окремих інструментів ЄС щодо регулювання доступу до ринку на основі екологічних критеріїв. Використовується підхід правового аналізу в контексті (*law-in-context*), щоб оцінити, як регуляторна архітектура ЄС функціонує через ланцюги постачання та впливає на в'єтнамських експортерів. Процедура винесення ЄС «жовтої картки» В'єтнаму за незаконне, непідзвітне та нерегульоване (ННН) рибальство використовується як наочне тематичне дослідження, оскільки воно чітко демонструє невідповідність між формальним адресатом процедури — третьою країною — та приватними експортерами, які несуть основний операційний та економічний тягар.

Результати та висновки. У статті зроблено висновок, що в'єтнамські експортери функціонують у структурно асиметричному процедурному середовищі. Пряме оскарження в судах ЄС залишається обмеженим через рестриктивну доктрину щодо права на позов, тоді як Стаття 267 ДФЕС пропонує лише умовний, опосередкований шлях, який залежить від судового розгляду в судах держав-членів.

Явище «жовтої картки» ННН рибальства ілюструє, що надання обґрунтувань та участь у процедурі зосереджені тільки на діалозі між Європейською Комісією та державою, тоді як експортери несуть посилений тягар документального підтвердження, забезпечення контролю продукції та репутаційних ризиків.

Автор доходить висновку, що ефективний опосередкований доступ до правосуддя залежить від внутрішньої інституційної архітектури країни. У статті пропонується впровадження механізму реагування на експортні наслідки за принципом «єдиного вікна», стандартизовані шаблони доказів, обмежені в часі вмотивовані відповіді, а також сумісні інформаційні системи відповідності, інтегровані в діалог та подальшу взаємодію в межах Комітету з питань торгівлі та сталого розвитку Угоди про вільну торгівлю між ЄС та В'єтнамом (EVFTA).

Ключові слова. Доступ до правосуддя, екологічна обумовленість ЄС, в'єтнамські експортери, процесуальне представництво експортерів, доступ до ринку ЄС, «жовта картка» ННН рибальства, EVFTA.

TÓM TẮT BẰNG TIẾNG VIỆT*

Bài báo nghiên cứu

ĐIỀU KIỆN HÓA MÔI TRƯỜNG CỦA LIÊN MINH CHÂU ÂU VÀ TIẾP CẬN CÔNG LÝ GIÁN TIẾP ĐỐI VỚI CÁC NHÀ XUẤT KHẨU VIỆT NAM: HẠN CHẾ VỀ TƯ CÁCH KHỞI KIẾN THEO ĐIỀU 263 TFEU VÀ BÀI HỌC TỪ CƠ CHẾ “THẺ VÀNG” IUU

Nguyễn Hữu Khánh Linh

TÓM TẮT

Bối cảnh: Liên minh châu Âu (EU) ngày càng sử dụng điều kiện hóa môi trường như một kỹ thuật quản trị tiếp cận thị trường thông qua kiểm soát biên giới, nghĩa vụ truy xuất nguồn gốc, báo cáo bền vững, thẩm định chuỗi cung ứng và đánh giá rủi ro theo quốc gia. Mặc dù nhiều nghĩa vụ về mặt hình thức được đặt ra đối với các chủ thể vận hành trong EU, chi phí tuân thủ và gánh nặng chứng minh thường được chuyển ngược lên các nhà cung ứng tại nước thứ ba. Đối với các nhà xuất khẩu Việt Nam, điều này tạo ra một khoảng trống thủ tục: họ có thể chịu thiệt hại thương mại, tổn hại uy tín và nguy cơ bị loại khỏi thị trường, trong khi vẫn nằm ở vị trí ngoại vi so với các cấu trúc ra quyết định và rà soát vốn định hình khả năng tiếp cận thị trường EU. Bài viết phân tích khoảng trống này dưới góc độ tiếp cận công lý, tập trung vào Điều 263 Hiệp ước về chức năng của Liên minh châu Âu (TFEU) và các biện pháp bảo đảm mang tính trung gian.

Phương pháp: Bài viết sử dụng phương pháp phân tích giáo lý pháp luật để xem xét các giới hạn về tư cách khởi kiện và khả năng được rà soát tư pháp theo Điều 263 TFEU, cũng như một số công cụ tiếp cận thị trường gắn với môi trường của EU. Bài viết kết hợp phương pháp luật trong bối cảnh nhằm đánh giá cách thức các cấu trúc điều chỉnh của EU vận hành thông qua chuỗi cung ứng và tác động đến các nhà xuất khẩu Việt Nam. Quy trình “thẻ vàng” của EU đối với khai thác hải sản bất hợp pháp, không báo cáo và không theo quy định (IUU) áp dụng đối với Việt Nam được sử dụng như một nghiên cứu trường hợp minh họa, vì trường hợp này thể hiện rõ sự không tương thích giữa chủ thể thủ tục chính thức — quốc gia thứ ba — và các nhà xuất khẩu tư nhân là những chủ thể phải gánh chịu các chi phí vận hành và kinh tế.

Kết quả và Kết luận: Bài viết chỉ ra rằng các nhà xuất khẩu Việt Nam hoạt động trong một môi trường thủ tục có tính bất đối xứng về cấu trúc. Khởi kiện trực tiếp trước tòa án EU vẫn bị giới hạn bởi học thuyết nghiêm ngặt về tư cách khởi kiện, trong khi Điều 267 TFEU chỉ mở ra một con đường gián tiếp và phụ thuộc vào việc có thủ tục tố tụng trước tòa án của quốc gia thành viên. Trường hợp “thẻ vàng” IUU cho thấy việc đưa ra lý do và sự tham gia thủ tục chủ yếu tập trung trong đối thoại giữa Ủy ban châu Âu và quốc gia liên quan, trong khi các nhà xuất khẩu

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

phải gánh chịu yêu cầu gia tăng về chứng từ, truy xuất nguồn gốc và rủi ro uy tín. Bài viết kết luận rằng tiếp cận công lý gián tiếp một cách thực chất phụ thuộc đáng kể vào thiết kế thể chế trong nước. Trên cơ sở đó, bài viết đề xuất thiết lập cơ chế một cửa để ứng phó với tác động lan tỏa đối với xuất khẩu, mẫu hóa chứng cứ tuân thủ, quy định nghĩa vụ phản hồi có lý do trong thời hạn xác định và xây dựng hệ thống thông tin tuân thủ có khả năng liên thông, gắn với đối thoại và cơ chế theo dõi trong khuôn khổ Chương Thương mại và Phát triển bền vững của Hiệp định Thương mại tự do Việt Nam – Liên minh châu Âu (EVFTA).

Từ khóa: Tiếp cận công lý; điều kiện hóa môi trường của EU; nhà xuất khẩu Việt Nam; đại diện thủ tục của nhà xuất khẩu; tiếp cận thị trường EU; thẻ vàng IUU; EVFTA.

Research Article

COMPETITION RULES IN THE DIGITAL AGE: A COMPARATIVE STUDY OF EU AND US APPROACHES AND THEIR IMPACT ON ARAB LEGAL SYSTEMS

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ABSTRACT

Background: *The digital revolution has fundamentally reshaped the global economic landscape, giving rise to dominant technology platforms such as Google, Amazon, Meta, Apple, and Microsoft. These entities function as digital gatekeepers across interconnected ecosystems encompassing search, social media, e-commerce, cloud computing, and mobile applications. Their scale and control over data flows have created new forms of market power that challenge conventional antitrust paradigms. Traditional competition law, developed in the industrial economy, struggles to address the dynamics of multi-sided markets, network effects, and data-driven dominance that characterise the digital era. This research seeks to analyse how the European Union and the United States have responded to these challenges and to draw insights for Arab jurisdictions seeking to craft context-sensitive regulatory models.*

Method: The study employs a doctrinal and comparative legal analysis, supplemented by policy evaluation. It examines legislative frameworks such as the EU's Digital Markets Act (DMA) and Digital Services Act (DSA), as well as US antitrust laws, the Sherman Act, Clayton Act, and FTC Act. Landmark enforcement cases, including *Google Shopping*, *United States v. Google LLC*, *FTC v. Meta Platforms*, and *FTC v. Amazon*, are analysed to illustrate practical applications of these frameworks. Comparative analysis is used to assess how ex-ante and ex-post regulatory philosophies shape enforcement outcomes. For Arab jurisdictions (Egypt, Saudi Arabia, and the UAE), the study incorporates institutional and policy analysis to evaluate capacity constraints and regional coordination mechanisms.

Results and Conclusions: Findings reveal fundamental contrasts between the EU and US approaches. The EU's ex-ante regime ensures speed, predictability, and structural intervention but may risk overreach and incentivise innovation. The US ex-post approach provides analytical rigour and judicial safeguards but often lags the pace of digital market evolution. For Arab jurisdictions, key challenges include limited enforcement capacity, dependence on foreign platforms, and fragmented regional governance. The study proposes a hybrid regulatory framework that integrates proactive ex-ante rules, inspired by the DMA, with flexible ex-post enforcement tailored to local conditions. Regional harmonisation through the Gulf Cooperation Council (GCC) and Arab League is emphasised as essential for cross-border effectiveness. The research concludes that balancing market contestability, innovation, and regional integration requires capacity-sensitive regulation that merges proactive oversight with evidence-based enforcement.

1 INTRODUCTION

The digital revolution has fundamentally transformed the global economic landscape. Platforms like Google, Amazon, Facebook (Meta), Apple, and Microsoft wield unprecedented market power through distinctive characteristics, multi-sided markets, network effects, data-driven dominance, and economies of scale, challenging traditional competition law frameworks developed for industrial-age markets. Conventional antitrust tools struggle to analyse zero-price services, assess competitive harm in data-intensive ecosystems, and respond effectively to rapid consolidation in digital markets.¹

- 1 Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (Publications Office of the EU 2019) doi:10.2763/407537; Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard UP 2016); Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448, doi:10.1093/yel/yez008; Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710; Geoffrey G Parker, Marshall W Van Alstyne and Sangeet Paul Choudary, *Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You* (WW Norton & Co 2016); Jean-Charles Rochet and Jean Tirole, 'Two-Sided Markets: A Progress Report' (2006) 37(3) RAND Journal

Regulatory responses vary significantly across jurisdictions, reflecting philosophical divergences about competition law's objectives and enforcement mechanisms. The European Union has pioneered comprehensive legislative initiatives, notably the Digital Markets Act (DMA) and Digital Services Act (DSA), establishing ex-ante rules for 'gatekeeper' platforms before competitive harm materialises, reflecting ordoliberal principles emphasising fair market structures. The United States maintains traditional case-by-case litigation rooted in the consumer welfare standard, though recent enforcement actions against Google, Meta, and Amazon signal potential doctrinal shifts influenced by neo-Brandeisian thinking that advocates broader antitrust objectives.²

For Arab jurisdictions, these divergent models present opportunities and challenges. Egypt, Saudi Arabia, and the United Arab Emirates face heavy reliance on foreign platforms, limited domestic tech development, emerging institutional capacity, and imperatives to balance competition with economic development objectives. Understanding EU and US approaches, their strengths, limitations, and philosophical commitments offer valuable insights for Arab policymakers developing context-appropriate regulatory frameworks.

This comparative analysis addresses three core questions: (1) How do the EU's ex-ante ordoliberal-inspired controls differ from US ex-post consumer welfare-focused approaches in addressing digital platform dominance? (2) Which enforcement model demonstrates greater effectiveness regarding regulatory certainty, speed, deterrence, and adaptability? (3) What hybrid framework best serves Arab jurisdictions given institutional constraints, market dependencies, and development priorities? The article contributes by: (i) offering a structured evaluation of EU and US models identifying doctrinal convergences and divergences; (ii) synthesising lessons from landmark enforcement to assess practical effectiveness; and (iii) developing tailored Arab policy recommendations accounting for regional integration gaps, institutional constraints, and foreign platform dominance.

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- of Economics 645, doi:10.1111/j.1756-2171.2006.tb00036.x; Nick Srnicek, *Platform Capitalism* (Polity Press 2016); Shoshana Zuboff, *The Age of Surveillance Capitalism* (PublicAffairs 2019).
- 2 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1; Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1. See also, Arab Federation for Digital Economy and Council of Arab Economic Unity of the League of Arab States, *Arab Digital Economy Index 2022* (ARABFDE 2022); Thomas W Hazlett, 'US Antitrust Policy in the Age of Amazon, Google, Microsoft, Apple, Netflix and Facebook' (2024) 35(1) Constitutional Political Economy 73, doi:10.1007/s10602-022-09391-9.

2 METHODOLOGY

This study employs doctrinal legal analysis combined with policy evaluation to examine competition law across three jurisdictional clusters: the European Union, the United States, and selected Arab states. The methodology integrates multiple analytical layers, enabling systematic comparison while accounting for distinct legal traditions, institutional frameworks, and market conditions.³

2.1. Jurisdiction Selection

The EU and US represent the world's most influential competition regimes with fundamentally different philosophical orientations. The EU exemplifies proactive, structure-oriented regulation reflecting ordoliberal traditions; the US demonstrates reactive, conduct-focused enforcement rooted in Chicago School economic-efficiency principles. Together, they shape global competition law discourse through the 'Brussels Effect' and American common law precedents.⁴

Among Arab jurisdictions, Egypt, Saudi Arabia, and the UAE were selected based on: (1) representativeness, Egypt reflects the Arab Republic model with French civil law heritage; Saudi Arabia represents Gulf monarchies with Islamic legal traditions; UAE exemplifies federal Gulf states balancing multiple systems; (2) institutional development, all three have established competition authorities with evolving digital mandates; (3) economic significance, they represent the largest, most technologically advanced Arab economies with substantial platform penetration; (4) data availability, sufficient legal, regulatory, and academic sources exist for meaningful analysis. While these three cannot capture full diversity across twenty-two Arab League member states, they provide substantive representation of predominant legal and institutional patterns.⁵

3 David J Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language' in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001) 190; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2006) ch 13.

4 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020) doi:10.1093/oso/9780190088583.001.0001.

5 Mohamad Teyseer Almohawes and Saud Rasheed Alowaidah, 'Evaluating the Effectiveness of Saudi Arabia's Merger Control Law in The Digital Economy' (2025) 24(4) *Al-Majalla Al-Qanuniyya* 1745, doi:10.21608/jlaw.2025.378829.1239; Dong-Hwan Kim and Yo Sop Choi, 'Modernization of Competition Law and Policy in Egypt' (2020) 64(1) *Journal of African Law* 107, doi:10.1017/S0021855319000342.

2.2. Comparative Legal Method

The study applies functional comparative analysis to examine how different legal systems address equivalent regulatory problems despite doctrinal variations. This acknowledges that jurisdictions may pursue similar objectives through different instruments and institutional arrangements. Comparison proceeds through: (1) Identification, mapping equivalent rules, mechanisms, and objectives across jurisdictions; (2) Explanation, analysing why jurisdictions adopt different approaches by examining historical development, legal traditions, structures, and underlying theories; (3) Evaluation, assessing comparative effectiveness based on regulatory certainty, enforcement speed, deterrence, technological adaptability, and alignment with policy objectives. This methodology emphasises analytical synthesis over description, identifying convergences (e.g., concern with data accumulation, nascent competitor acquisitions) and persistent divergences (ex-ante v. ex-post orientation, market structure v. consumer welfare focus).

2.3. Sources and Case Selection

Primary legal sources include EU treaties (Articles 101-102 TFEU), regulations (EU Merger Regulation, DMA, DSA), CJEU jurisprudence; US statutes (Sherman Act, Clayton Act, FTC Act), federal court decisions; Arab competition laws (Egypt Law 3/2005, Saudi Royal Decree M/75/2019, UAE Federal Decree-Law 36/2023). Landmark cases were selected based on representativeness, illustrating core enforcement theories; precedential value, establishing standards for subsequent proceedings; practical impact, resulting in substantial remedies or regulatory reforms. Google Shopping demonstrates self-preferencing theory informing DMA provisions; US v. Google illustrates monopoly maintenance through exclusionary contracts; FTC v. Meta tests nascent competitor elimination theories relevant to both jurisdictions.⁶

2.4. Policy Evaluation Framework

Beyond doctrinal comparison, the study evaluates policy effectiveness across: (1) Responsiveness, ability to address emerging threats; (2) Timeliness, speed from investigation to remedy; (3) Certainty, predictability for market participants; (4) Deterrence, whether enforcement credibly discourages anticompetitive conduct; (5) Proportionality, whether remedies appropriately calibrate to harm. For Arab jurisdictions, additional criteria include institutional feasibility, alignment with administrative capacity, economic alignment, compatibility with development objectives, regional coordination, and potential for cross-border cooperation.⁷

6 Giuseppe Colangelo, 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse' (2022) 47 *European Law Review* 597, doi:10.2139/ssrn.4070310.

7 LP Barbosa and EB Luvizotto, 'Rethinking Competition Law for Digital Markets: A Comparative Institutional Analysis' (2024) 45(2) *European Competition Law Review* 75.

2.5. Limitations

The study triangulates legal sources, enforcement outcomes, and scholarship for analytical rigour. Claims about enforcement effectiveness are supported by empirical indicators where available, acknowledging data limitations, particularly for Arab jurisdictions. The temporal scope extends through January 2025; ongoing litigation may yield outcomes that alter the comparative assessment. Geographic scope acknowledges that while Egypt, Saudi Arabia, and the UAE provide meaningful representation, they cannot capture the full diversity of Arab contexts, which vary in legal traditions, capacities, and market conditions. The study addresses conceptual transplant challenges; legal rules may function differently in new institutional and cultural contexts, requiring careful adaptation rather than wholesale adoption.

3 THEORETICAL FOUNDATIONS AND DIGITAL MARKET CHALLENGES

The evolution of competition law reflects ongoing debates about proper objectives and guiding economic theories. These debates have intensified with the rise of digital platforms, as traditional analytical frameworks struggle to account for market dynamics characterised by network effects, multi-sided platforms, and data-driven competitive advantages.

3.1. Objectives of Competition Law

The US competition framework has centred on the consumer welfare standard emerging from Chicago School influence beginning in the 1970s. Supreme Court decisions, including *Reiter v. Sonotone Corp.* (1979) and *Brooke Group v. Brown & Williamson Tobacco* (1993), established economic efficiency and consumer price effects as primary concerns. This approach requires evidence that challenged conduct results in higher prices, reduced output, or diminished innovation as measured by consumer surplus. Critics argue this narrow focus has proven inadequate for addressing competitive concerns in digital markets where services are often zero-priced, network effects create winner-take-all dynamics, and harm may manifest as reduced privacy, diminished innovation, or foreclosed market entry rather than immediate price effects.⁸

8 Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 2021); Richard A Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press 1976); Khan (n 1); Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018). See also, *Reiter v Sonotone Corp* (US Supreme Court, 11 June 1979) 442 US 330 <<https://supreme.justia.com/cases/federal/us/442/330/>> accessed 13 November 2025.

This critique aligns with broader calls in contemporary US antitrust scholarship to move beyond a narrow consumer-welfare paradigm and restore competition law's role in protecting competitive market structures, entry opportunities, and the broader process of rivalry.⁹

The EU framework is rooted in ordoliberal economic theory, emphasising competitive market structures and preventing the concentration of private power that threatens economic freedom. Treaty provisions reflect broader social and political objectives beyond economic efficiency, including protecting SMEs, ensuring market access for new entrants, and maintaining competitive processes themselves. CJEU jurisprudence, particularly *Intel Corp v European Commission*, clarifies that Article 102 TFEU prohibits conduct that hinders competition on the merits by foreclosing competitors from markets regardless of direct consumer price effects. This structural approach treats fair competition as both instrumental to consumer welfare and an intrinsic policy objective worthy of protection.¹⁰

3.2. Digital Market Challenges

Digital platforms fundamentally challenge traditional competition analysis through their multi-sided nature, serving as intermediaries connecting distinct user groups. Digital platforms do not merely participate in digital markets; they may also operate as private gatekeepers controlling access to online spaces, data flows, and informational resources, thereby shaping the conditions under which users, businesses, researchers, and competitors interact within digital environments.¹¹

Platforms create value by facilitating interactions between sides, merchants and consumers on Amazon, advertisers and users on Google, developers, and consumers on app stores. This creates indirect network effects in which the value to each side increases with participation on the other side but may involve cross-subsidisation, making one side free while monetising the others. Traditional analysis focusing on single-sided markets and direct price effects struggles to capture these complex dynamics.¹²

The accumulation of vast datasets has emerged as a competitive advantage, creating 'data-driven dominance.' The strategic importance of data is not limited to competition concerns within platform ecosystems; it also has broader developmental implications, particularly for

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- 9 Jonathan B Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard UP 2019).
10 Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing 2012); David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press 1998).
11 Thomas E Kadri, 'Digital Gatekeepers' (2021) 99 Texas Law Review 951.
12 David S Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) 20(2) Yale Journal on Regulation 325; Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) Journal of the European Economic Association 990, doi:10.1162/154247603322493212.

countries seeking to capture value from cross-border data flows while avoiding new forms of digital dependency and inequality.¹³

Platforms collect extensive user data, enabling personalised services, targeted advertising, and algorithmic improvements. Data advantages exhibit scale effects: more users generate more data, improving services, attracting more users, and creating self-reinforcing cycles that are difficult for competitors to overcome. Data-driven dominance poses challenges because data assets are difficult to value, the competitive significance may be unclear at acquisition, and traditional market-definition tools struggle to assess data's competitive implications.

Recent scholarship highlights how the accumulation of big data can translate into market power and raise concerns about refusal to supply, discrimination, and data-driven mergers.¹⁴

Network effects represent the most significant challenge, leading to rapid market concentration and winner-take-most outcomes. However, digital market concentration should not always be understood as a simple monopoly or winner-take-all outcome. Petit's "moligopoly" thesis suggests that Big Tech firms may simultaneously enjoy monopoly-like power in certain tipped markets while facing oligopolistic rivalry across adjacent digital ecosystems. This perspective supports a more calibrated competition law analysis, focusing intervention on markets where platform power produces durable exclusion or rent extraction while preserving efficiencies generated by scale and ecosystem competition.¹⁵ Direct network effects (Facebook users valuing more connected users) and indirect effects (more app developers attracting more iPhone users) create powerful competitive advantages. Strong network effects can make markets contestable in principle but concentrated in practice, as users face significant switching costs and platforms achieve dominance that is difficult to challenge. These dynamics have prompted calls for reformed antitrust approaches recognising that traditional tools designed for static markets may inadequately address dynamic competition in digital ecosystems. The comparative analysis that follows examines how EU and US jurisdictions have responded to these challenges through their respective regulatory frameworks.¹⁶

13 UNCTAD, *Digital Economy Report 2021: Cross-Border Data Flows and Development: For Whom the Data Flow* (UN 2021).

14 Richa Jain, 'Big Data and Competition Law: Navigating Trade Practices in the Digital Age' (2025) 4(1) *Journal of Law, Market & Innovation* 63, doi:10.13135/2785-7867/11803.

15 Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (OUP 2020).

16 Michael L Katz and Carl Shapiro, 'Network Externalities, Competition, and Compatibility' (1985) 75(3) *American Economic Review* 424.

4 THE EUROPEAN UNION APPROACH

The European Union has developed a comprehensive regulatory architecture to address digital competition challenges, building on traditional competition law enforcement (Articles 101-102 TFEU, EU Merger Regulation) while innovating through ex-ante regulatory frameworks (DMA, DSA). This dual approach reflects the EU's assessment that traditional ex-post enforcement alone cannot adequately address structural competition problems in digital markets. This trajectory has been framed within broader EU digital-market priorities and the need to adapt competition tools to digital ecosystems.¹⁷

4.1. Traditional Competition Law Framework

Articles 101 and 102 TFEU form the foundation of EU competition law. Article 101 prohibits agreements that prevent, restrict, or distort competition within the internal market. Article 102 prohibits abuse of dominant position. Applying these provisions to digital markets has required significant adaptation.¹⁸ German reform debates anticipated this adaptive trajectory. Schweitzer and others argued that digital platform markets require a more flexible assessment of dominance, recognition of intermediation power, and earlier intervention where practices such as obstructing multi-homing or switching create a dangerous probability of market tipping. They also emphasised that access to competitively relevant data should inform the assessment of market power and potential abuse in digital ecosystems.¹⁹ The CJEU's landmark decision in *Intel Corp. v. European Commission* has been particularly influential, clarifying that anticompetitive effects cannot be presumed solely from the form of conduct, and requiring more nuanced economic analysis that considers market characteristics and the specific context.²⁰ This approach has been applied in subsequent digital market cases, in which the Commission has employed sophisticated economic analysis while maintaining its structural concerns.

Foreclosure constitutes abuse regardless of evidence of concrete effects on consumers, rejecting requirements for detailed as-efficient-competitor tests in all exclusivity cases. This establishes that Article 102 protects market structure and competitive process, not merely end-consumer prices.

The EU Merger Regulation provides a control framework for concentrations significantly impeding effective competition. However, traditional turnover-based jurisdictional thresholds failed to capture nascent competitor acquisitions (Facebook/WhatsApp,

17 Lucia Irinescu, 'New Challenges in the Digital Age: Competition Policy' (2019) 65(suppl) *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice* 49.

18 Richard Whish and David Bailey, *Competition Law* (10th edn, OUP 2021).

19 Heike Schweitzer and others, 'Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)' [2018] SSRN, doi:10.2139/ssrn.3250742

20 Case C-413/14 *Intel Corp v European Commission* (CJEU, 6 September 2017) EU:C:2017:632 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62014CJ0413>> accessed 13 November 2025.

Google/DoubleClick) where target firms had low revenues but high strategic value. The Commission has responded through revised guidance emphasising innovation theories of harm and attempted referrals under Article 22 EUMR to review below-threshold transactions. High-profile cases, including Facebook/WhatsApp, Microsoft/LinkedIn, and Google/Fitbit, demonstrate evolving enforcement efforts that address data accumulation, ecosystem foreclosure, and innovation concerns beyond traditional market share analysis.

4.2. Digital Markets Act: Ex-ante Framework

The Digital Markets Act, which came into force in November 2022, represents a paradigmatic shift toward proactive ex-ante regulation.²¹ It designates 'gatekeepers', platforms meeting quantitative thresholds (€7.5bn annual EEA turnover or €75bn market capitalisation, providing core platform services in at least three Member States, with 45mn monthly end users and 10,000 annual business users) and qualitative criteria (entrenched durable position, significant impact on internal market, intermediation role).

This ex-ante model is supported by economic scholarship arguing that the traditional competition law sequence of market definition, market-power assessment, and remedy design is often too slow and information-intensive for digital markets, making threshold-based gatekeeper designation and quasi-automatic obligations more suitable for large platform ecosystems.²²

The DMA imposes prohibitions and positive obligations. Key prohibitions include restrictions on self-preferencing (favouring the gatekeeper's own services), limitations on combining data across services without consent, and prohibitions on requiring app developers to use the gatekeeper's payment systems. Positive obligations include data portability requirements, interoperability mandates, and obligations to provide business users with access to data generated through their activities.

The DMA's relevance is even more pronounced where gatekeepers rely on artificial intelligence and data-driven ranking systems. Its obligations regarding data access, transparency, and fair treatment may constrain gatekeepers' use of AI training data while enabling business users to obtain access to the data necessary to develop competing AI-based services. Moreover, the prohibition of self-preferencing and the requirement of fair ranking under the DMA extend competition concerns beyond traditional market foreclosure to algorithmic visibility, explainability, and non-discrimination in platform-mediated markets.²³

21 Regulation (EU) 2022/1925 (n 2) arts 3, 5-7.

22 Luís Cabral and others, *The EU Digital Markets Act: A Report from a Panel of Economic Experts* (Publications Office of the EU 2021) doi:10.2760/139337.

23 Philipp Hacker, Johann Cordes and Janina Rochon, 'Regulating Gatekeeper AI and Data: Transparency, Access, and Fairness under the Digital Markets Act, the General Data Protection Regulation and beyond' (2024) 15(1) European Journal of Risk Regulation 49, doi:10.1017/err.2023.81.

Enforcement is conducted by the Commission, which is empowered to conduct investigations, impose fines of up to 10% of worldwide turnover (20% for repeated infringements), and adopt structural remedies for systematic non-compliance. Initial designations in September 2023 identified six gatekeepers (Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft) operating twenty-two core platform services.²⁴

The DMA also affects the relationship between ex-ante platform regulation and the traditional enforcement of Articles 101 and 102 TFEU, particularly because it may create overlaps between sector-specific obligations and general competition law proceedings. This interaction raises questions about whether the DMA merely complements traditional EU competition law or gradually reshapes the role of EU competition law in digital markets.²⁵

4.3. Digital Services Act: Platform Accountability

The Digital Services Act, applicable from February 2024, complements the DMA by establishing comprehensive platform accountability frameworks.²⁶ It creates tiered obligations based on platform size and role. Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs) exceeding 45million monthly active users face stringent requirements, including systemic risk assessments, independent audits, transparency reporting, and measures to address illegal content and disinformation. The DSA's enforcement framework involves coordination between national authorities and the Commission, with the Commission directly supervising VLOPs/VLOSEs. Though primarily focused on content moderation and user protection, the DSA intersects with competition policy through transparency requirements and restrictions on dark patterns that may affect market contestability.

4.4. Landmark Cases: Enforcement in Action

The Commission's Google Search (Shopping) decision (2017) established important precedents for addressing self-preferencing. The Commission found that Google systematically favoured its comparison shopping service in search results while demoting rivals, thereby constituting an abuse of dominance in general search services to leverage an advantage in comparison shopping. Google argued its conduct represented product improvement and competition on the merits. The Commission rejected these arguments, concluding that algorithmic preference for Google's own services harmed rival comparison

24 'Digital Markets Act: Commission Designates Six Gatekeepers: Press Release' (*European Commission*, 6 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> accessed 13 November 2025.

25 Arianna Andreangeli, 'The Digital Markets Act and the Enforcement of EU Competition Law: Some Implications for the Application of Articles 101 and 102 TFEU in Digital Markets' (2022) 43(11) *European Competition Law Review* 496.

26 Regulation (EU) 2022/2065 (n 2).

shopping services, denied consumers genuine choice, and stifled innovation. The €2.42bn fine and behavioural remedy requiring equal treatment principles significantly influenced subsequent enforcement and informed DMA self-preferencing prohibitions.²⁷

Microsoft investigations exemplify sustained enforcement regarding interoperability and ecosystem foreclosure. Building on historical interventions, current investigations address cloud service interoperability and licensing practices that may be foreclosing competition. The approach reflects evolving understanding of digital ecosystems and interoperability requirements essential for market contestability.

Apple Apps Store investigations exemplify challenges of regulating platform ecosystems and the power of gatekeepers. The Apple Music case addresses restrictions on music streaming apps' ability to inform users about alternative subscription options, examining whether Apple's 30% commission and anti-steering provisions constitute abuse. Investigations into contactless payment restrictions focus on whether limiting NFC access to Apple Pay forecloses competition. These cases informed DMA provisions on app store practices, payment system requirements, and interoperability obligations, demonstrating how traditional enforcement identifies problems subsequently addressed through ex-ante rules.

5 THE UNITED STATES APPROACH

The United States antitrust framework represents the world's oldest competition law system. However, applying traditional legal standards to digital platforms has proven challenging, prompting debates about whether existing statutes remain adequate or require reform or reinterpretation.²⁸

5.1. Traditional Legal Framework

The Sherman Act (1890) serves as a cornerstone of US competition law. Section 1 prohibits contracts, combinations, or conspiracies restraining trade. Section 2 prohibits monopolisation, attempts to monopolise, and conspiracies to monopolise. Courts apply rule of reason analysis to most restraints, requiring detailed examination of competitive effects, though per se rules apply to hardcore cartels. Section 2 requires proof of monopoly power and exclusionary conduct, that is, conduct that harms competition rather than merely competitors.

27 Case C-48/22 P *Google LLC and Alphabet Inc v European Commission* (CJEU, 10 September 2024) EU:C:2024:726 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62022CJ0048>> accessed 13 November 2025. See also, Elias Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-Preferencing under Article 102 TFEU' (2021) 6(3) *European Papers* 1345, doi:10.15166/2499-8249/528.

28 Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (West Academic Press 2024).

United States v. Microsoft Corp. (2001) established important precedents for applying the monopolisation doctrine to technology markets. The D.C. Circuit held that Microsoft's tying Internet Explorer to Windows and its exclusionary agreements with computer manufacturers violated Section 2, rejecting arguments that software design choices fall outside antitrust scrutiny. Recent digital platform cases have tested the boundaries of Section 2. The Epic Games v. Apple litigation exemplifies the challenges of applying the monopolisation doctrine to app store ecosystems, with courts grappling with relevant market definition and whether Apple's restrictions constitute exclusionary conduct or legitimate platform management.²⁹

The Clayton Act (1914) addresses specific practices and provides the primary merger control framework. Section 7 prohibits acquisitions that lessen competition or tend to create a monopoly. Enforcement agencies have developed theories addressing digital platform mergers, including nascent competitor elimination and ecosystem foreclosure. Economic scholarship on BigTech mergers similarly emphasises that acquisitions of potential competitors in digital markets may entrench incumbent platforms and raise serious concerns for merger control, particularly where startups could otherwise develop into future competitive constraints.³⁰

Recent enforcement reflects heightened scrutiny: the FTC's challenge to Meta's acquisition of Within Unlimited, though ultimately unsuccessful, signalled a willingness to contest vertical mergers in digital markets. The withdrawn challenge to Nvidia's ARM acquisition demonstrated the limits of aggressive merger enforcement when faced with complex technical markets and international dimensions.

The Federal Trade Commission Act established the FTC with authority to challenge 'unfair methods of competition' under Section 5, providing broader reach than the Sherman Act. FTC's use of Section 5 in digital markets has included investigations of data privacy practices, algorithmic discrimination, and platform self-preferencing, though its scope remains judicially constrained compared to the FTC's aspirational interpretations.

5.2. Philosophical Evolution

The Chicago School economics fundamentally transformed US antitrust enforcement beginning in the 1970s, establishing consumer welfare primacy as the organising principle. Courts applying this framework have required evidence that challenged conduct results in higher prices, reduced output, or diminished innovation measurable through consumer surplus. The approach prioritises economic efficiency over market-structure concerns,

29 *United States v Microsoft Corp* (US Court of Appeals for the District of Columbia Circuit, 28 June 2001) 253 F 3d 34 <<https://law.justia.com/cases/federal/appellate-courts/F3/253/34/576095/>> accessed 13 November 2025.

30 Massimo Motta and Martin Peitz, 'Big Tech Mergers' (2021) 54 *Information Economics and Policy* 100868, doi:10.1016/j.infoecopol.2020.100868.

expresses scepticism about government intervention in dynamic markets and favours behavioural remedies over structural ones.

The neo-Brandeisian movement, named for Justice Louis Brandeis, advocates returning to broader antitrust objectives rather than a narrowly defined consumer welfare. This neo-Brandeisian critique has also revived interest in structural separation as a remedy for conflicts of interest that arise when dominant platforms both operate essential digital infrastructure and compete with the businesses that depend on it.³¹

Proponents argue that concentrated economic power threatens democratic governance, worker welfare, and small business vitality regardless of immediate consumer price effects. The Stigler Center's Market Structure and Antitrust Subcommittee similarly emphasised that digital platform markets are unlikely to self-correct rapidly once dominance becomes entrenched, given the combined effects of network effects, data advantages, behavioural biases, and strategic exclusionary conduct. The report therefore called for stronger antitrust enforcement and, where necessary, complementary institutional reforms such as a specialist digital authority to lower entry barriers and preserve competition in platform markets.³² The movement's influence has been evident in digital platform enforcement under the Biden administration, with FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter pursuing more aggressive theories and challenging long-standing precedents.³³

5.3. Major Digital Platform Cases

The DOJ's case against Google, filed in October 2020, represents the most significant monopolisation prosecution since *United States v. Microsoft*. The complaint alleges that Google unlawfully maintains search engine and search advertising monopolies through exclusionary agreements, particularly payments to Apple and other partners that secure default search placement. The case emphasises that these arrangements create barriers that prevent rivals from achieving the scale necessary to compete effectively. Google defended its position on product quality, arguing that users choose Google for its superior search results and that default placements are easily changeable. Trial proceedings in late 2023 revealed extensive evidence about Google's market strategy and competitive dynamics. Judge Mehta's August 2024 ruling found Google liable for maintaining a monopoly through anticompetitive default agreements, though remedy proceedings remain ongoing.³⁴

31 Lina M Khan, 'The Separation of Platforms and Commerce' (2019) 119 *Columbia Law Review* 973.

32 Fiona Scott Morton and others, *Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee: Report, Draft 15 May 2019* (George J Stigler Center for the Study of the Economy and the State, University of Chicago Booth School of Business 2019).

33 Marshall Steinbaum and Maurice E Stucke, 'The Effective Competition Standard: A New Standard for Antitrust' (2020) 87(2) *The University of Chicago Law Review* 595.

34 *United States v Google LLC* No 1:20-cv-03010 (US District Court, District of Columbia, 5 August 2024) <<https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc>> accessed 13 November 2025.

The FTC's ongoing litigation against Meta Platforms combines retrospective challenge to completed acquisitions (Instagram 2012, WhatsApp 2014) with allegations of ongoing exclusionary conduct. The FTC argues that these acquisitions eliminated nascent competitive threats, and Meta maintains dominance through policies that restrict data interoperability and condition API access on competitors forswearing competition. Meta emphasises competition from TikTok, YouTube, and emerging social media services, arguing that markets remain dynamic and competitive. The case presents novel theories about platform competition, two-sided market dynamics, and retrospective merger challenges that test the limits of FTC authority.³⁵

The FTC's case against Amazon, filed in September 2023, represents a comprehensive challenge to alleged monopolisation of online marketplace services. The complaint alleges that Amazon maintains monopoly power by punishing sellers who use competing platforms, conditioning preferential placement on the use of Amazon's fulfilment services and manipulating search results to favour Amazon's own products. Amazon defends its practices by emphasising intense retail competition, arguing that its practices benefit consumers through lower prices and improved services. The case raises novel theories about platform competition and two-sided market dynamics that may significantly influence future enforcement.³⁶

6 COMPARATIVE ANALYSIS: EU V. US

The divergent EU and US approaches reflect fundamental differences in regulatory philosophy, institutional design, and enforcement priorities. This section synthesises key convergences and divergences, evaluating comparative effectiveness across multiple dimensions.

6.1. Philosophical Divergence

The EU approach is fundamentally grounded in ordoliberal principles that prioritise market fairness, the protection of the competitive process, and the prevention of the concentration of private power. The DMA exemplifies this through an ex-ante regulatory framework that imposes obligations on gatekeepers regardless of demonstrated consumer harm, treating fair competition as both instrumental to consumer welfare and an intrinsic policy objective. This reflects broader EU regulatory philosophy emphasising precautionary intervention to maintain competitive market structures.

35 *FTC v Meta Platforms Inc* No 1:20-cv-03590 (US District Court, District of Columbia, 18 November 2025) <<https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2020cv03590/224921/693/>> accessed 13 November 2025.

36 *FTC v Amazon.com Inc* No 2:23-cv-01495 (US District Court, Western District of Washington, 26 September 2023) <<https://www.courtlistener.com/docket/67828404/federal-trade-commission-v-amazoncom-inc/>> accessed 13 November 2025.

The US framework remains primarily oriented toward economic efficiency and consumer welfare, traditionally understood in terms of price effects. Courts require evidence that challenged conduct harms competition, manifesting as cognizable consumer injury, typically price increases, output reductions, or diminished innovation. While recent neo-Brandeisian influence has expanded enforcement theories, judicial precedent remains anchored in the consumer welfare standard, which requires demonstrable competitive harm rather than structural market characteristics.³⁷

Despite philosophical divergence, both jurisdictions increasingly recognise that traditional frameworks inadequately address competition among digital platforms. Both have adopted theories addressing data accumulation, nascent competitor elimination, and ecosystem foreclosure. Both grapple with the challenges of zero-price markets, network effects, and the difficulty of applying traditional market-definition tools. This represents meaningful convergence in problem identification even amid divergent solutions.³⁸

6.2. Enforcement Style and Mechanisms

The EU has increasingly adopted proactive regulatory approaches, most notably through the DMA. The gatekeeper designation process exemplifies this methodology, establishing quantitative thresholds and qualitative criteria triggering automatic obligations. Once designated, gatekeepers must comply with specified requirements regardless of whether conduct demonstrably harms competition. This provides regulatory certainty and enables swift intervention, but risks overinclusive regulation that captures benign conduct and reduces platform incentives for pro-competitive innovation.

The US maintains a reactive approach, relying on case-by-case litigation. Enforcement agencies must identify specific instances of anticompetitive conduct and demonstrate harm through detailed economic analysis and, often, by extensive discovery. Courts apply a structured rule-of-reason analysis, examining the conduct's actual effects on competition. This approach offers advantages regarding factual thoroughness and legal precision, allowing detailed examination of complex economic evidence and limiting intervention to demonstrably harmful conduct. However, it suffers from protracted timelines; major cases often require five to seven years from complaint to final resolution, during which challenged conduct may continue causing competitive harm.

EU enforcement has produced swift, substantial remedies, including multi-billion euro fines (Google Shopping €2.42bn, Google Android €4.34bn) and behavioural requirements. DMA provisions enable prospective compliance obligations and structural remedies for

37 Daniel A Crane, 'The New Crisis in Antitrust (?)' (2020) 83(1) *Antitrust Law Journal* 253.

38 Giorgio Monti and Alexandre Ruiz Feases, 'The Case against Google: Has the US Department of Justice Become European?' (2021) 35 *Antitrust* 26.

systematic non-compliance. US enforcement has produced more mixed results: successful cases have resulted in injunctive relief and behavioural commitments, but structural remedies remain rare, given the behavioural focus of the Microsoft consent decree. Ongoing major cases seek significant structural relief, but outcomes remain uncertain.

6.3. Comparative Effectiveness

EU proactive regulation offers advantages in enforcement speed and regulatory certainty. DMA designation creates immediate obligations with six-month compliance deadlines. Traditional enforcement also operates more swiftly than US litigation; Commission decisions typically occur within two to three years of the investigation's commencement. This enables addressing competitive concerns before market structures become irreversibly concentrated. The approach provides market participants with clearer guidance about prohibited conduct.

US litigation-based approach offers advantages in factual thoroughness and legal precision. Extensive discovery, expert testimony, and judicial fact-finding enable detailed examination of complex economic evidence. Judicial oversight provides procedural protections and limits intervention to ensure that stringent legal standards are met. This reduces the risk of regulatory overreach and Type I errors (false positives) that condemn pro-competitive conduct.

EU enforcement has generated substantial deterrence through significant fines and a credible threat of structural remedies for systematic non-compliance. DMA's ex-ante obligations create ongoing compliance requirements with monitoring and enforcement mechanisms. US enforcement deterrence has been more limited; lengthy litigation timelines reduce the immediate deterrent effect, though successful major cases may generate a precedential impact. The prospect of treble damages in private litigation provides an additional deterrent, though private plaintiffs face significant evidentiary burdens in complex digital markets.

Both approaches face challenges in adapting to rapid technological change. EU ex-ante rules risk becoming outdated as markets evolve, though DMA includes review provisions and Commission adaptability through implementing regulations. The US case-by-case approach theoretically offers greater flexibility to address novel conduct, but lengthy litigation timelines may render decisions obsolete by the time of final resolution. Both jurisdictions struggle with a fundamental challenge: competition law necessarily operates retrospectively, while digital markets evolve prospectively.

This limitation confirms that effective digital-market enforcement cannot depend on fines and cease-and-desist orders alone. Where platform markets have already tipped, competition authorities may need stronger tools, including presumptions of anticompetitiveness in limited

circumstances, restorative remedies capable of reintroducing competition, and greater attention to harms to quality and innovation rather than price alone.³⁹

6.4. Global Influence and Regulatory Convergence

Both models have generated significant global influence. The EU's DMA has inspired similar legislation in multiple jurisdictions, including the UK's Digital Markets, Competition and Consumers Act, Japan's Act on Improving Transparency and Fairness of Digital Platforms, and proposed legislation in numerous other countries. The 'Brussels Effect' operates through platforms' global compliance; obligations imposed on EU operations often extend worldwide due to technical and operational integration. US influence continues through common law precedents and technical assistance, particularly in jurisdictions with an American legal heritage. However, its influence has diminished relative to the EU's proactive regulatory model, leading to wider adoption among jurisdictions lacking established antitrust enforcement capacity.

Recent US scholarship has also treated the DMA as a blueprint for modernising American antitrust law in digital markets. Ogle argues that the United States should move beyond purely reactive litigation by adopting privacy legislation and DMA-style gatekeeper obligations, particularly when dominant platforms use personal data extraction to reinforce market power and raise barriers to entry.⁴⁰ Meaningful convergence is occurring despite divergent approaches. Both jurisdictions increasingly recognise the competitive significance of data accumulation, the nascent scrutiny of competitor acquisitions, and ecosystem foreclosure theories. Both have expanded merger enforcement in digital markets and developed theories addressing multi-sided platform dynamics. This suggests potential for harmonisation around core principles even while specific enforcement mechanisms remain distinct. For Arab jurisdictions, this convergence around problem identification while maintaining enforcement flexibility offers valuable lessons; successful regulation need not replicate either model wholesale but can adapt core insights to local contexts.

39 Damien Geradin and Dimitrios Katsifis, 'Strengthening Effective Antitrust Enforcement in Digital Platform Markets' (2022) 18(2) European Competition Journal 356, doi:10.1080/17441056.2021.2002589.

40 Nathan Ogle, 'The Digital Markets Act: A Blueprint for Modernizing American Antitrust Law' (2024) 26(1) Transactions: The Tennessee Journal of Business Law 147, doi:10.70658/4486-1457.1703.

Table 1. Digital-Competition Readiness Matrix (EU–US–Selected Arab Jurisdictions)⁴¹

Criteria	EU	US	Egypt	Saudi Arabia	UAE
Legal approach to digital markets (ex-ante / ex-post; sector-specific tools)	Strongly hybrid but increasingly ex-ante: DMA/DSA alongside Arts 101–102 TFEU enforcement.	Primarily ex-post: case-by-case enforcement under Sherman/Clayton/FTC Acts; no comprehensive economy-wide ex-ante digital regime.	Predominantly ex-post under general competition law; limited digital-specific rules; technology-neutral orientation.	Predominantly ex-post; reforms and market studies expanding attention to digital sectors, but limited platform-specific ex-ante rules.	Predominantly ex-post: Decree-Law 36/2023 is tech-neutral but applies to a ‘physical or digital’ relevant market and has extraterritorial reach (Art. 3).
Institutional capacity & specialised units	High: mature supranational capacity with specialised digital-market enforcement and DMA compliance monitoring.	High but litigation-dependent: strong agencies, yet resource-intensive investigations and court timelines.	Developing: capacity constraints and limited experience with complex digital/economic evidence.	Developing→moderate: institutional strengthening aligned with Vision 2030; growing use of sector studies, limited platform precedents.	Developing: newer framework; capacity-building underway; limited public digital enforcement precedents.
Investigative powers (access to data, dawn raids, digital forensics)	Strong administrative toolkit (RFIs, inspections); DMA enhances monitoring and compliance leverage.	Strong legal powers via subpoenas/disclosure, but fact-finding is court-centred and time-consuming.	Powers exist in law, but practical bottlenecks remain: data access, technical expertise, and cooperation from foreign platforms.	Similar constraints: cross-border evidence and platform data access; market studies help but do not substitute for investigative access.	Jurisdictional basis strengthened by Art. 3, yet effective evidence-gathering still depends on cooperation and operational digital forensics.
Evidentiary toolkit (algorithmic evidence, data)	More developed: market studies and structured obligations	Highly developed economics + discovery, but high burdens	Emerging: limited published practice on algorithmic	Emerging: increased analytical capacity via studies; limited	Emerging: limited published practice; Decree-Law contemplates

⁴¹ *Note:* Readiness is assessed qualitatively using the manuscript’s evaluation criteria (responsiveness, timeliness, certainty, deterrence, proportionality), and for Arab jurisdictions, institutional feasibility, and cross-border enforceability.

Criteria	EU	US	Egypt	Saudi Arabia	UAE
access, market studies)	(DMA) reduce some case-by-case proof burdens.	of proof and long litigation cycles.	evidence/data access; studies exist but depth varies.	track record on algorithmic/marketplace analytics.	access to 'physical or digital infrastructure' where refusal forecloses entry (Art. 6(1)(k)).
Remedies (interoperability, data portability, conduct/structural remedies)	Broad: large fines + behavioural remedies; DMA hardwires interoperability/data portability; structural remedies possible for systematic non-compliance.	Mostly behavioural/injunctive; structural relief historically rarer (though increasingly sought).	Mostly classic remedies (fines/behavioural); technical remedies (interop/portability/audits) not yet routinised and would require tailored guidance.	Mostly classic remedies: targeted ex-ante guardrails (interop/portability) are typically recommended rather than embedded.	Mostly classic remedies: the legal basis exists for addressing digital exclusionary conduct, but technical remedies remain limited in practice.
Transparency & publication of decisions/guidance	High relative transparency: published decisions, guidance, and DMA compliance visibility.	Moderate-high: public filings and court rulings, but outcomes can be slow and settlements vary.	Lower/fragmented: fewer detailed published digital decisions/guidance; limited reliable official statistics specific to digital enforcement.	Lower-moderate: improving institutional outputs but limited published digital precedent base.	Lower-moderate: newer framework; limited published digital precedent base to date.
Cross-border cooperation & enforcement feasibility	Strong: EU-wide architecture facilitates multi-state enforcement and consistent obligations.	Moderate: cooperation exists, but enforcement remains jurisdiction-bounded and litigation-heavy.	Challenging: reliance on foreign platforms makes cross-border evidence and execution central; cooperation mechanisms are uneven.	Challenging but improvable: regional coordination (e.g., GCC) could raise feasibility; evidence access and coordinated remedies remain constraints.	Challenging but somewhat strengthened on jurisdictional theory (Art. 3); practical feasibility still hinges on cooperation and enforceability.

7 IMPLICATIONS FOR ARAB JURISDICTIONS

EU and US experience in digital platform competition law offers useful comparative benchmarks for Arab jurisdictions, but it does not provide a ready-made model for legal transplantation.⁴²

The main obstacle is not simply a doctrinal difference; it is an institutional asymmetry: most Arab jurisdictions still rely on general competition statutes (rather than digital-market-specific ex-ante regimes), while enforcement agencies confront platform markets shaped by cross-border conduct, foreign-controlled data, and a substantial technical-evidentiary imbalance.⁴³

For this reason, the central policy question is not whether to “choose” the EU or US model in the abstract, but how to sequence legal adaptation, institutional capacity-building, and selective rulemaking to match administrative capability and market structure.⁴⁴

This caution is also consistent with broader Arab legal scholarship on digital transformation, which shows that legislative and doctrinal adaptation often outpaces institutional implementation across multiple fields of law.⁴⁵

Egypt has one of the region’s more established competition law systems, centred on the Egyptian Competition Authority (ECA) and Competition Law No. 3 of 2005.⁴⁶

However, the framework should not be overstated as a fully developed digital-competition regime: its application to platform markets still depends primarily on how general competition concepts are interpreted and enforced in data-driven and multi-sided settings, rather than on a dedicated ex-ante statute comparable to the EU DMA.⁴⁷

The principal constraint is therefore institutional as much as legislative, including technical expertise, digital-market analytics, and access to platform-held information; moreover, publicly available evidence of sustained platform-specific enforcement remains more limited than reform discourse may imply.⁴⁸

42 UNCTAD, *Enforcing Competition Law in Digital Markets and Ecosystems: Policy Challenges and Options* (UNCTAD 2024).

43 Georgiana Pop and Gonalo Coelho, *Competition Policy in Digital Markets in Africa* (World Bank Group 2024).

44 ESCWA and League of Arab States, *Arab Digital Agenda 2023–2033: Arab States Action Programme on Advancing Digital Cooperation and Development* (UN 2024).

45 Nadia Ismail Mahmoud Mohamed, ‘Party Autonomy in the Age of Digital Transformation: Toward the Reshaping of Private International Law Rules: A Comparative Legal Analytical Study’ (2023) 35(44) *Al-Majalla Al-Qanuniyya Al-Iqtisadiyya* 668.

46 Law of the Arab Republic of Egypt No 3 of 2005 ‘On the Protection of Competition and the Prohibition of Monopolistic Practices’ (adopted 15 February 2005) <<https://eg.andersen.com/translation-law-3-2005/>> accessed 13 November 2025.

47 Kim and Choi (n 5).

48 Abdel Fattah Mohamed Abdel Fattah, ‘Digital Transformations and their Role in Enhancing Competition Protection and Preventing Monopoly in the Egyptian Market’ (2025) 16(2) *Journal of Commercial and Environmental Studies* 689, doi:10.21608/jces.2025.435069.

Recent Egyptian scholarship on digital transformation and competition protection usefully highlights the scale of these challenges, but it also reinforces the point that doctrinal modernisation alone does not close enforcement-capacity and evidence gaps. Saudi Arabia's competition framework, anchored in the 2019 Competition Law (Royal Decree No. M/75) and enforced by the General Authority for Competition (GAC), has developed a more structured institutional profile than many regional counterparts.⁴⁹

Yet a stronger formal framework should not be equated with a mature digital-competition jurisprudence: the available record suggests an evolving system in which merger-control practice has advanced more visibly than enforcement of broader digital-platform conduct, especially in cases involving complex platform economics and cross-jurisdictional effects.⁵⁰

Recent Saudi-focused scholarship is particularly valuable because it identifies not only progress but also weaknesses in regulatory clarity, institutional capacity, and cross-border coordination, precisely the factors that determine whether digital competition rules can be enforced in practice rather than merely stated in legislation.

Saudi Arabia is therefore best understood as a jurisdiction with significant regulatory momentum but incomplete operational consolidation in digital competition enforcement.⁵¹ The UAE competition regime has been substantially updated through Federal Decree-Law No. 36 of 2023, which establishes a comprehensive framework addressing anticompetitive agreements, abuse of dominance, and economic concentration. The Decree-Law is particularly relevant to digital-platform markets because it adopts a broad scope of application, including conduct outside the State that affects competition within the UAE.⁵²

At the same time, broad statutory reach does not, by itself, resolve the core implementation bottlenecks: technical capacity, access to digital evidence and data, transparency in published enforcement practice, and sustained institutional specialisation remain decisive constraints. The UAE is thus a promising but transitional case: legislatively modernised and strategically positioned, but not demonstrably equivalent to mature digital-enforcement systems in publicly evidenced practice.

49 Royal Decree of the Saudi Arabia No M/75 of 29/06/1440H 'Competition Law' (adopted 7 March 2019) <<https://www.wipo.int/wipolex/en/legislation/details/19748>> accessed 13 November 2025.

50 Almohawes and Alowaidah (n 5).

51 Annabelle Gawer and Carla Bonina, 'Digital Platforms and Development: Risks to Competition and their Regulatory Implications in Developing Countries' (2024) 34(3) *Information and Organization* 100525, doi:10.1016/j.infoandorg.2024.100525.

52 Federal Decree-Law of the United Arab Emirates No 36 of 2023 'On the Regulation of Competition' (adopted 28 September 2023) <https://www.lexismiddleeast.com/law/UnitedArabEmirates/DecreeLaw_36_2023/en> accessed 13 November 2025.

7.1. Common Challenges

Developing countries face significant challenges in building institutional and technical capacity for digital market governance. The complexity of digital markets requires competition authorities with specialised expertise in data analytics, algorithmic systems, multi-sided platforms, and network effects, capabilities that go beyond traditional competition law. Many Arab competition authorities lack sufficient economists, data scientists, and technology specialists. Rapid changes in the digital market require authorities to continually update their understanding, but budget constraints limit training, technical assistance, and the hiring of specialised personnel.

Firm-level evidence from Jordan, Morocco, and Egypt confirms that digital market development in Arab jurisdictions depends not only on the design of competition law but also on the broader conditions that enable firms to participate effectively in e-commerce. These conditions include broadband access, digital payment infrastructure, firm capabilities, workers' skills, and enterprises' ability to use online platforms for production, trade, and innovation.⁵³

Arab markets are characterised by heavy reliance on foreign digital platforms, with limited competitive domestic alternatives in key sectors: search (Google dominance), social media (Meta dominance), e-commerce (Amazon's increasing presence), and mobile operating systems (Apple/Google duopoly).

Foreign platform dominance creates difficult trade-offs: governments may face pressure not to aggressively regulate platforms providing valuable services to citizens and businesses. However, excessive deference risks entrenching foreign platforms' dominance, limiting opportunities for domestic innovation, and creating dependence on foreign technology infrastructure. Platforms' lack of physical presence and limited local revenue generation complicate enforcement; authorities struggle to obtain information, secure compliance, and collect fines from entities operating primarily outside territorial jurisdiction.

Egypt's experience illustrates that digital market competition in Arab jurisdictions is shaped not only by the conduct of dominant foreign platforms but also by domestic enabling conditions such as ICT infrastructure, logistics, payment security, consumer trust, legal certainty, human capital, and innovation capacity. These factors are central to local e-commerce firms' ability to compete effectively and reduce dependence on large external platforms.⁵⁴

53 Nong Zhu and Xubei Luo, *Digitalization and Firm Performance in the Middle East and North Africa: Case Studies of Jordan, Morocco, and Egypt* (Working Paper no 1637, Economic Research Forum 2023).

54 Esam El Gohary, 'The Reality of E-Commerce in Egypt and Its Role in Enhancing Companies' Competitiveness' (International Conference on e-Democracy, e-Government and e-SocietyAt, Paris, 24-25 January 2019).

The fragmented nature of Arab digital markets, with limited regional integration, creates challenges in addressing competition concerns that transcend national borders. Platforms operating across multiple Arab jurisdictions may engage in conduct that affects regional markets, but individual national authorities lack the jurisdiction or resources to intervene comprehensively. Limited cooperation among Arab competition authorities impedes coordinated enforcement and creates opportunities for platforms to exploit regulatory arbitrage. The absence of a regional competition framework comparable to the EU's supranational system means Arab jurisdictions cannot leverage collective market size and regulatory capacity.

7.2. Policy Recommendations

Arab jurisdictions should adopt hybrid approaches that combine elements of the EU and US models while addressing specific regional challenges. Full EU-style ex-ante regulation may exceed current institutional capacity and risk overregulating markets that are still developing. Pure US-style litigation may prove too slow and resource-intensive given limited technical capacity and foreign platforms' ability to delay proceedings.

Recommended hybrid framework includes: (1) Targeted ex-ante rules for specific high-risk practices: Rather than comprehensive DMA-style regulation, adopt focused rules addressing particularly problematic conduct, self-preferencing by dominant platforms, data combination restrictions, basic interoperability requirements for messaging and social media, merchant parity clauses restricting pricing flexibility. These requirements should have clear, objective triggers (market share thresholds, user numbers) and straightforward compliance requirements, minimising enforcement resource demands. (2) Case-based enforcement foundation: Maintain traditional case-by-case enforcement as the primary mechanism, allowing detailed examination of specific conduct in the Arab market context. This preserves flexibility and limits intervention to demonstrably harmful practices. Streamline procedures, recognise resource constraints, adopt abbreviated timelines for digital market cases, develop standardised analytical frameworks to reduce the investigation burden, and enable provisional measures to prevent irreversible harm during lengthy proceedings. (3) Merger notification thresholds addressing nascent competitors: Adopt transaction value-based thresholds capturing high-value acquisitions of low-revenue startups. Germany and Austria have implemented such thresholds, providing valuable precedents. This enables the review of acquisitions that would fall outside traditional turnover thresholds but pose competitive concerns.

Regional coordination is essential for the effective implementation of ex-ante rules, as platforms operating across multiple Arab jurisdictions could otherwise exploit regulatory arbitrage. Recommendations include: (1) establishing an Arab Competition Network modelled on the European Competition Network, facilitating information sharing, coordinated enforcement, and technical cooperation. The Gulf Cooperation Council

provides a particularly promising framework for enhanced cooperation among Gulf states, building on existing economic integration and shared legal systems. (2) Developing regional guidelines for digital market analysis, creating shared analytical frameworks and enforcement priorities, reducing inconsistent approaches, and providing platforms with greater regulatory certainty. (3) Implementing capacity-building initiatives that help smaller Arab jurisdictions develop expertise through knowledge sharing, joint training programs, and technical assistance from more advanced authorities. (4) Pursuing mutual recognition of enforcement decisions where jurisdictions have sufficiently similar legal standards and procedural protections, enabling coordinated action against regional competition concerns.

Arab jurisdictions must carefully balance competition policy with broader economic development goals, recognising that digital market regulation impacts innovation ecosystems, foreign investment, and economic diversification. Recommendations include: (1) Coordinating closely with economic development agencies, innovation support programs, and digital transformation initiatives, ensuring competition policy supports rather than undermines development objectives. (2) Considering differential treatment for domestic platforms in nascent development stages, while avoiding protectionism harming consumers, limited safe harbours or graduated enforcement could enable domestic platforms to achieve the scale necessary for regional competition. (3) Emphasising promoting competitive entry and expansion over punishing incumbent success, focus enforcement on conduct genuinely foreclosing competition rather than advantages legitimately earned through innovation and investment. (4) Engaging with international platform companies constructively, seeking commitments on local investment, data localisation (where justified by legitimate policy objectives), and market access for local businesses as an alternative or complement to adversarial enforcement.

8 CONCLUSION

This comparative analysis has examined EU and US approaches to digital platform competition, identifying fundamental divergences in regulatory philosophy, enforcement mechanisms, and practical effectiveness. The findings provide valuable insights for Arab jurisdictions seeking to develop context-appropriate regulatory frameworks that address digital market challenges while supporting economic development objectives.

The EU approach represents a paradigmatic shift toward proactive ex-ante regulation, prioritising market-structure fairness, and the protection of competitive processes. Through the Digital Markets Act, Digital Services Act, and vigorous traditional enforcement, the EU has established a comprehensive architecture for digital platform governance. This approach reflects ordoliberal principles, viewing competitive market structures as both instrumental to consumer welfare and intrinsically valuable policy objectives. Key strengths include regulatory certainty through clear ex-ante obligations; swift intervention through

gatekeeper designation and streamlined procedures; substantial deterrence through significant fines and credible threats of structural remedies; and global influence through the Brussels Effect, which inspires similar legislation internationally.

However, the EU approach presents risks including potential overregulation that captures benign conduct; reduced innovation incentives from extensive ex-ante obligations; limited flexibility in rapidly evolving markets; and implementation challenges ensuring effective monitoring and compliance. The success of EU regulation will depend on whether the benefits of increased competition and innovation outweigh the costs of regulatory burden and potential chilling effects on platform investment.

The US approach maintains a reactive, case-by-case litigation model emphasising detailed factual analysis, economic evidence, and judicial oversight. Grounded in consumer welfare standards and Chicago School economics, US enforcement requires demonstrating that the challenged conduct causes cognizable competitive harm that manifests as consumer injury. Key strengths include factual thoroughness through extensive discovery and expert testimony; legal precision through judicial oversight and structured analysis; flexibility addressing novel conduct in dynamic markets; and limiting intervention to demonstrably harmful practices, reducing Type I error risks.

However, the US approach suffers from protracted litigation timelines (five to seven years) that delay intervention; uncertain outcomes that create limited deterrence during extended proceedings; high resource requirements for complex economic analysis; and potential underenforcement due to demanding evidentiary standards. Recent neo-Brandeisian influence has begun to challenge the narrow consumer-welfare focus, with major ongoing cases (*US v. Google*, *FTC v. Meta*, *FTC v. Amazon*) that could reshape US antitrust doctrine. However, even with more aggressive enforcement leadership, fundamental structural features, a litigation-based approach, and demanding legal standards, judicial conservatism regarding intervention will persist.

Despite philosophical and procedural divergences, meaningful convergence is occurring around core competition concerns: both jurisdictions increasingly recognise the competitive significance of data accumulation; both scrutinise nascent competitor acquisitions; both develop theories addressing ecosystem foreclosure and multi-sided platform dynamics; both grapple with challenges in applying traditional tools to zero-price markets with network effects. This convergence in problem identification, while maintaining distinct enforcement approaches, suggests that multiple regulatory paths can address competition between digital platforms, with the optimal approach depending on institutional capacity, legal traditions, and policy priorities.

For Arab jurisdictions, neither the EU nor the US model provides a directly transplantable template. Arab markets present distinctive challenges: heavy reliance on foreign platforms, limited domestic alternatives, emerging institutional capacity, fragmented regional markets, and the imperative to balance competition with

development objectives. Direct EU model adoption risks regulatory overreach given capacity constraints and could deter platform investment in developing markets. Pure US-style litigation may prove too slow and resource-intensive given technical capacity limitations and platforms' ability to delay proceedings.

The recommended hybrid approach combines elements from both models: (1) Targeted ex-ante rules addressing specific high-risk practices (self-preferencing, data combination, basic interoperability) with clear objective triggers minimizing enforcement burden; (2) Case-based enforcement foundation maintaining flexibility through traditional investigation and adjudication while streamlining procedures recognizing resource constraints; (3) Transaction value-based merger thresholds capturing nascent competitor acquisitions; (4) Regional cooperation through Arab Competition Network enabling coordinated enforcement and capacity building; (5) Development-sensitive implementation balancing competition objectives with innovation promotion and economic diversification goals.

Successful implementation requires sustained institutional investment. Arab jurisdictions must prioritise: developing technical expertise in digital markets through specialised training and expert recruitment; establishing regional cooperation mechanisms for information sharing and coordinated enforcement; building relationships with international enforcement agencies for technical assistance and best practice exchange; engaging constructively with platforms seeking commitments on local investment and market access; and integrating competition policy with broader economic strategies, ensuring regulatory coherence.

8.1. Future Research Directions

This comparative analysis opens several avenues for future research. First, as major US cases reach conclusions and the EU's DMA implementation matures, empirical assessment of comparative effectiveness will become possible, examining whether EU ex-ante regulation successfully promotes competition and innovation compared to the US ex-post approach, and analysing compliance burdens, innovation impacts, and consumer welfare effects across jurisdictions.

Second, the emergence of artificial intelligence as a central competitive factor requires examination. The integration of AI systems into platform operations raises concerns about algorithmic collusion, discriminatory pricing, and opacity in decision-making. How competition frameworks should address AI-driven competition and whether existing tools remain adequate require careful analysis.

Third, the growth of cross-border e-commerce and the integration of digital trade create opportunities and challenges for Arab competition policy. Regional digital trade agreements and e-commerce frameworks should include competition provisions that ensure competitive markets and prevent platform abuse. How Arab jurisdictions can effectively coordinate digital market regulation across borders requires sustained attention.

Fourth, the relationship between competition policy and other regulatory objectives, data privacy, content moderation, and cybersecurity require integrated analysis. Digital platform regulation increasingly involves multiple policy domains intersecting in complex ways. How jurisdictions can coherently address these overlapping concerns without creating contradictory or duplicative requirements merits further examination.

Finally, developing country perspectives on digital platform regulation require greater scholarly attention. Most comparative analysis focuses on advanced economies' approaches. How developing jurisdictions can effectively regulate dominant foreign platforms, given capacity constraints, and dependence on foreign technology infrastructure, warrants systematic investigation.

Digital platform competition presents unprecedented challenges for competition law, requiring frameworks that can address novel market dynamics while remaining faithful to core competition principles. The EU and US have developed distinct but increasingly converging approaches, each offering valuable lessons for other jurisdictions. Neither model provides a universal solution; effective regulation must adapt to specific institutional, economic, and legal contexts.

For Arab jurisdictions, the path forward involves creative adaptation rather than wholesale adoption of foreign models. By combining targeted ex-ante rules with flexible, case-based enforcement, emphasising regional cooperation, building institutional capacity, and balancing competition with development objectives, Arab jurisdictions can develop effective frameworks that promote competitive, innovative, and inclusive digital economies. Success will require sustained commitment to institutional development, regional coordination, and international engagement, challenging undertakings, but essential to ensure that digital markets serve Arab economies and societies effectively in the coming decades.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВИЛА КОНКУРЕНЦІЇ В ЦИФРОВУ ЕПОХУ:
ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ ПІДХОДІВ ЄС ТА США
ТА ЇХНЬОГО ВПЛИВУ НА АРАБСЬКІ ПРАВОВІ СИСТЕМИ

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АНОТАЦІЯ

Вступ. Цифрова революція докорінно змінила світовий економічний ландшафт, призвівши до появи провідних технологічних платформ, таких як Google, Amazon, Meta, Apple та Microsoft. Ці суб'єкти функціонують як «цифрові гейткіпери» у взаємопов'язаних екосистемах, що охоплюють пошук, соціальні мережі, електронну комерцію, хмарні обчислення та мобільні застосунки. Їхній масштаб та контроль над потоками даних створили нові форми ринкової влади, які кидають виклик традиційним антимонопольним парадигмам. Традиційне конкурентне право, розроблене в промисловій економіці, намагається врахувати динаміку багатосторонніх ринків, мережеві ефекти та домінування, засноване на даних, що характеризують цифрову епоху. Це дослідження має на меті проаналізувати, як Європейський Союз та Сполучені Штати відреагували на ці виклики, та отримати досвід для арабських юрисдикцій, які прагнуть створити контекстно-чутливі регуляторні моделі.

Методи. У дослідженні використовується доктринальний та порівняльно-правовий аналіз, доповнений оцінкою політики. У ньому розглядаються такі законодавчі бази, як Закон ЄС про цифрові ринки (DMA) та Закон про цифрові послуги (DSA), а також антимонопольне законодавство США, Закон Шермана, Закон Клейтона та Закон про Федеральну торгову комісію (FTC). Для ілюстрації практичного застосування цих баз аналізуються знакові справи щодо правозастосування, зокрема *Google Shopping, United States v. Google LLC, FTC v. Meta Platforms* та *FTC v. Amazon*. Порівняльний аналіз використовується для оцінки того, як регуляторні філософії *ex-ante* та *ex-post* впливають на результати правозастосування. Для арабських юрисдикцій (Єгипет, Саудівська Аравія та ОАЕ) дослідження містить інституційний та політичний аналіз з метою оцінки обмежень потужностей та механізмів регіональної координації.

Результати та висновки. Результати дослідження виявляють фундаментальні відмінності між підходами ЄС та США. Регулювання *ex-ante* ЄС забезпечує швидкість, передбачуваність та структурне втручання, але може нести ризик надмірного впливу та стимулювати інновації. Підхід *ex-post* США забезпечує аналітичну ретельність та судові гарантії, але часто відстає від темпів розвитку цифрового ринку. Для арабських юрисдикцій ключовими проблемами є обмежені можливості правозастосування, залежність від іноземних платформ та фрагментоване регіональне управління. У дослідженні пропонується гібридна регуляторна база, яка інтегрує проактивні правила *ex-ante*, засновані на положеннях DMA, з гнучким *ex-post* правозастосуванням, адаптованим до місцевих умов. Регіональна гармонізація через Раду співробітництва арабських держав Перської затоки (GCC) та Лігу арабських держав підкреслюється як важлива для транскордонної ефективності. У дослідженні було зроблено висновок, що збалансування ринкової конкурентності, інновацій та регіональної інтеграції вимагає регулювання, чутливого до потужностей, яке поєднує проактивний нагляд із правозастосуванням на основі доказів.

Ключові слова. Конкурентне право; цифрові платформи; цифрове антимонопольне законодавство; платформи-гейткіпери; Закон про цифрові ринки (DMA); регулювання *ex-ante*; порівняльне конкурентне право; арабські юрисдикції.

ABSTRACT IN ARABIC*

مقال بحثي

قواعد المنافسة في العصر الرقمي: دراسة مقارنة بين نهج الاتحاد الأوروبي والولايات المتحدة وتأثيرها على الأنظمة القانونية العربية.

نجلاء فليح*, محمد حسون علي، عبد العزيز الحسن، أحمد فضلي

الملخص

الخلفية:

أحدثت الثورة الرقمية تغييراً جذرياً في المشهد الاقتصادي العالمي، مما أدى إلى ظهور منصات تكنولوجية مهيمنة مثل جوجل، وأمازون، وميتا، وآبل، ومايكروسوفت. تعمل هذه الكيانات كحراس بوابة رقمية عبر أنظمة بيئية مترابطة تشمل البحث، ووسائل التواصل الاجتماعي، والتجارة الإلكترونية، والحوسبة السحابية، وتطبيقات الهاتف المحمول. وقد أدى حجم هذه الكيانات وسيطرتها على تدفقات البيانات إلى خلق أشكال جديدة من القوة السوقية تتحدى نماذج مكافحة الاحتكار التقليدية. ويواجه قانون المنافسة التقليدي، الذي نشأ في الاقتصاد الصناعي، صعوبة في معالجة ديناميكيات الأسواق متعددة الأطراف، وتأثيرات الشبكة، والهيمنة القائمة على البيانات التي تميز العصر الرقمي. يسعى هذا البحث إلى تحليل كيفية استجابة الاتحاد الأوروبي والولايات المتحدة لهذه التحديات، واستخلاص رؤى قيمة للأنظمة القانونية العربية الساعية إلى وضع نماذج تنظيمية تراعي السياق المحلي.

المنهجية:

تعتمد الدراسة على تحليل قانوني تأصيلي ومقارن، مدعوم بتقييم السياسات. وتدرس الأطر التشريعية، مثل قانون الأسواق الرقمية (DMA) وقانون الخدمات الرقمية (DSA) في الاتحاد الأوروبي، فضلاً عن قوانين مكافحة الاحتكار الأمريكية، مثل قانون شيرمان وقانون كلايتون وقانون لجنة التجارة الفيدرالية. كما تُحلل قضايا إنفاذ بارزة، منها قضية جوجل للتسوق، وقضية الولايات المتحدة ضد

*. The publication metadata in Arabic is presented as submitted by the authors.

جوجل، وقضية لجنة التجارة الفيدرالية ضد ميتا بلافورمز، وقضية لجنة التجارة الفيدرالية ضد أمازون، لتوضيح التطبيقات العملية لهذه الأطر. ويُستخدم التحليل المقارن لتقييم كيفية تأثير الرقابة المسبقة واللاحقة على نتائج الإنفاذ. وبالنسبة للأنظمة القضائية العربية (مصر، والمملكة العربية السعودية، والإمارات العربية المتحدة)، تتضمن الدراسة تحليلاً مؤسسياً وسياسياً لتقييم قيود القدرات وآليات التنسيق الإقليمية.

النتائج والاستنتاجات:

تكشف النتائج عن تباينات جوهرية بين نهجي الاتحاد الأوروبي والولايات المتحدة. يتميز النظام الأوروبي القائم على الرقابة المسبقة بالسرعة والقدرة على التنبؤ والتدخل الهيكلي، ولكنه قد ينطوي على خطر الإفراط في التدخل التنظيمي، رغم أنه يشجع الابتكار. أما نهج الولايات المتحدة اللاحق فيوفر دقة تحليلية وضمانات قضائية، ولكنه غالباً ما يتخلف عن وتيرة تطور السوق الرقمية. بالنسبة للأنظمة القضائية العربية، تشمل التحديات الرئيسية محدودية القدرة على الإنفاذ، والاعتماد على المنصات الأجنبية، وتشتت الحوكمة الإقليمية. تقترح الدراسة إطاراً تنظيمياً هجيناً يدمج قواعد استباقية، مستوحاة من قانون السوق الرقمية، مع إنفاذ لاحق مرن مصمم خصيصاً للظروف المحلية. ويُشدد على أهمية التنسيق الإقليمي من خلال مجلس التعاون الخليجي وجامعة الدول العربية لتحقيق فعالية عابرة للحدود. ويخلص البحث إلى أن تحقيق التوازن بين قابلية السوق للمنافسة والابتكار والتكامل الإقليمي يتطلب تنظيمًا يراعي القدرات ويدمج الرقابة الاستباقية مع الإنفاذ القائم على الأدلة.

الكلمات المفتاحية:

قانون المنافسة؛ المنصات الرقمية؛ مكافحة الاحتكار الرقمي؛ حراس البوابة الرقميون؛ قانون الأسواق الرقمية؛ التنظيم الاستباقي؛ قانون المنافسة المقارن؛ الأنظمة القضائية العربية.

Research Article

THE ROLE OF ARTIFICIAL INTELLIGENCE IN CONSTITUTIONAL ADJUDICATION: COMPARATIVE INSIGHTS FROM GENERAL JUDICIAL PRACTICE

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ABSTRACT

Background: The growing integration of artificial intelligence (AI) into judicial systems represents one of the most significant contemporary developments in the administration of justice. While AI technologies are increasingly employed in areas such as case management, legal research, document analysis, and procedural automation, their use within constitutional adjudication raises distinct legal and institutional concerns. Constitutional courts perform a unique function that extends beyond ordinary dispute resolution, as they are entrusted with safeguarding constitutional supremacy, protecting fundamental rights, and preserving the balance between state powers. Consequently, the incorporation of AI into constitutional justice requires careful examination of its implications for judicial independence, constitutional interpretation, procedural fairness, and the legitimacy of constitutional review.

Method: This study adopts a comparative analytical methodology, focusing on selected jurisdictions that represent different models of constitutional review and varying levels of judicial digitalisation. The comparative framework is limited to jurisdictions that demonstrate identifiable institutional practices or regulatory approaches concerning the use of AI in judicial systems. The study examines the experiences of the European Union (EU) and selected EU Member States, particularly Estonia, as examples of rights-oriented and digitally advanced governance models, alongside the United States as a representative decentralised common-law system. In addition, selected Arab jurisdictions, including the United Arab Emirates (UAE), Saudi Arabia, Jordan, and Egypt, are analysed to assess emerging regional approaches to judicial digital transformation. The selection of jurisdictions is based on three criteria: (1) the existence of identifiable AI-related judicial or regulatory initiatives, (2) diversity in constitutional review models, and (3) the availability of legislative or institutional frameworks relevant to judicial digitalisation. The study further analyses constitutional principles, judicial practices, regulatory instruments, and selected judicial decisions relevant to AI-assisted adjudication.

Results and Conclusions: The study demonstrates that AI technologies are increasingly employed in constitutional and judicial environments to support administrative and analytical functions, including legal data processing, case classification, precedent retrieval, workload management, and assistance with drafting legal memoranda. However, comparative analysis confirms that AI remains limited to an assistive role and cannot replace constitutional judges in exercising constitutional interpretation or value-based judicial reasoning. Constitutional adjudication inherently depends on contextual analysis, balancing of constitutional principles, and the protection of fundamental rights, all of which require human judicial discretion. The findings further indicate that the scope and legitimacy of AI integration are significantly influenced by constitutional structures, regulatory safeguards, and institutional capacities within each jurisdiction. The study concludes that the responsible integration of AI into constitutional courts requires a balanced regulatory framework that promotes judicial efficiency and technological innovation while safeguarding constitutional guarantees, judicial independence, transparency, due process, and public confidence in constitutional justice.

1 INTRODUCTION

Contemporary judicial systems are undergoing profound transformation due to rapid digitalisation and the accelerated development of artificial intelligence (AI).¹ Across different legal systems, courts increasingly employ algorithmic technologies in areas such as case management, legal research, document processing, predictive analytics, and

¹ Klaus Schwab, *The Fourth Industrial Revolution* (Crown Business 2017).

procedural administration.² These developments form part of a broader transition toward digital justice systems intended to improve efficiency, accessibility, and institutional performance. However, the integration of AI into judicial functions also raises fundamental legal and constitutional concerns relating to transparency, accountability, procedural fairness, judicial independence, and the preservation of human-centred adjudication.³

These concerns become particularly significant within the field of constitutional adjudication. Constitutional courts occupy a unique institutional position within modern constitutional democracies, serving as guarantors of constitutional supremacy, protectors of fundamental rights, and arbiters of the separation of powers. Unlike ordinary judicial bodies, constitutional courts engage in interpretative reasoning that requires balancing competing constitutional principles, evaluating proportionality, and resolving politically and socially sensitive disputes. Consequently, constitutional adjudication involves normative and value-based reasoning that cannot be reduced to purely technical or algorithmic processes.⁴

The growing use of AI technologies in judicial environments has, therefore, generated important debates concerning the constitutional limits of automated or semi-automated judicial assistance. While AI systems improve procedural efficiency, legal data analysis, precedent retrieval, and judicial administration, their use in constitutional justice raises distinct concerns about the legitimacy of algorithmic assistance in constitutional interpretation and rights adjudication. This issue is especially relevant given the increasing reliance of public institutions on automated decision-making technologies and the corresponding need to ensure that technological innovation remains compatible with constitutional guarantees and fundamental rights.⁵

Comparative experience demonstrates that approaches to judicial digitalisation and AI integration vary significantly across jurisdictions, depending on constitutional structure, legal tradition, institutional capacity, and regulatory philosophy. In China, “smart court” initiatives have introduced advanced digital infrastructures to enhance procedural

- 2 CEPEJ, *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment* (Council of Europe 2019); CEPEJ, *Possible Uses of AI in the Judicial Systems* (CEPEJ (2021) 11 final, Council of Europe 2021). See also Richard Susskind, *Online Courts and the Future of Justice* (OUP 2019); Tania Sourdin, ‘Judge v Robot? Artificial Intelligence and Judicial Decision-Making’ (2018) 41(4) UNSW Law Journal 1114, doi:10.53637/ZGUX2213; Aleš Završnik, ‘Criminal Justice, Artificial Intelligence Systems, and Human Rights’ (2020) 20 ERA Forum 567, doi:10.1007/s12027-020-00602-0.
- 3 Johnny Hernán Tupayachi Sotomayor, ‘The Application of Artificial Intelligence in Constitutional Processes for the Protection of Fundamental Rights’ (2024) 16(22) Revista Oficial del Poder Judicial 499, doi:10.35292/ropj.v16i22.1015.
- 4 Andrew Coan and Harry Surden, ‘Artificial Intelligence and Constitutional Interpretation’ (2025) 96(2) University of Colorado Law Review 413, doi:10.2139/ssrn.5018779.
- 5 Mizuki Hashiguchi, ‘Constitutional Rights of Artificial Intelligence’ (2024) 19(2) Washington Journal of Law, Technology & Arts 25.

management and judicial efficiency.⁶ In the United States, debates surrounding algorithmic systems have primarily focused on issues of due process, transparency, judicial discretion, and algorithmic bias within judicial decision-making.⁷ Within the EU, regulatory efforts have concentrated on establishing rights-based safeguards governing the use of AI technologies through ethical and legal frameworks designed to protect fundamental rights and ensure human oversight.⁸ Estonia, as one of the most digitally advanced European states, provides an important example of institutional digitalisation and the integration of e-governance integration within judicial administration.⁹

In the Arab region, judicial digital transformation has accelerated in recent years. The UAE has implemented extensive digital court services and electronic litigation systems,¹⁰ while Saudi Arabia has expanded integrated judicial digital platforms, including the “Najiz” system, to facilitate judicial procedures and remote access to justice.¹¹ Jordan and Egypt have also introduced varying levels of judicial automation and electronic litigation services as part of broader digital governance reforms. Nevertheless, the use of AI technologies in constitutional adjudication within Arab constitutional courts remains limited, both institutionally and normatively.¹²

Despite the expanding body of scholarship on AI in judicial systems, the specific relationship between AI and constitutional adjudication remains comparatively underexplored in the legal literature. Existing studies frequently address AI applications within civil, criminal, or administrative justice, while insufficient attention has been devoted to the distinctive constitutional dimensions of algorithm-assisted adjudication. Limited research has examined the compatibility of AI-assisted judicial functions with the requirements of constitutional interpretation, constitutional legitimacy, judicial independence, and the protection of fundamental rights.¹³

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- 6 George G Zheng, ‘China’s Grand Design of People’s Smart Courts’ (2020) 7(3) *Asian Journal of Law and Society* 561, doi:10.1017/als.2020.20.
 - 7 Rachel F Adler and others, ‘A User-Centered Approach to Developing an AI System Analyzing US Federal Court Data’ (2023) 31(3) *Artificial Intelligence and Law* 547, doi:10.1007/s10506-022-09320-z.
 - 8 Susan Wright, ‘Artificial Intelligence in Legal Translation at the Court of Justice of the European Union’ (2025) 14 *International Journal of Language and Law* 120, doi:10.14762/jll.2025.120.
 - 9 Agne Limantė and Monika Sukytė, ‘Comparative Insights and Future Directions of AI in the Courts of the Baltic States’ (2025) 33 *International Journal of Law and Information Technology* eaf002, doi:10.1093/ijlit/eaf002.
 - 10 Anteneh Teferi and Natasha Ridge, ‘Understanding the Criminal Justice System of the United Arab Emirates’ [2025] *AI Qasimi Foundation*, doi:10.18502/aqf.0230.
 - 11 Fahad Abdullah Moafa and Hamad Salem Almarri, ‘Artificial Intelligence in the Saudi Judiciary Before Judgment: The Guidance Phase and Its Regulatory Framework’ (2025) 38(12s) *International Journal of Applied Mathematics* 196, doi:10.12732/ijam.v38i12s.1367.
 - 12 Mohamed Hussien Mohamed Hela and others, ‘The Contribution of Digital Transformation to the Development of the Judicial Procedural System’ (2025) (3) *Science of Law* 58, doi:10.55284/z01hrt52.
 - 13 Agnė Juškevičiūtė-Vilienė, ‘Artificial Intelligence and the Constitutional Right of Access to Justice’ (2020) 93 *Acta Universitatis Lodzianis* 117, doi:10.18778/0208-6069.93.08.

This study, therefore, examines the extent to which AI technologies may contribute to the work of constitutional courts without undermining the guarantees of constitutional justice. Specifically, the study addresses the following research question: To what extent can artificial intelligence contribute to the functioning and development of constitutional courts while preserving constitutional guarantees, judicial independence, and the human-centred nature of constitutional adjudication?

Several subsidiary questions arise from this inquiry: What are the principal applications of AI technologies within judicial systems? What constitutional and legal challenges accompany the integration of AI into judicial processes? How do different constitutional systems regulate or approach AI-assisted judicial functions? To what extent are Arab judicial systems institutionally and legally prepared for the integration of AI? Can AI meaningfully contribute to constitutional adjudication without affecting judicial discretion and constitutional interpretation?

Methodologically, the study adopts a comparative analytical approach focusing on selected jurisdictions that represent different models of constitutional review and varying levels of judicial digitalisation. The comparative scope is limited to jurisdictions where identifiable legislative, institutional, or judicial developments concerning AI in judicial systems are evident. The selected jurisdictions were chosen according to three principal criteria: (1) the existence of AI-related judicial or regulatory initiatives; (2) diversity in constitutional review structures and legal traditions; and (3) the availability of relevant legal and institutional materials concerning judicial digital transformation.

The study argues that AI should be understood not as a substitute for constitutional judges, but rather as a supportive technological instrument whose legitimacy depends upon strict compliance with constitutional guarantees, judicial independence, transparency, procedural fairness, and meaningful human oversight. Accordingly, the integration of AI into constitutional justice must remain carefully limited to assistive and administrative functions, while the core interpretative authority of constitutional adjudication remains vested exclusively in human judges.¹⁴

2 METHODOLOGY

This study adopts a comparative analytical legal methodology to examine the role of artificial intelligence (AI) in constitutional adjudication and its implications for constitutional justice, judicial independence, and fundamental constitutional guarantees. Given the interdisciplinary nature of the subject, situated at the intersection of constitutional law, judicial governance, and digital technologies, the research combines doctrinal legal analysis with

14 Inna M Bernaziuk, 'Artificial Intelligence in Justice: Constitutional and Legal Aspect' (2025) 2 Analytical and Comparative Jurisprudence 130, doi:10.24144/2788-6018.2025.02.16 [in Ukrainian].

comparative institutional evaluation to provide a comprehensive assessment of the constitutional dimensions of AI integration into judicial systems.

The principal methodological approach employed in this study is the comparative legal method. This approach enables examination of different constitutional and judicial systems in terms of their institutional and regulatory approaches to AI-assisted judicial functions. Rather than attempting to compare judicial systems in their entirety, the study focuses on how selected jurisdictions regulate or implement technological tools within judicial environments, particularly regarding courts exercising constitutional review.

To ensure methodological coherence, the study distinguishes between supranational regulatory frameworks and national constitutional systems. In this regard, the European Union is examined primarily as a supranational normative and regulatory framework that influences standards on AI governance, judicial digitalisation, and the protection of fundamental rights, rather than as a unified constitutional adjudicative model comparable to national constitutional courts. In contrast, the United States, Estonia, and the selected Arab jurisdictions are analysed as national constitutional systems characterised by distinct legal traditions, institutional structures, and models of constitutional review.

The selection of jurisdictions included in the comparative analysis is based on several methodological considerations. First, the selected jurisdictions demonstrate identifiable institutional or regulatory initiatives concerning the use of AI within judicial systems. Second, they represent different constitutional and legal traditions, thereby allowing a broader comparative understanding of how constitutional systems respond to technological transformation. Third, these jurisdictions provide sufficient legislative, judicial, and institutional materials to conduct meaningful comparative legal analysis. Within this framework, Estonia was selected as a digitally advanced state with extensive e-governance infrastructure and progressive judicial digitalisation policies, while the United States was included due to the significant constitutional debate surrounding algorithmic decision-making, due process, judicial discretion, and transparency. The European Union was included because of its influential rights-based regulatory approach to AI governance. In addition, selected Arab jurisdictions, namely the UAE, Saudi Arabia, Jordan, and Egypt, were included to assess emerging regional experiences in judicial digital transformation and institutional preparedness for AI integration.

The study further employs a descriptive-analytical approach to clarify the conceptual foundations of artificial intelligence and to distinguish between automated decision-making systems and assistive AI technologies used in judicial contexts. This analytical framework also examines the institutional nature of constitutional courts and the distinctive characteristics of constitutional adjudication as a form of value-oriented judicial reasoning that relies heavily on constitutional interpretation, balancing of rights, and normative assessment.

The analytical dimension of the research focuses on evaluating the constitutional implications of integrating AI into judicial functions. Attention is given to the potential impact of AI technologies on judicial independence, procedural fairness, equality before the law, transparency, accountability, and the requirement of reasoned constitutional judgments. The study additionally examines constitutional and legal concerns associated with algorithmic systems, including algorithmic bias, opacity in “black box” systems, discriminatory risks, and the limitations of automated legal reasoning in constitutionally sensitive disputes.

The research relies primarily on doctrinal legal analysis, supported by constitutional texts, judicial decisions, regulatory frameworks on AI and digital governance, institutional reports, ethical guidelines, and selected judicial decisions relevant to algorithmic adjudication and judicial digitalisation. Furthermore, the study incorporates relevant international and regional instruments on AI governance and judicial ethics to strengthen the empirical and legal foundations of the comparative analysis.

The study adopts a normative constitutional perspective that treats AI not as a substitute for constitutional judges but as an assistive technological tool whose legitimacy depends on preserving meaningful human judicial oversight and maintaining the constitutional guarantees underpinning the rule of law and constitutional justice.

3 DISCUSSION

The integration of artificial intelligence (AI) into judicial systems represents a major institutional transformation affecting not only judicial administration but also broader conceptions of legal reasoning, adjudicative authority, and access to justice. Within the specific context of constitutional adjudication, this transformation raises particularly complex legal and constitutional questions because constitutional courts exercise functions that extend beyond ordinary dispute resolution. Constitutional courts are entrusted with safeguarding constitutional supremacy, protecting fundamental rights, preserving the separation of powers, and maintaining constitutional balance within the state. Consequently, the incorporation of AI into constitutional judicial work cannot be evaluated solely by technical efficiency but must also be examined in light of constitutional legitimacy, judicial independence, and the normative nature of constitutional interpretation.¹⁵

15 D Drozd, 'Judicial Independence and the Use of Artificial Intelligence in Courts' (2023) 99(2) Law and State 15, doi:10.51634/2307-5201_2023_2_15.

3.1. The Concept of Artificial Intelligence and Its Relation to Constitutional Courts

Artificial intelligence is generally understood as a group of computational systems capable of performing tasks associated with human cognitive functions, including learning, reasoning, pattern recognition, natural language processing, and predictive analysis. Contemporary legal scholarship increasingly defines AI systems as data-driven technologies capable of generating predictions, classifications, recommendations, or analytical outputs through algorithmic processing of large datasets.¹⁶ In judicial contexts, AI technologies are commonly employed in functions such as document review, legal information retrieval, case classification, procedural automation, and predictive analytics.¹⁷

Within constitutional adjudication, however, the role of AI remains significantly more limited due to the distinctive nature of constitutional reasoning. Constitutional courts do not merely apply legal rules mechanically; rather, they engage in interpretative and value-oriented reasoning, including proportionality analysis, balancing constitutional principles, protecting fundamental rights, and resolving politically sensitive constitutional disputes.¹⁸ Constitutional interpretation frequently requires contextual assessment, normative judgement, and constitutional balancing that cannot be reduced to statistical modelling or automated pattern recognition.¹⁹

For this reason, AI technologies within constitutional courts are generally understood as assistive instruments rather than autonomous adjudicative actors. Their primary function is to support judicial work by organising legal materials, identifying relevant precedents, facilitating legal research, analysing jurisprudential trends, and improving administrative efficiency.²⁰ The ultimate authority for constitutional interpretation and judicial reasoning nevertheless remains vested exclusively in human judges.²¹

Comparative judicial practice demonstrates that different jurisdictions have adopted varying approaches toward AI integration within judicial systems. In China, “smart

16 AD (Dory) Reiling, ‘Courts and Artificial Intelligence’ (2020) 11(2) *International Journal for Court Administration* 1, doi:10.36745/IJCA.343.

17 Md Abdul Malek, ‘Criminal Courts’ Artificial Intelligence: The Way It Reinforces Bias and Discrimination’ (2022) 2(1) *AI and Ethics* 233, doi:10.1007/s43681-022-00137-9.

18 Badruzzaman Nawawi and Roswati Nurdin, ‘Neo-Siyasah: Reconstructing Constitutional Sovereignty in the Age of Artificial Intelligence’ (2025) 8(2) *Jurnal Al-Dustur* 195, doi:10.30863/aldustur.v8i2.10529.

19 Ilija Jovanov, ‘Application of Artificial Intelligence in Criminal Court Proceedings and the Possible Ethical Dilemmas’ (2025) 1(2) *UKLO Proceedings* 33, doi:10.20544/aisc.1.2.25.p03.

20 Miquel Julià Pijoan, ‘The Implementation of the Right to Understand Court Rulings through Artificial Intelligence: Boundaries and Opportunities’ (2025) 43 *Revista de Internet, Derecho y Política* 1, doi:10.7238/idp.v0i43.433076.

21 Antonio D’Aloia, ‘Artificial Intelligence, Fundamental Rights, Constitutional Democracy’ (2025) 55 *Teoría y Realidad Constitucional* 101, doi:10.5944/trc.55.2025.45030.

court” initiatives have introduced extensive technological infrastructures designed to improve judicial efficiency through automated document processing, intelligent legal databases, digital litigation systems, and algorithm-assisted procedural management. Although these systems primarily operate within ordinary courts, they illustrate an expansive model of judicial digitalisation characterised by strong institutional reliance on technological governance.²²

In contrast, the European approach has generally emphasised human oversight, transparency, and the protection of fundamental rights. The European Commission for the Efficiency of Justice (CEPEJ) adopted the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment, which established core principles governing AI use in judicial contexts, including respect for fundamental rights, non-discrimination, quality and security of data, transparency, impartiality, and user control. Similarly, the EU’s regulatory framework, particularly Regulation (EU) 2024/1689 (EU Artificial Intelligence Act, or AI Act), classifies certain AI systems used in the administration of justice as high-risk applications that requires strict safeguards, human supervision, transparency obligations, and accountability mechanisms.

Estonia provides a distinct model of gradual judicial digitalisation within a highly developed e-governance environment. Estonian judicial reforms have focused primarily on improving administrative efficiency and facilitating access to judicial services while preserving meaningful human judicial control over legal interpretation and adjudication. This reflects a cautious integration model in which technology supports, rather than replaces, judicial decision-making.²³

In the United States, constitutional and legal debates concerning AI in judicial processes have emerged primarily in connection with algorithmic risk assessment tools used within criminal justice systems. One of the most prominent examples is *State v. Loomis*, in which concerns were raised regarding transparency, due process, and defendants’ inability to examine the internal logic of proprietary algorithmic systems used in sentencing proceedings. Although the case did not directly concern constitutional adjudication, it significantly influenced broader legal debates on algorithmic accountability, explainability, and procedural fairness within judicial systems.²⁴

In *Mobley v. Workday*, the plaintiff challenged the use of AI-driven hiring systems, alleging algorithmic discrimination in employment screening. The case raises constitutional and statutory concerns regarding equal protection and disparate impact

22 Zheng (n 6).

23 Shakaib Aleem Arshad and others, ‘AI Judges and Robotic Justice: Are Pakistani Courts Ready for the Future?’ (2025) 4(3) ACADEMIA International Journal for Social Sciences 1039, doi:10.63056/acad.004.01.0427.

24 *State v Loomis* 2015AP157-CR (Supreme Court of Wisconsin, 19 May 2016) <<https://law.justia.com/cases/wisconsin/supreme-court/2016/2015ap000157-cr.html>> accessed 3 April 2026.

when automated decision-making systems exclude protected groups (such as older applicants). The court allowed claims to proceed, indicating that AI systems used in employment decisions may be subject to anti-discrimination scrutiny even without human intent. Although not a ruling by a constitutional court, it reflects broader constitutional concerns about fairness and equality in AI systems.²⁵

The integration of AI into judicial systems has also expanded within several Arab jurisdictions. The UAE has implemented digital court systems and AI-assisted judicial services to enhance procedural efficiency and facilitate electronic litigation.²⁶ Saudi Arabia has similarly expanded digital judicial services through the “Najiz” platform, which provides integrated electronic judicial procedures and remote litigation services.²⁷ Jordan and Egypt have also undertaken gradual judicial digitalisation initiatives through electronic filing systems, remote hearings, and procedural automation measures. Nevertheless, the application of AI technologies in constitutional adjudication remains institutionally limited across the region.

Despite the administrative and procedural advantages of AI technologies, their use in constitutional justice raises substantial constitutional concerns. One of the most significant challenges relates to algorithmic bias. AI systems depend heavily on the quality and representativeness of the data on which they are trained. Consequently, biased or incomplete datasets may reproduce discriminatory patterns or institutional inequalities, thereby undermining constitutional guarantees of equality and non-discrimination.²⁸

Additional concerns arise from the opacity of certain algorithmic systems, particularly so-called “black box” models whose internal reasoning processes remain inaccessible even to system operators. Such opacity creates serious tension with constitutional principles requiring transparency, reasoned judicial decisions, and the ability of litigants to challenge judicial reasoning effectively.²⁹ In constitutional adjudication, where judicial legitimacy depends substantially upon publicly reasoned justification,

25 *Mobley v Workday, Dobrivoje Milicevic* 1-23-42763 (US Bankruptcy Court ED, 17 November 2023) <<https://www.courtlistener.com/docket/67660423/mobley-v-workday-inc/>> accessed 3 April 2026.

26 Tetiana Lotysh, ‘Application of Artificial Intelligence in Motivating Court Decisions in Criminal Proceedings: International Experience and Prospects for Ukraine’ (2024) 1(27) *ScienceRise: Juridical Science* 52, doi:10.15587/2523-4153.2024.301533 [in Ukrainian].

27 Dalia Kadry Ahmed Abdel Aziz, ‘Justice in the Age of Artificial Intelligence: A Comparative Study of the Legal Framework for Forensic Evidence in Saudi Arabia and Global Practices’ (2024) 3(8) *Ecounism* 8043, doi:10.62754/joe.v3i8.5431.

28 Channarong Intahchomphoo and others, ‘References to Artificial Intelligence in Canada’s Court Cases’ (2020) 20(1) *Legal Information Management* 39, doi:10.1017/s1472669620000080.

29 PR Biju and O Gayathri, ‘The Indian Approach to Artificial Intelligence: An Analysis of Policy Discussions, Constitutional Values, and Regulation’ (2024) 39(5) *AI and Society* 2321, doi:10.1007/s00146-023-01685-2.

the use of non-explainable algorithmic systems may threaten procedural fairness and public confidence in constitutional justice.³⁰

These concerns have contributed to the emergence of the concept of “responsible AI” within judicial governance frameworks. Responsible AI emphasises principles such as explainability, transparency, accountability, human oversight, fairness, and non-discrimination.³¹ Within constitutional adjudication, these safeguards are especially critical because constitutional courts directly affect fundamental rights, democratic legitimacy, and the constitutional order itself.³²

Accordingly, the integration of AI into constitutional courts must remain subject to strict constitutional limitations. While AI technologies may legitimately support administrative and analytical judicial functions, constitutional interpretation and normative constitutional reasoning must remain the exclusive responsibility of human judges. The legitimacy of AI-assisted constitutional justice, therefore, depends not replacing judicial reasoning but on preserving meaningful human oversight while using technological tools to improve procedural efficiency, access to justice, and institutional effectiveness.

3.2. The Role of Artificial Intelligence in Supporting the Constitutional Judge

Artificial intelligence (AI) is increasingly integrated into judicial environments as a supportive technological instrument designed to assist judges in managing complex legal information and improving procedural efficiency. In constitutional adjudication, the significance of AI lies primarily in its ability to enhance the informational and analytical capacities of constitutional judges rather than its ability to replace judicial reasoning itself.³³ Constitutional courts frequently operate within complex normative environments involving extensive constitutional jurisprudence, comparative legal materials, legislative history, doctrinal scholarship, and competing constitutional principles. In this context, AI technologies may help improve the organisation, accessibility, and analysis of legal information necessary for constitutional decision-making.³⁴

30 Olesya Kozakevich, 'Legal Challenges of Our Time: Can Artificial Intelligence Replace a Judge' (2025) 2 Slovo of the National School of Judges of Ukraine 63, doi:10.37566/2707-6849-2025-2(51)-6 [in Ukrainian].

31 Caroline Müller Bitencourt and Luisa Helena Nicknig Martins, 'Artificial Intelligence in the Constitutional Accounting Control Bodies of Brazilian Public Administration' (2023) 10(3) Revista de Investigacoes Constitucionais 1, doi:10.5380/rinc.v10i3.93650.

32 Vicko Taniady and Steven Theonald Siahaan, 'Artificial Intelligence and the Constitutional Court: A New Path of Making Independent Decisions?' (2023) 3(2) Jurnal Kajian Pembaruan Hukum 157, doi:10.19184/jkph.v3i2.41726.

33 Raphael Souza de Oliveira, Amilton Sales Reis Jr and Erick Giovani Sperandio Nascimento, 'Predicting the Number of Days in Court Cases Using Artificial Intelligence' (2022) 17(5) PLoS ONE 1, doi:10.1371/journal.pone.0269008.

34 Pei Yee Tan, 'The Need for Artificial Intelligence in Solving Unsolved Criminal Cases and Sentencing in Malaysia' (2023) 3(3) Asian Journal of Law and Policy 89, doi:10.33093/ajlp.2023.7.

AI-supported systems are already employed in several jurisdictions to facilitate legal research, identify relevant precedents, classify cases, analyse jurisprudential trends, and assist with managing judicial workloads. Such technologies can process substantial quantities of legal texts in short periods, thereby reducing administrative burdens and enabling judges to focus more directly on substantive constitutional analysis. In practical terms, AI may support constitutional courts through functions such as automated legal search, semantic analysis of judicial precedents, identification of doctrinal inconsistencies, and analytical mapping of constitutional jurisprudence.³⁵

From a functional perspective, AI in constitutional adjudication may be understood as a judicial decision-support mechanism that operates primarily during the preparatory and administrative stages of judicial work. Its role is essentially auxiliary and informational. AI systems may assist judges by organising constitutional jurisprudence, highlighting interpretative developments, identifying comparative constitutional approaches, and facilitating access to relevant legal materials. However, these technologies do not engage in constitutional interpretation in the legal sense, nor do they have the authority to resolve constitutional disputes independently.³⁶

This distinction between support and substitution is constitutionally significant. Constitutional adjudication is not merely a technical process of rule application, but a normative activity requiring constitutional balancing, contextual reasoning, proportionality assessment, and interpretation of fundamental rights within dynamic political and social contexts. The legitimacy of constitutional courts depends substantially on human judicial reasoning that can publicly justify constitutional conclusions through transparent, reasoned judgments. Consequently, AI technologies cannot replace the interpretative authority vested in constitutional judges.³⁷

Comparative practice demonstrates that most judicial systems continue to adopt a cautious approach toward AI integration within adjudicative functions. Within the European legal framework, the principle of meaningful human oversight has emerged as a central safeguard governing the use of AI in judicial systems. The European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment emphasises that AI tools must remain compatible with fundamental rights, judicial independence, and procedural fairness.³⁸ Similarly, the EU Artificial Intelligence Act identifies AI systems used in the

35 Melinda Szappanyos, 'Artificial Intelligence: Is the European Court of Human Rights Prepared?' (2023) 11(1) *Acta Humana* 93, doi:10.32566/ah.2023.1.6.

36 Vahid Bakoei Ketrimi, Javad Taghizadeh and Morteza Nejabatkhah, 'Independence of the Supreme Constitutional Court of Egypt' (2021) 5(1) *Journal of Comparative Law* 49.

37 Mehmet Fatih Sert, Engin Yıldırım and İrfan Haşlak, 'Using Artificial Intelligence to Predict Decisions of the Turkish Constitutional Court' (2022) 40(6) *Social Science Computer Review* 1416, doi:10.1177/08944393211010398.

38 Fernando Esteban de la Rosa, Pablo Cortés and Nuria Marchal Escalona (eds), *Digitalization and Artificial Intelligence in Courts: Opportunities and Challenges* (OUP 2025) doi:10.1093/9780198918752.001.0001.

administration of justice as high-risk applications that require strict safeguards regarding transparency, accountability, and human supervision.³⁹

In Estonia, judicial digitalisation policies have focused primarily on improving administrative efficiency and facilitating judicial access to legal information while preserving human control over legal reasoning and adjudicative discretion. Estonian e-governance reforms illustrate a model of technological integration in which AI serves as a complementary instrument that supports judicial administration rather than replacing judicial authority.⁴⁰

The United States presents a different but equally important experience. American legal debate concerning AI in judicial contexts has largely focused on algorithmic risk assessment systems used in criminal proceedings, particularly COMPAS.⁴¹ In the *State v. Loomis* (2016), the Wisconsin Supreme Court addressed constitutional concerns arising from the use of algorithmic risk assessment tools during sentencing proceedings.⁴² Although the court permitted limited use of the system, substantial concerns were raised regarding transparency, due process, and litigants' inability to examine the internal logic of proprietary algorithms. The case became a major reference point in discussions concerning algorithmic accountability and the constitutional implications of AI-assisted judicial processes.⁴³

One of the most serious constitutional challenges associated with the integration of AI into judicial systems concerns algorithmic bias. AI systems are heavily dependent on the datasets used during training and operation. Where such data reflects existing social inequalities or institutional biases, algorithmic outputs may reproduce or amplify discriminatory patterns. This concern directly implicates constitutional guarantees of equality before the law and non-discrimination, particularly where algorithmic outputs influence judicial assessments or legal recommendations.⁴⁴

A further constitutional concern relates to the opacity of certain algorithmic systems, commonly described as the "black box" problem. Many advanced AI models operate

39 Abdulaziz Abdulrhman Mohammed Alkhalifa, 'Legal Challenges of AI and Automation in the Workplace' (2025) 8(2) *Access to Justice in Eastern Europe* 203, doi:10.33327/AJEE-18-8.2-a000104.

40 Andrii Petrovskyi, Bohdan Kyrdan and Kateryna Kutsyk, 'Implementation of Artificial Intelligence in Civil Proceedings: Experience of EU Countries' (2025) 30(1) *Scientific Journal of the National Academy of Internal Affairs* 45, doi:10.63341/naia-herald/1.2025.45.

41 Ana Farič and Ivan Bratko, 'Machine Bias: A Survey of Issues' (2024) 48(2) *Informatica* 205, doi:10.31449/inf.v48i2.5971.

42 *State v Loomis* 2015AP157-CR (n 24).

43 Ahmed M Khawaldeh, 'Generative AI Hallucinations and Legal Liability in Jordanian Civil Courts: Promoting the Responsible Use of Conversational Chat Bots' (2025) 38(2) *International Journal for the Semiotics of Law* 381, doi:10.1007/s11196-024-10199-z.

44 Žaklina Spalevic and Miloš Ilić, 'Artificial Intelligence in the Court Justice System' (2024) 48(3) *TEME* 745, doi:10.22190/teme240110042s.

through complex computational processes that remain difficult to interpret even for system developers. In constitutional adjudication, such opacity runs counter to the constitutional requirement that judicial decisions be reasoned, transparent, and open to public scrutiny.⁴⁵ Constitutional legitimacy depends significantly upon the ability of litigants and society to understand the reasoning underlying judicial decisions. Excessive reliance on opaque algorithmic outputs may therefore undermine procedural fairness and weaken public confidence in constitutional justice.⁴⁶

Concerns also arise regarding the potential long-term impact of AI on judicial independence. Although AI systems are formally designed as assistive technologies, persistent institutional reliance on algorithmic recommendations may gradually influence judicial behaviour and constrain independent legal reasoning. This risk is particularly sensitive in constitutional adjudication, where judges must frequently engage in principled constitutional balancing and normative interpretation that cannot be reduced to predictive or statistical analysis.⁴⁷

For these reasons, contemporary regulatory approaches increasingly emphasise the concept of “responsible AI” in judicial governance. Responsible AI frameworks generally require explainability, accountability, transparency, non-discrimination, cybersecurity protections, and meaningful human oversight. These safeguards are particularly important within constitutional courts because constitutional adjudication directly affects democratic legitimacy, constitutional rights, and the institutional balance of powers.⁴⁸

Accordingly, the proper role of AI in constitutional adjudication should be understood as supportive rather than determinative. AI technologies may significantly improve judicial efficiency, legal research, consistency of information management, and institutional accessibility. Nevertheless, constitutional interpretation and authoritative constitutional reasoning must remain the exclusive responsibility of human judges. The central constitutional challenge is, therefore, not whether AI should be incorporated into judicial systems, but how such integration can occur without compromising judicial independence, procedural fairness, constitutional legitimacy, and the normative foundations of constitutional justice.

45 Sojida Murodova, ‘The Black Box Problem in Administering Justice: Risks of Opaque Algorithms in Legal Decision-Making’ (2025) 3(6) *International Journal of Law and Policy* 1, doi:10.59022/ijlp.331.

46 Anca Parmena Olimid, Cătălina Maria Georgescu and Daniel Alin Olimid, ‘Legal Analysis of EU Artificial Intelligence Act (2024): Insights from Personal Data Governance and Health Policy’ (2024) 7(4) *Access to Justice in Eastern Europe* 120, doi:10.33327/AJEE-18-7.4-a000103.

47 Oleksandr Shevchuk and others, ‘Problems of Legal Regulation of Artificial Intelligence in Administrative Judicial Procedure’ (2023) 13(3) *Juridical Tribune* 348, doi:10.24818/TBJ/2023/13/3.02.

48 Rafael Bustos Gisbert, ‘A European Constitutionalist Facing Artificial Intelligence: Methodological Reflections by a Newcomer’ (2024) 131 *Revista Española de Derecho Constitucional* 149, doi:10.18042/cepc/redc.131.05.

3.3. International Legal and Regulatory Frameworks Governing AI in the Judiciary

The regulation of artificial intelligence (AI) within judicial systems has emerged as one of the central legal challenges accompanying contemporary digital transformation.

The increasing reliance on algorithmic systems in judicial administration, legal analysis, and procedural management requires the establishment of legal and institutional safeguards to ensure compatibility with constitutional principles and fundamental rights.⁴⁹ This issue is of particular significance in constitutional adjudication, where judicial decisions directly affect constitutional legitimacy, individual rights, the separation of powers, and the rule of law. Consequently, the use of AI in judicial environments cannot remain solely a matter of technological policy or administrative efficiency; it must instead be governed by clear constitutional and regulatory frameworks that preserve judicial independence, due process, transparency, and accountability.⁵⁰

Comparative legal practice demonstrates that approaches to regulating AI in judicial systems differ substantially according to constitutional traditions, regulatory philosophies, and institutional models of governance. Among the most developed regulatory approaches is the European rights-based model, which treats AI governance primarily as a constitutional and human rights issue rather than merely a technological matter.⁵¹ Within the EU, the AI Act establishes a comprehensive regulatory framework for AI systems and classifies certain applications used in the administration of justice as “high-risk” systems. Under this framework, AI applications that affect judicial processes are subject to strict legal obligations regarding transparency, explainability, data quality, human oversight, cybersecurity, and risk management.⁵²

The European approach is further reinforced through ethical and institutional instruments developed within the broader European legal space. Particularly significant is the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment, adopted by the European Commission for the Efficiency of Justice (CEPEJ). The Charter identifies five foundational principles governing the use of AI in judicial systems: respect for fundamental rights, non-discrimination, quality and security of data, transparency and impartiality, and user control. These principles reflect a broader European

49 Michał Kowalski, 'The Impact of Artificial Intelligence on the Future Functioning of Administrative Courts' (2024) 53(6) *Prawo i Więź* 173, doi:10.36128/PRIW.VI53.988.

50 Mohit Sharma, 'India's Courts and Artificial Intelligence: A Future Outlook' (2023) 15(1) *LeXonomica* 99, doi:10.18690/lexonomica.15.1.99-120.2023.

51 Thomas Gremsl and Elisabeth Hödl, 'Emotional AI: Legal and Ethical Challenges' (2022) 27(2) *Information Polity* 163, doi:10.3233/IP-211529.

52 Oksana Kukuruz and Ruslan Pakhomov, 'Permissible Limits of Artificial Intelligence Use in the Administration of Justice: Political and Legal Aspects' (2024) 93 *Politology Bulletin* 82, doi:10.17721/2415-881x.2024.93.82-93 [in Ukrainian].

commitment to ensuring that technological innovation remains subordinate to constitutional guarantees and human rights protections.

The EU has adopted one of the most comprehensive legislative frameworks governing artificial intelligence through the AI Act. The regulation establishes a rights-based approach to AI governance and is particularly relevant to the functioning of constitutional courts because it emphasises the protection of fundamental rights, transparency, accountability, and human oversight. Article 14 of the AI Act expressly requires that high-risk AI systems be subject to effective human oversight to prevent automated systems from undermining human judgment or constitutional guarantees. The article states that AI systems must be designed to enable natural persons to “fully understand the capacities and limitations of the AI system and remain able to oversee its operation.” This provision is particularly important in constitutional adjudication because it confirms that judicial authority cannot be delegated entirely to automated systems. In addition, Article 10 of the AI Act requires the use of high-quality datasets and the implementation of measures to reduce algorithmic bias and discriminatory outcomes. Such safeguards are closely linked to constitutional principles of equality before the law and the guarantee of a fair trial. Article 13 further imposes transparency obligations by requiring AI systems to operate in a sufficiently transparent manner for users to interpret and understand their outputs. Collectively, these provisions demonstrate that the EU seeks to balance technological innovation with the preservation of constitutional justice and judicial independence.⁵³

Judicial practice within the European legal order has also helped shape standards on algorithmic governance and digital rights. The jurisprudence of the Court of Justice of the European Union (CJEU), particularly in cases concerning data protection and automated decision-making, has reinforced principles relating to transparency, proportionality, and individual rights in technologically mediated processes. Although these cases do not directly concern constitutional courts, they significantly influence the normative environment governing AI use within judicial systems more broadly.⁵⁴

In contrast, the regulatory approach in the United States remains comparatively decentralised and jurisprudence-driven. Rather than adopting a unified federal legislative framework governing AI in judicial systems, American regulation has largely developed through judicial decisions, institutional guidelines, and constitutional litigation concerning algorithmic tools. One of the most influential judicial precedents in this context is *State v. Loomis*, which examined the constitutional implications of using COMPAS algorithmic risk

53 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 2024/1689 <<https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng>> accessed 3 April 2026.

54 Navneet Kaur and Manpreet Kaur, ‘Role of Artificial Intelligence in the Indian Courts’ (2024) 6(1) *International Journal of Law, Policy and Social Review* 17.

assessment software during sentencing proceedings. Although the court permitted limited use of the system, it emphasised that algorithmic outputs could not replace judicial discretion and that judges must remain aware of the system's limitations and potential biases. The case became a major reference point in debates concerning due process, explainability, procedural fairness, and algorithmic accountability.⁵⁵

The United States has not yet enacted a unified federal law specifically regulating the use of artificial intelligence within constitutional courts. Nevertheless, constitutional principles and judicial ethical guidelines provide an important legal framework governing the use of AI in judicial decision-making. The Fifth and Fourteenth Amendments to the United States Constitution guarantee due process of law and equal protection, which impose constitutional limitations on the use of automated systems in judicial proceedings. These constitutional safeguards require that judicial decisions remain subject to human reasoning, fairness, and procedural transparency. In practice, American judicial institutions have increasingly issued ethical and procedural guidance concerning the use of generative AI within courts. The National Center for State Courts emphasised that judicial authority must remain vested exclusively in judges, not in artificial intelligence systems. Judicial guidance further stresses that AI may serve as a supportive technological tool but cannot replace judicial discretion or independent legal reasoning. Similarly, the Supreme Court of Virginia issued guidance on the responsible use of generative AI within the judicial system, requiring human supervision of AI-generated outputs and prohibiting exclusive reliance on automated decision-making in judicial matters. These developments indicate that the American approach focuses on preserving constitutional guarantees and judicial accountability while permitting limited technological innovation within the administration of justice.⁵⁶

China represents a substantially different regulatory and institutional model characterised by strong state-led technological implementation and extensive judicial digitalisation initiatives. Chinese “smart court” reforms have incorporated AI technologies into case management, legal information systems, document processing, online dispute resolution, and procedural administration. These reforms are designed primarily to enhance efficiency, consistency, and institutional capacity within the judiciary. However, comparative legal scholarship has raised concerns about the limited transparency of algorithmic systems, the scope of state control over judicial digital infrastructures, and the relative weakness of procedural safeguards and judicial accountability mechanisms when measured against constitutional rule-of-law standards.⁵⁷

55 *State v Loomis* 2015AP157-CR (n 24).

56 Thomson Reuters Institute and National Center for State Courts AI Policy Consortium for Law and Courts, *Principles and Practices for Using AI Responsibly and Effectively in Courts: A Guide for Court Administrators, Judges, and Legal Professionals* (NCSC 2025) <<https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2659/>> accessed 3 April 2026.

57 Changqing Shi, Tania Sourdin and Bin Li, ‘The Smart Court – A New Pathway to Justice in China?’ (2021) 12(1) International Journal for Court Administration 1, doi:10.36745/ijca.367.

China has adopted an extensive regulatory framework concerning artificial intelligence through the Interim Measures for the Management of Generative Artificial Intelligence Services (2023). These measures require AI providers to ensure that AI systems comply with legal and ethical standards, avoid discriminatory practices, protect public interests, and maintain the accuracy and reliability of the content they generate. The regulation also emphasises the necessity of state supervision and human oversight over AI technologies. The Chinese legal approach is particularly relevant because China has developed advanced “smart courts” and AI-assisted judicial systems to improve judicial efficiency and drive digital transformation. The Supreme People’s Court of China has promoted the integration of artificial intelligence into judicial administration, case management, and online litigation systems. However, despite the extensive use of judicial technologies, Chinese regulations continue to require that judicial authority remain under human supervision and within the framework of legality. Consequently, the Chinese model reflects an attempt to combine judicial modernisation with institutional control and legal oversight.⁵⁸

Estonia presents another important comparative model. As one of the world’s most digitally advanced governance systems, Estonia has pursued gradual integration of technological tools within public administration and judicial services. Estonian judicial digitalisation emphasises administrative support, accessibility, and procedural efficiency while maintaining mandatory human judicial oversight over adjudicative functions. This model reflects a cautious and rights-conscious approach in which technology supplements judicial work without displacing judicial authority or constitutional responsibility.⁵⁹

Despite this technological orientation, Estonian legal policy continues to emphasise that final judicial authority must remain vested in human judges. The use of AI within judicial systems is therefore treated as an assistive mechanism rather than a substitute for judicial reasoning. Estonian reforms also stress procedural fairness, transparency, and public trust in digital justice systems. Accordingly, Estonia provides an important comparative example of how constitutional justice may incorporate technological innovation while preserving fundamental legal safeguards and judicial accountability.⁶⁰

Within the Arab region, regulatory frameworks governing AI in judicial systems remain comparatively underdeveloped and fragmented. Nevertheless, several states have introduced extensive judicial digitalisation initiatives as part of broader national digital transformation strategies. The UAE has adopted an advanced legislative approach toward artificial intelligence and digital governance. One of the most relevant legal instruments is Federal Decree-Law No. 45 of 2021 on the Protection of Personal Data, which establishes safeguards concerning automated processing and the protection of individual rights.

58 ‘China - Generative AI Services Management’ (*Regulations.ai*, 15 August 2023) <<https://regulations.ai/regulations/china-2023-7-generative-ai>> accessed 3 April 2026.

59 Nele Siitam, ‘IT and AI at National Courts. Some Examples from Estonia’ (2025) 26(4) ERA Forum 663, doi:10.1007/s12027-025-00861-9.

60 *Estonian Ministry of Justice* <<https://www.justdigi.ee/en>> accessed 3 April 2026.

Article 18 of the law provides protection against decisions based solely on automated processing when such decisions produce legal or significant effects on individuals. This provision is particularly significant for constitutional justice because it reinforces the principle that judicial decisions must remain subject to meaningful human review and legal accountability.⁶¹ The UAE has also adopted broader strategic frameworks, including the UAE Artificial Intelligence Strategy 2031 and the UAE AI Charter, which promote ethical AI, responsible innovation, transparency, and human-centred governance. These policies support the modernisation of judicial systems while emphasising the importance of preserving public trust, procedural fairness, and institutional accountability. Consequently, the Emirati approach reflects an attempt to integrate advanced technologies into judicial administration without compromising constitutional guarantees or the principles of justice.⁶² The UAE has implemented advanced electronic litigation systems, digital court services, and AI-supported judicial administration mechanisms to enhance efficiency and accessibility. Saudi Arabia has similarly expanded digital judicial services through integrated platforms such as “Najiz,” which facilitate electronic filing, remote hearings, and procedural management.⁶³ Saudi Arabia has introduced important legal and ethical frameworks governing artificial intelligence and data protection, particularly through the Personal Data Protection Law (PDPL) issued under Royal Decree No. M/19 of 2021 and amended by Royal Decree No. M/148 of 2023.⁶⁴ The law establishes principles concerning the lawful processing of personal data, transparency, accountability, and the protection of individual rights. These principles are highly relevant to the judicial sector because AI systems operating within courts may process sensitive judicial and personal information. In addition to the PDPL, the Saudi Data and Artificial Intelligence Authority (SDAIA) adopted the Principles and Controls of AI Ethics, which emphasise fairness, transparency, privacy protection, accountability, and human oversight in the use of artificial intelligence. These

- 61 UAE Federal Decree-Law no (45) of 2021 ‘Concerning the Protection of Personal Data’ (adopted 20 September 2021) [2021] Official Gazette 712 <<https://uaelegislation.gov.ae/en/legislations/1972>> accessed 3 April 2026.
- 62 ‘UAE Cabinet adopts National Artificial Intelligence Strategy 2031’ (*Emirates News Agency*, 21 April 2019) <<https://www.wam.ae/en/article/hszr8hoo-uae-cabinet-adopts-national-artificial>> accessed 3 April 2026; UAE Cabinet, *UAE National Strategy for Artificial Intelligence 2031* (National Program for Artificial Intelligence 2018).
- 63 UAE Federal Decree-Law no (46) of 2021 ‘On Electronic Transactions and Trust Services’ (adopted 20 September 2021) [2021] Official Gazette 712 <<https://uaelegislation.gov.ae/en/legislations/1539>> accessed 3 April 2026; ‘Procedural Guide for the Electronic Litigation Service’ (*Najiz Platform, Saudi Ministry of Justice*, 20 August 2020) <https://laws.moj.gov.sa/ar/legislation/myVO-TMtIwgPSdkK_pOfjw> accessed 3 April 2026; ‘Saudi Data and Artificial Intelligence Authority’ (*Riyadh Region Municipality*, 2026) <<https://alriyadh.gov.sa/ar/content/saudi-Data-and-AIAuthority>> accessed 3 April 2026; Jorge Castellanos Claramunt, ‘Human Rights, Vulnerability and Artificial Intelligence: An Analysis in Constitutional Perspective’ (2024) (14) *Deusto Journal of Human Rights* 33, doi:10.18543/djhr.3187.
- 64 *Digitizing the Courts: Egypt Government Portal* <<https://digital.gov.eg/>> accessed 3 April 2026; Regulation no 95 of 2018 ‘On the Use of Electronic Means in Civil Judicial Procedures’ (Jordan) [2018] Official Gazette 5529 <<http://adaleh.info/Art.aspx?Typ=2&Id=1202>> accessed 3 April 2026.

ethical principles are directly connected to constitutional justice because they seek to ensure that automated systems do not undermine legal safeguards, judicial impartiality, or procedural fairness. The Saudi regulatory approach reflects an effort to modernise judicial and governmental systems while maintaining legal and ethical protections consistent with the rule of law.⁶⁵ Egypt and Jordan have also introduced various electronic litigation systems and judicial digitalisation initiatives.

Despite these developments, most Arab jurisdictions have not yet adopted comprehensive legislative frameworks that specifically regulate the use of AI in judicial or constitutional adjudication. Existing reforms remain focused primarily on procedural digitalisation and administrative automation rather than substantive AI-assisted adjudicative functions. Consequently, AI governance within Arab judicial systems remains largely implicit, fragmented, and institutionally transitional. Judicial precedents directly addressing algorithmic adjudication or constitutional implications of AI remain scarce across the region, reflecting the relatively early stage of technological integration into judicial institutions.

From a comparative perspective, the absence of a unified global regulatory model for AI in judicial systems remains evident. Instead, three broad regulatory patterns can be identified. The first is the European rights-based regulatory model, emphasising constitutional safeguards, human oversight, and the protection of fundamental rights.⁶⁶ The second is the American jurisprudential and oversight-based approach, which relies heavily on constitutional litigation and judicial scrutiny of algorithmic systems.⁶⁷ The third is the Chinese state-driven implementation model, which prioritises efficiency, technological integration, and institutional digitalisation under centralised governance structures.

This comparative landscape demonstrates that the regulation of AI in judicial systems remains an evolving area of law and governance. The principal challenge confronting constitutional systems today is no longer whether AI technologies should be integrated into judicial environments, but rather how legal and constitutional frameworks can ensure that such integration is consistent with judicial independence, constitutional legitimacy, procedural fairness, transparency, and the protection of fundamental rights. In the context of constitutional adjudication, these safeguards are indispensable because constitutional courts occupy a unique institutional role in preserving the constitutional order and maintaining public confidence in the rule of law.

65 Saudi Arabia Royal Decree no M/19 of 2021 'Personal Data Protection Law (PDPL)' amended by Royal Decree no M/148 of 2023 <<https://regulations.ai/regulations/saudi-arabia-2021-09-personal-data-protection-law-pdpl>> accessed 3 April 2026.

66 Case C-413/23 P *European Data Protection Supervisor v Single Resolution Board* (CJEU, 4 September 2025) ECLI:EU:C:2025:645 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62023CJ0413>> accessed 3 April 2026.

67 'The Court and Constitutional Interpretation' (*Supreme Court of the United States*, 2026) <<https://www.supremecourt.gov/about/constitutional.aspx>> accessed 3 April 2026.

3.4. Prospects for Developing Constitutional Courts in the Era of Artificial Intelligence

The future development of constitutional courts in the era of artificial intelligence (AI) reflects a broader transformation in judicial governance, institutional design, and legal decision-making within increasingly digital societies. The issue is no longer confined to the technical possibility of integrating AI into judicial systems but rather concerns the extent to which constitutional adjudication itself may be reshaped by data-driven technologies, digital infrastructures, and algorithm-assisted analytical tools. Consequently, discussions concerning the future of constitutional courts must address not only technological efficiency, but also the preservation of constitutional legitimacy, judicial independence, democratic accountability, and the normative foundations of constitutional interpretation.⁶⁸

Contemporary developments suggest the gradual emergence of an “assisted adjudication” model within judicial systems. Under this model, AI technologies function primarily as advanced analytical and administrative support mechanisms operating within broader judicial ecosystems. Rather than replacing constitutional judges, AI systems increasingly contribute to the informational environment in which constitutional adjudication takes place. This includes facilitating access to constitutional jurisprudence, organising legal materials, analysing comparative constitutional trends, managing judicial workloads, and supporting procedural administration. Such technologies may significantly enhance the institutional capacity of constitutional courts, particularly in jurisdictions experiencing increasing litigation complexity and growing constitutional caseloads.⁶⁹

Nevertheless, constitutional adjudication remains fundamentally distinct from ordinary forms of legal decision-making. Constitutional courts do not merely apply predefined legal rules mechanically; they engage in value-oriented interpretation, including proportionality analysis, balancing competing constitutional rights, protecting democratic structures, and resolving politically sensitive disputes. Constitutional interpretation frequently requires contextual judgement, historical understanding, ethical reasoning, and assessment of constitutional principles within evolving societal conditions. For this reason, AI systems, regardless of their analytical sophistication, remain incapable of independently exercising the normative and interpretative authority that defines constitutional adjudication.⁷⁰

68 Carlo Colapietro and Alessandro Moretti, 'L'Intelligenza Artificiale nel dettato costituzionale: opportunità, incertezze e tutela dei dati personali' (2020) 3 BioLaw Journal 359, doi:10.15168/2284-4503-713.

69 Anna Fine and Shawn Marsh, 'Judicial Leadership Matters (yet Again): The Association between Judge and Public Trust for Artificial Intelligence in Courts' (2024) 4(1) Discover Artificial Intelligence 44, doi:10.1007/s44163-024-00142-3.

70 Noila Nurmamatova, 'Digital Transformation in Constitutional Courts: Opportunities and Risks' (2025) 5(4) Jurisprudence 30, doi:10.51788/tsul.jurisprudence.5.4./mfeu4662.

Comparative developments illustrate different trajectories concerning the future integration of AI into judicial institutions. Estonia provides one of the clearest examples of gradual and institutionally cautious judicial digitalisation. Through its advanced e-governance infrastructure and interconnected public digital systems, Estonia has demonstrated how digital technologies may improve procedural efficiency, accessibility, and judicial administration while preserving meaningful human judicial control over adjudicative functions. The Estonian model reflects a technologically advanced yet constitutionally restrained approach, in which AI serves as a supportive instrument subordinate to judicial authority.⁷¹

China, in contrast, illustrates a more expansive and state-driven model of judicial technological integration. Chinese “smart court” initiatives employ AI technologies extensively in case management, online dispute resolution, legal information processing, automated document generation, and procedural administration. These reforms demonstrate the significant institutional potential of AI in managing judicial workloads and improving administrative efficiency on a large-scale. At the same time, comparative legal scholarship continues to raise concerns regarding transparency, accountability, procedural safeguards, and the compatibility of highly centralised technological governance with constitutional rule-of-law standards.⁷²

Within the European legal framework, future developments concerning AI in constitutional and judicial systems are likely to remain linked to rights-based regulatory safeguards. The EU’s AI regulatory approach emphasises human oversight, explainability, accountability, and the protection of fundamental rights. Through instruments such as the AI Act and the ethical principles developed by the European Commission for the Efficiency of Justice (CEPEJ), European institutions have consistently maintained that judicial AI systems must remain subordinate to constitutional guarantees and meaningful human supervision. This approach reflects a broader European constitutional understanding that constitutional interpretation and the balancing of rights cannot be delegated to autonomous algorithmic systems.⁷³

In the case concerning large-scale digital surveillance and automated data processing by intelligence agencies, the European Court of Human Rights (ECtHR) held that bulk interception regimes must be accompanied by strong legal safeguards to comply with Article 8 of the European Convention on Human Rights, which guarantees the right to privacy. The

71 Heru Setiawan and others, ‘Digitalization of Legal Transformation on Judicial Review in the Constitutional Court’ (2024) 4(2) *Journal of Human Rights, Culture and Legal System* 263, doi:10.53955/jhcls.v4i2.263.

72 Rachel E Stern and others, ‘Automating Fairness? Artificial Intelligence in the Chinese Courts’ (2021) 59(3) *Columbia Journal of Transnational Law* 515.

73 Giovanni De Gregorio and Oreste Pollicino, ‘The European Constitutional Way to Address Disinformation in the Age of Artificial Intelligence’ (2025) 26(3) *German Law Journal* 449, doi:10.1017/glj.2025.24.

case is particularly significant in the context of AI governance, as modern surveillance systems increasingly depend on algorithmic filtering and automated data analysis. The Court emphasised that proportionality, necessity, and effective oversight constitute essential constitutional safeguards for regulating digital technologies and protecting individual rights and freedoms in the digital age.⁷⁴

In the United States, future developments are likely to continue evolving through constitutional litigation, judicial scrutiny, and institutional oversight rather than through centralised legislative regulation. American legal debates concerning AI in judicial systems increasingly focus on issues of procedural fairness, algorithmic transparency, due process, equal protection, and judicial accountability. The ongoing controversy surrounding algorithmic risk assessment systems underscores the broader constitutional concern that AI technologies may indirectly shape judicial reasoning and institutional behaviour if insufficient safeguards are in place.⁷⁵

Within the Arab region, prospects for AI integration into constitutional adjudication remain associated with broader processes of judicial digital transformation and state modernisation. The UAE and Saudi Arabia have made substantial progress in judicial digitalisation through electronic litigation systems, digital judicial services, and integrated procedural platforms such as “Najiz.”⁷⁶ Egypt and Jordan have also advanced in electronic filing systems, remote hearings, and digital judicial administration. However, the transition from procedural digitalisation toward AI-assisted constitutional adjudication remains institutionally limited throughout the region. Existing reforms largely focus on administrative efficiency rather than substantive adjudicative support or algorithm-assisted constitutional analysis.⁷⁷

The future role of constitutional judges is therefore likely to evolve in response to increasingly sophisticated digital legal environments. Constitutional judges may interact more extensively with AI-assisted systems capable of conducting comparative legal analysis, identifying jurisprudential trends, organising constitutional materials, and facilitating procedural management. However, this evolution does not alter the essential constitutional nature of judicial authority. The legitimacy of constitutional adjudication continues to depend upon human interpretative reasoning, public justification, constitutional balancing, and normative assessment grounded in constitutional values rather than algorithmic prediction.⁷⁸

74 *Big Brother Watch v United Kingdom* Apps nos 58170/13, 62322/14 and 24960/15 (ECtHR, 25 May 2021) <<https://hudoc.echr.coe.int/eng?i=001-210077>> accessed 3 April 2026.

75 Dario Martire, ‘Artificial Intelligence and the Constitutional State’ (2022) (2) *Diritto Pubblico* 397, doi:10.1438/104988.

76 UAE Federal Decree-Law No (46) of 2021 (n 63); ‘Procedural Guide for the Electronic Litigation Service’ (n 63); Castellanos Claramunt (n 63).

77 Regulation no 95 of 2018 (n 64).

78 Abraham Bechara and others, ‘Inteligencia Artificial y su incidencia en el debido proceso’ (2024) 20(1) *Juridicas CUC* 436, doi:10.17981/JURIDCUC.20.1.2024.20.

At the same time, expanding AI integration within judicial systems generates persistent structural challenges that constitutional systems must address proactively. These include ensuring algorithmic transparency and explainability, preventing discriminatory or biased outcomes, maintaining judicial independence, protecting data privacy, safeguarding procedural fairness, and establishing clear institutional accountability for AI-assisted judicial processes. Such concerns reveal an important tension between technological capability and constitutional readiness, particularly in legal systems where institutional safeguards governing AI remain underdeveloped.⁷⁹

Accordingly, the responsible integration of AI into constitutional courts requires a multidimensional governance framework combining constitutional regulation, institutional safeguards, judicial training, technological expertise, ethical oversight, and procedural accountability mechanisms. Without such safeguards, AI technologies risk undermining rather than strengthening constitutional justice by weakening transparency, reducing judicial autonomy, or compromising public trust in judicial institutions.⁸⁰

Overall, comparative developments suggest that the future trajectory of constitutional courts will likely entail the emergence of a technologically assisted adjudicative environment in which AI serves as an analytical and administrative infrastructure supporting judicial work, while leaving ultimate interpretative authority exclusively in human hands. The central constitutional challenge will therefore not be technological adoption itself, but rather the preservation of the constitutional identity, legitimacy, and human-centred nature of constitutional adjudication within increasingly data-driven judicial systems.⁸¹

3.5. Practical Applications of Artificial Intelligence in Constitutional Judiciary

The examination of practical applications of artificial intelligence (AI) in judicial systems is essential to understanding the realistic scope and constitutional limits of integrating technology into constitutional adjudication. Although the most advanced uses of AI currently occur in ordinary courts, administrative judicial services, and procedural management systems, these experiences remain highly relevant to constitutional courts, as they illustrate how digital technologies may reshape judicial infrastructures, legal research practices, and institutional decision-support environments. At the same time, they also demonstrate the constitutional limitations

79 Carlo Casonato, 'Artificial Intelligence and Constitutional Law: First Considerations' (2019) 21 *Diritto Pubblico Comparato ed Europeo* 101, doi:10.17394/93043.

80 Paul Nemitz, 'Constitutional Democracy and Technology in the Age of Artificial Intelligence' [2018] *Philosophical Transactions of the Royal Society A*, doi:10.1098/rsta.2018.0089.

81 Tareq Al-Billeh, 'Legal Framework for Protecting the Right to Private Life in the Digital Space: The Extent to Which Jordanian Constitution and Legislation Takes into Account International Requirements' (2024) 11(1) *Revista de Investigaciones Constitucionales* e258, doi:10.5380/rinc.v11i1.90631.

that arise when algorithmic systems approach functions traditionally associated with judicial reasoning and constitutional interpretation.⁸²

From a functional perspective, AI applications in judicial systems can be classified into three principal categories: legal information processing systems, procedural automation mechanisms, and analytical or predictive support tools. This functional classification provides a clearer analytical framework for assessing which applications may be compatible with constitutional adjudication and which remain constitutionally problematic.⁸³

The first category concerns legal information processing and jurisprudential analysis. AI-supported legal databases and intelligent search systems are increasingly employed to process large volumes of judicial decisions, legislative materials, doctrinal scholarship, and comparative legal sources. These technologies facilitate legal research by identifying relevant precedents, detecting jurisprudential patterns, organising legal materials, and accelerating access to judicial information. In the United States, major legal research platforms increasingly rely on AI-assisted technologies capable of semantic legal analysis and advanced jurisprudential retrieval. Although such systems do not exercise judicial authority directly, they significantly influence the informational environment within which judicial reasoning takes place.⁸⁴

Within constitutional adjudication, these technologies may assist constitutional judges in identifying constitutional precedents, comparing interpretative approaches, analysing doctrinal developments, and mapping constitutional jurisprudence across different legal systems. Constitutional courts often engage with extensive historical, comparative, and doctrinal materials, particularly in cases involving proportionality analysis, constitutional balancing, and fundamental-rights interpretation. AI-supported legal research systems may therefore improve the efficiency and comprehensiveness of constitutional judicial preparation without affecting the substantive authority of constitutional judges.⁸⁵

The second category involves procedural automation and judicial administration. This area currently represents the most widespread and institutionally accepted form of AI-related judicial digitalisation. Courts in numerous jurisdictions increasingly employ digital systems for case registration, document management, electronic filing, hearing scheduling, remote litigation, procedural notifications, and judicial workflow administration. These technologies contribute significantly to reducing procedural delays, improving accessibility, and enhancing institutional efficiency.⁸⁶

82 De Gregorio and Pollicino (n 73).

83 Nemitz (n 80).

84 Tülay Turan and Ecir Uğur Küçükşille, 'Summarization and Prediction of Turkish Constitutional Court Decisions with Explainable Artificial Intelligence and a Hybrid Natural Language Processing Method' (2025) 13 IEEE Access 59766, doi:10.1109/ACCESS.2025.3556725.

85 Eduardo Martín Acosta Yparraguirre, 'The Artificial Intelligence and the End of the Constitutional Rule of Law and Democracy... or Not?' (2024) 27 Eunomia 137, doi:10.20318/eunomia.2024.9004.

86 Alaa Abdul Hussein Taher Al-Shuwaili, 'The Role of Artificial Intelligence in Constitutional and Legislative Rules in Iraq and Egypt' (2024) 69 Journal of the Iraqia University.

Several comparative experiences illustrate this development. The UAE has implemented advanced electronic litigation systems and digital judicial platforms designed to facilitate remote access to judicial services and improve procedural administration. Saudi Arabia has similarly expanded digital judicial services through integrated electronic systems such as the “Najiz” platform, which supports electronic filing, digital communication, and online procedural management.⁸⁷ Jordan and Egypt have also introduced electronic litigation mechanisms and judicial digitalisation initiatives modernise court administration and improve access to justice.⁸⁸

Although these applications are primarily administrative rather than adjudicative, they indirectly affect constitutional courts by improving the broader judicial infrastructure within which constitutional adjudication operates. Enhanced procedural management may reduce institutional burdens, accelerate constitutional litigation procedures, and improve judicial access to legal materials and litigant submissions. Nevertheless, these technologies remain supportive tools and do not directly participate in constitutional interpretation or judicial reasoning.⁸⁹

The third category concerns analytical and predictive AI systems, which constitute the most controversial and constitutionally sensitive area of judicial AI application. Certain jurisdictions, particularly in the United States, have experimented with algorithmic systems that analyse historical judicial data to identify patterns, estimate litigation risks, or predict judicial outcomes. Such technologies rely on statistical modelling and machine-learning techniques designed to infer future judicial behaviour from prior case patterns.⁹⁰

However, predictive systems raise substantial constitutional concerns when considered in relation to constitutional adjudication. Constitutional courts do not merely resolve disputes according to recurring factual patterns; they frequently interpret constitutional principles within evolving political, social, and ethical contexts. Constitutional reasoning often requires normative balancing, democratic sensitivity, and contextual judgment that cannot be reduced to predictive algorithms or statistical correlations. Consequently, predictive AI systems remain fundamentally incompatible with autonomous constitutional decision-making.⁹¹

87 Egidija Tamošiūnienė and others, ‘The Possibility of Applying Artificial Intelligence in the Delivery of Justice by Courts’ (2024) 17(1) *Baltic Journal of Law and Politics* 207, doi:10.2478/bjlp-2024-0010.

88 Marija Ampovska, ‘Judicial Responses to AI-Generated Works: A Comparative Case Law Analysis on Copyright’ (2025) 62(3) *Review of European and Comparative Law* 107, doi:10.31743/recl.18615.

89 Kareem Sayed Aboelazm and others, ‘Robotic Judges: A New Step Towards Justice or the Exclusion of Humans?’ (2024) 4(4) *Journal of Lifestyle and SDGs Review* e02515, doi:10.47172/2965-730x.sdgsreview.v4.n04.pe02515.

90 Shokhjakhon Abudusattorov, ‘Artificial Intelligence, Personal Data, And Digital Surveillance: Uzbekistan’s Constitutional Path to Balance’ (2025) 5(8) *International Journal of Law and Criminology* 71, doi:10.37547/ijlc/volume05issue08-13.

91 Nur Aqilah Khadijah Rosili and others, ‘A Systematic Literature Review of Machine Learning in Court Decisions’ (2021) 10(4) *IAES International Journal of Artificial Intelligence (IJ-AI)* 1091, doi:10.11591/IJAI.V10.I4.PP1091-1102.

The constitutional concerns associated with predictive judicial technologies became particularly visible in American legal debates surrounding algorithmic risk assessment tools such as COMPAS. Judicial and academic criticism focused on issues of transparency, algorithmic bias, due process, and litigants' inability to meaningfully challenge opaque computational outputs. These debates demonstrated the broader constitutional risks that may arise when algorithmic systems begin to influence judicial assessments or institutional behaviour.⁹²

Another important technological development concerns natural language processing (NLP) systems. NLP technologies enable automated analysis, summarisation, translation, and classification of legal texts. In multilingual legal environments such as the EU, these systems facilitate access to legal materials across different languages and legal traditions, thereby supporting comparative legal analysis and judicial cooperation. Constitutional courts may benefit from NLP technologies when analysing comparative constitutional jurisprudence, legislative histories, doctrinal materials, and multilingual legal sources. Nevertheless, NLP systems remain limited in their capacity to understand contextual constitutional meaning, normative interpretation, and constitutional balancing.⁹³

Taken together, comparative practice demonstrates that AI technologies within judicial systems function primarily as support infrastructures rather than autonomous adjudicative mechanisms. Their principal contribution lies in improving efficiency, accessibility, information management, and procedural organisation. However, the applicability of AI technologies to constitutional courts remains necessarily differentiated according to functional suitability and constitutional permissibility.⁹⁴

Certain applications, particularly legal research systems, procedural administration technologies, jurisprudential databases, and analytical support tools, may be integrated into constitutional judicial work with relatively limited constitutional risk. In contrast, predictive adjudication systems and automated decision-making technologies remain fundamentally incompatible with the normative and interpretative character of constitutional adjudication. Constitutional courts exercise authority grounded not merely in technical legal analysis, but in constitutional legitimacy, public reasoning, democratic accountability, and human judgement.⁹⁵

92 Omar Caramaschi, 'Constitutionalism in Front of Artificial Intelligence: New Challenges, What Solutions?' (2025) 7(1) *Rivista Italiana di Informatica e Diritto* 29, doi:10.32091/RIID0204.

93 Bin Wei and others, 'A Full-Process Intelligent Trial System for Smart Court' (2022) 23(2) *Frontiers of IT & Electronic Engineering* 186, doi:10.1631/FITEE.2100041.

94 Beliaña Annery Herrera-Tapias and others, 'Algorithmic Discrimination and Explainable AI in the Judiciary: A Case Study of the Constitutional Court of Colombia' (2025) 257 *Procedia Computer Science* 1227, doi:10.1016/j.procs.2025.03.164.

95 Jeffry Tarantang and Ibnu Elmi Pelu, 'Neo-Digitalism in the Legal System: Adapting Law to Technological Developments' (2024) 9(2) *Jurnal Ilmu Hukum Tambun Bungai* 519, doi:10.61394/jihtb.v9i2.495.

Accordingly, the integration of AI into constitutional courts requires a selective and constitutionally constrained model of technological adoption. The relevant criterion should not be technological capability alone, but rather compatibility with constitutional guarantees, judicial independence, transparency, due process, and meaningful human oversight. AI technologies may legitimately enhance the institutional capacity of constitutional courts, but they cannot replace the interpretative reasoning that defines constitutional adjudication itself.⁹⁶

The practical experience of AI deployment within judicial systems reveals an important structural distinction between procedural efficiency and constitutional judgment. While AI technologies may significantly strengthen administrative and analytical capacities, constitutional adjudication remains inherently dependent upon human interpretative authority. The future legitimacy of AI-assisted constitutional justice, therefore, depends upon maintaining this distinction and ensuring that technological integration remains subordinate to constitutional principles rather than determinative of constitutional outcomes.⁹⁷

3.6. Challenges of Implementing Artificial Intelligence in Constitutional Courts

The integration of AI into constitutional adjudication presents a set of complex and interrelated ethical, legal, and institutional challenges that distinguish it from its use in administrative or procedural judicial contexts. Unlike routine judicial functions, constitutional adjudication directly involves interpreting constitutional norms, protecting fundamental rights, and resolving disputes concerning the structure of the state and the limits of public power. As a result, the introduction of AI into constitutional courts raises concerns that extend beyond technical performance and efficiency, reaching into the core principles of constitutional justice, judicial legitimacy, and the rule of law.⁹⁸

From an ethical and constitutional standpoint, one of the most significant challenges concerns algorithmic bias. AI systems operate on historical datasets that may reflect pre-existing social, institutional, or systemic inequalities. When such data is used in training or operational processes, there is a risk that these biases are reproduced or even amplified in algorithmic outputs. In the context of constitutional courts, this raises direct concerns about

96 I Ketut Sukewati Lanang Putra Perbawa, 'Application of Artificial Intelligence as Evidence in Indonesian Courts' (2021) 5(2) *International Journal of Social Science and Business* 180, doi:10.23887/ijssb.v5i2.36185.

97 Michele Francaviglia, 'L'intelligenza Artificiale Nell'attività Amministrativa: Principi e Garanzie Costituzionali Nel Passaggio Dalla Regola Agendi Alla Regola Algoritmica' (2024) 17 *Federalismi.it* 114.

98 Muhammad Jefri Kurniawan and Ruli Purwanto, 'The Revolution of Public Administration in the Era of Artificial Intelligence: Legal Challenges and Constitutional Implications' (2025) 5(1) *Fortiori Law Journal* 1, doi:10.47200/flj.v5i01.3050.

the principle of equality before the law and non-discrimination, both of which constitute foundational elements of constitutional justice. The use of biased or unbalanced data may therefore compromise the neutrality expected of judicial reasoning, even where AI systems are formally limited to advisory functions.⁹⁹

Connected to this issue is the problem of transparency and explainability, often described in the literature as the “black box” phenomenon. Many advanced AI systems operate through complex machine-learning models whose internal reasoning processes are not easily interpretable by users, including legal professionals. In constitutional adjudication, this opacity creates a fundamental tension with the requirement that judicial decisions must be reasoned, intelligible, and open to scrutiny. The legitimacy of constitutional courts depends not only on the correctness of outcomes but also on the transparency of reasoning. Accordingly, any reliance on non-explainable algorithmic outputs may undermine procedural fairness and weaken public confidence in constitutional justice.¹⁰⁰

A further constitutional concern relates to judicial responsibility and accountability. Although AI systems are formally designed as assistive tools, their increasing influence on legal research, analysis, and recommendation processes raises questions about the attribution of responsibility for judicial outcomes. If judicial reasoning is partially shaped by algorithmic suggestions or predictive outputs, it becomes necessary to determine whether accountability remains exclusively with the judge or whether it is indirectly shared with the designers, developers, or operators of such systems. This diffusion of responsibility presents a significant challenge to traditional doctrines of judicial accountability, particularly in constitutional courts where decisions have far-reaching normative and institutional consequences.¹⁰¹

From a legal perspective, the absence or incompleteness of specific regulatory frameworks governing the use of AI in judicial and constitutional contexts constitutes another major challenge. In many jurisdictions, particularly in several Arab legal systems, there is currently no explicit legislation governing the admissibility, limits, or oversight of AI in judicial decision-making. This creates a degree of normative uncertainty that may affect both the legitimacy and consistency of judicial practice. Even in more advanced regulatory environments, such as the EU, the legal approach remains highly precautionary, requiring strict compliance with principles of transparency, human

99 Asbudi Dwi Saputra, Hartono Tasir Irwanto and Nurisnah Nurisnah, 'Measuring Judicial Accountability in the Algorithmic Era: Juridical Implications of Using Judicial Assistants and Black Box Risks in Constructing Judgment Arguments' (2025) 7(2) SIGn Jurnal Hukum 958, doi:10.37276/sjh.v7i2.570.

100 Tareq Al-Billeh and others, 'The Risks of Using Artificial Intelligence on Privacy and Human Rights: Unifying Global Standards' (2024) 31(2) Jurnal Media Hukum 333, doi:10.18196/jmh.v31i2.23480.

101 Kasper Lippert-Rasmussen, 'Algorithmic and Non-Algorithmic Fairness: Should We Revise Our View of the Latter Given Our View of the Former?' (2025) 44(2) Law and Philosophy 155, doi:10.1007/s10982-024-09505-4.

oversight, risk assessment, and the protection of fundamental rights, particularly under frameworks such as the EU Artificial Intelligence Act.¹⁰²

An additional legal dimension concerns data protection and privacy. AI systems deployed within judicial environments necessarily process large volumes of sensitive personal and legal data, including case files, judicial records, and litigant information. Without adequate safeguards, such processing may lead to risks of unauthorised data use, breaches of confidentiality, or violations of privacy rights. In constitutional terms, this raises concerns about the rights to privacy and the protection of personal data as fundamental rights, thereby reinforcing the need for strict legal and institutional safeguards governing data handling in AI-enabled judicial systems.¹⁰³

The District Court of The Hague invalidated the SyRI algorithmic system used by the Dutch government to detect welfare fraud. The Court found that the system violated the right to privacy under Article 8 of the European Convention on Human Rights (ECHR) because it lacked transparency, accountability, and proportionality. This case is considered a landmark decision in Europe against opaque governmental AI systems, reinforcing constitutional principles of due process and data protection.¹⁰⁴

At the institutional and societal level, the implementation of AI in constitutional courts also raises issues of legitimacy, trust, and public perception. Judicial legitimacy in constitutional systems is linked to public confidence in the independence, impartiality, and human-centred nature of judicial reasoning. The introduction of opaque or poorly understood algorithmic tools may undermine this confidence, particularly in contexts where digital literacy remains limited. Furthermore, disparities in technological infrastructure and institutional capacity between jurisdictions may lead to unequal levels of AI adoption, thereby creating asymmetries in judicial modernisation and potentially widening the gap between advanced and developing legal systems.¹⁰⁵

Comparative practice illustrates these challenges in concrete terms. The controversies surrounding algorithmic risk assessment tools, such as Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) in the United States, highlight concerns about transparency, due process, and perceived algorithmic bias in

102 Directorate General for Communication, '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>> accessed 3 April 2026.

103 Otavio Morato de Andrade and Marco Antônio Sousa Alves, 'Using Explainable AI to Reduce Opacity and Address Bias in Algorithmic Models' (2024) 13(1) *Revista Thesis Juris* 3, doi:10.5585/13.2024.26510.

104 Case no C-09-550982-HA ZA 18-388 (District Court of the Hague, 5 February 2020) ECLI:NL:RBDHA:2020:865 <<https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2020:1878>> accessed 3 April 2026.

105 Christoph Engel, Lorenz Linhardt and Marcel Schubert, 'Code Is Law: How COMPAS Affects the Way the Judiciary Handles the Risk of Recidivism' (2025) 33(2) *Artificial Intelligence and Law* 383, doi:10.1007/s10506-024-09389-8.

judicial contexts. In the EU, in contrast, regulatory developments emphasise a precautionary and rights-based model that prioritises human oversight, accountability, and compliance with fundamental rights in the deployment of AI systems within justice environments. Estonia offers a further example of a gradual and controlled approach, in which AI technologies are introduced incrementally under strict institutional supervision, with a clear emphasis on preserving human judicial authority.¹⁰⁶ Taken together, these challenges demonstrate that the integration of AI into constitutional courts is not merely a technical or administrative reform, but a matter of constitutional design and institutional legitimacy. The effective governance of AI in this context requires a carefully balanced framework that reconciles technological innovation with the preservation of judicial independence, procedural fairness, constitutional accountability, and the normative integrity of constitutional adjudication.¹⁰⁷

Accordingly, any sustainable model for integrating AI into constitutional courts must be based on three interdependent pillars. The first is the establishment of clear and coherent legal frameworks governing the use of AI in judicial contexts. The second is the development of transparent, explainable, and auditable AI systems that comply with constitutional and human rights standards. The third is the strengthening of institutional capacity through continuous judicial training and the development of technological literacy among judges. Equally important is preserving a clear conceptual distinction between AI as an assistive tool and human judges as the sole bearers of constitutional interpretative authority, thereby ensuring that technological innovation enhances rather than undermines the legitimacy of constitutional justice.

4 CONCLUSION

This study has examined the evolving role of artificial intelligence (AI) in constitutional courts through a comparative legal and analytical framework. The analysis demonstrates that AI is progressively reshaping judicial environments by improving legal research capacities, enhancing case management systems, and supporting the organisation and analysis of judicial precedents. However, despite these functional contributions, AI remains strictly confined to an assistive role, as constitutional adjudication continues to depend fundamentally on human interpretative authority grounded in constitutional principles, normative reasoning, and value-based judicial judgment.

The comparative examination of international legal and institutional experiences reveals the absence of a unified global model for integrating AI into judicial and constitutional

106 Muhammad Atif Khokhar, Attiya Anees and Muhammad Waqas Gujjar, 'From Judges to Algorithms: The Future of Corporate Adjudication in AI-Driven Courts' (2025) 3(2) *The Critical Review of Social Sciences Studies* 1794, doi:10.59075/3jvaxr72.

107 Francaviglia (n 97).

systems. Instead, three principal regulatory and institutional approaches can be identified. The EU adopts a rights-based regulatory model that prioritises transparency, human oversight, accountability, and the protection of fundamental rights. China represents a state-driven, efficiency-oriented model characterised by extensive deployment of “smart court” technologies and large-scale judicial digitalisation. The United States, in contrast, reflects a jurisprudence-driven, case-law-oriented approach in which regulatory control over algorithmic systems emerges primarily through judicial decisions and constitutional litigation rather than through centralised legislation. Within this comparative framework, several Arab jurisdictions, including the UAE, Saudi Arabia, Egypt, and Jordan, are still in a transitional phase in which judicial digital transformation is advancing primarily at the procedural and administrative levels, while the integration of AI into constitutional adjudication remains limited and institutionally undeveloped.

A central finding of this study is that the integration of AI into constitutional courts is constrained not only by technological limitations but also by fundamental constitutional and normative considerations. Algorithmic bias, opacity in decision-making processes, and accountability deficits raise serious concerns regarding the compatibility of AI systems with constitutional requirements such as equality before the law, due process, judicial independence, and the obligation to provide reasoned judicial decisions. These challenges underscore that constitutional adjudication involves forms of normative reasoning and constitutional balancing that cannot be replicated by, or delegated to, algorithmic systems.

From a policy and governance perspective, the study highlights that any sustainable integration of AI into constitutional justice requires a carefully structured and constitutionally grounded regulatory framework. Such a framework must include clear legal rules governing the use of AI in judicial contexts, enforceable ethical standards that ensure transparency, explainability, fairness, and non-discrimination, and mandatory human oversight in all AI-assisted judicial processes. In addition, institutional capacity-building, continuous judicial training, and the development of adequate digital infrastructure are essential prerequisites for the responsible and effective use of AI in judicial systems.

The study further emphasises that the functional scope of AI within constitutional courts must remain clearly limited to supportive and auxiliary tasks, particularly in legal research, precedent analysis, jurisprudential mapping, and procedural management. Any form of autonomous decision-making or algorithmic substitution of judicial reasoning is incompatible with the normative structure of constitutional adjudication and poses risks to judicial independence and the integrity of constitutional interpretation.

At the theoretical level, this research contributes to the broader discourse on the relationship between law, technology, and constitutional governance by conceptualising AI not as a replacement for judicial reasoning, but as an epistemic support system that modifies the informational and analytical environment of constitutional courts without

altering their normative core. This conceptual distinction is essential for preserving the balance between technological innovation and constitutional legitimacy.

In conclusion, the future of constitutional justice is likely to evolve towards an assisted-judgement model in which artificial intelligence serves as a supportive analytical infrastructure, while ultimate interpretative authority remains vested exclusively in human judges. The principal challenge is, therefore, not the adoption of AI as such, but the development of robust constitutional safeguards to ensure that technological innovation operates strictly within the boundaries of constitutional justice, the protection of fundamental rights, and the preservation of judicial independence.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЛЬ ШТУЧНОГО ІНТЕЛЕКТУ В КОНСТИТУЦІЙНОМУ СУДОЧИНСТВІ: ПОРІВНЯЛЬНИЙ ОГЛЯД ЗАГАЛЬНОЇ СУДОВОЇ ПРАКТИКИ

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АНОТАЦІЯ

Вступ. Усе більша інтеграція штучного інтелекту (ШІ) у судові системи є одним із найважливіших сучасних явищ у сфері здійснення правосуддя. Хоча технології ШІ дедалі частіше використовуються у таких сферах, як управління судовими справами, юридичні дослідження, аналіз документів та автоматизація процедур, їх застосування у сфері конституційного судочинства породжує особливі правові та інституційні виклики. Конституційні суди виконують унікальну функцію, що виходить за межі звичайного врегулювання спорів, оскільки вони відповідають за забезпечення верховенства права та дотримання норм Конституції, захист основних прав і свобод та підтримання балансу між гілками влади. Відповідно, інтеграція ШІ в конституційне правосуддя потребує ретельного аналізу її впливу на судову незалежність, тлумачення Конституції, процесуальну справедливість та легітимність конституційного контролю.

Методи. У дослідженні застосовано порівняльно-аналітичну методологію, що зосереджується на окремих юрисдикціях, які представляють різні моделі конституційного контролю та різні рівні цифровізації судової системи. Порівняльний метод обмежується юрисдикціями, які демонструють чітко визначені інституційні практики або регуляторні підходи щодо використання ШІ в судових системах. Дослідження охоплює досвід Європейського Союзу та окремих держав-членів, зокрема Естонії, як приклади правозахисної та цифрової розвиненої моделі управління, а також Сполучених Штатів як представника децентралізованої системи загального права. Крім того, аналізуються окремі арабські юрисдикції, зокрема Об'єднані Арабські Емірати, Саудівська Аравія, Йорданія та Єгипет, з метою оцінки нових регіональних підходів до цифрової трансформації судової системи. Вибір юрисдикцій ґрунтується на трьох критеріях: (1) наявність ініціатив щодо використання ШІ у судовій або регуляторній сфері, (2) різноманітність моделей конституційного контролю, (3) наявність законодавчих або інституційних меж цифровізації судової системи. В дослідженні також аналізуються конституційні принципи, судова практика, регуляторні інструменти та окремі судові рішення, пов'язані із застосуванням ШІ в судочинстві.

Результати та висновки. Дослідження показує, що технології ШІ дедалі частіше використовуються в конституційних і судових системах для підтримки адміністративних та аналітичних функцій, зокрема для обробки даних, категоризації справ, пошуку прецедентів, управління навантаженням судів та допомоги у підготовці юридичних документів. Водночас підтверджується, що ШІ залишається лише

допоміжним інструментом і не може замінити суддів від час тлумачення або ціннісно-орієнтованого суддівського розсуду. Конституційне судочинство за своєю природою ґрунтується на контекстуальному аналізі та забезпеченні балансу між конституційними принципами і захистом основних прав і свобод, що зумовлює необхідність людського суддівського розсуду. Результати свідчать, що обсяг і легітимність інтеграції ШІ здебільшого залежать від конституційних структур, регуляторних гарантій та інституційної спроможності кожної юрисдикції. Також було з'ясовано, що відповідальна інтеграція ШІ в конституційні суди потребує збалансованої регуляторної системи, здатної одночасно забезпечити ефективність правосуддя та технологічні інновації, а також створити умови для дотримання конституційних гарантій, судової незалежності, прозорості, належної правової процедури та довіри суспільства до конституційного правосуддя.

Ключові слова: штучний інтелект; конституційні суди; цифрове правосуддя; електронне судочинство; цифрова трансформація; технологічні інновації.

ABSTRACT IN ARABIC*

مقال بحثي

دور الذكاء الاصطناعي في القضاء الدستوري: رؤية مقارنة من الممارسة القضائية العامة

طارق البله*, وتوفيق الخشاشنة, ونور عيسى الهندي, ومحمد الشباطات, وجورجيت البله

الملخص:

الخلفية:

يمثل التزايد في إدماج الذكاء الاصطناعي (AI) داخل الأنظمة القضائية أحد أهم التطورات المعاصرة في إدارة العدالة. وعلى الرغم من أن تقنيات الذكاء الاصطناعي تُستخدم بشكل متزايد في مجالات

*. The publication metadata in Arabic is presented as submitted by the authors.

مثل إدارة القضايا، والبحث القانوني، وتحليل الوثائق، وأتمتة الإجراءات، فإن استخدامها داخل القضاء الدستوري يثير إشكاليات قانونية ومؤسسية متميزة. إذ تضطلع المحاكم الدستورية بوظيفة خاصة تتجاوز مجرد تسوية النزاعات، كونها مسؤولة عن حماية سمو الدستور، وصون الحقوق والحريات الأساسية، والحفاظ على التوازن بين سلطات الدولة. وبناءً عليه، فإن إدماج الذكاء الاصطناعي في العدالة الدستورية يتطلب دراسة دقيقة لانعكاساته على الاستقلال القضائي، وتفسير الدستور، وضمانات المحاكمة العادلة، وشرعية الرقابة الدستورية.

المنهجية:

تعتمد هذه الدراسة منهجية تحليلية مقارنة تركز على عدد من النظم القضائية المختارة التي تمثل نماذج مختلفة للرقابة الدستورية ومستويات متفاوتة من التحول الرقمي القضائي. ويقتصر الإطار المقارن على الولايات القضائية التي تُظهر ممارسات مؤسسية أو تنظيمية واضحة تتعلق باستخدام الذكاء الاصطناعي في النظم القضائية. وتتناول الدراسة تجربة الاتحاد الأوروبي وبعض الدول الأعضاء، وخاصة إستونيا، بوصفها نماذج للحكومة الحقوقية المتقدمة رقمياً، إضافة إلى الولايات المتحدة كنموذج لنظام القانون العام اللامركزي. كما تشمل الدراسة بعض النظم العربية، بما في ذلك دولة الإمارات العربية المتحدة، والمملكة العربية السعودية، والأردن، ومصر، بهدف تحليل الاتجاهات الناشئة في التحول الرقمي القضائي على المستوى الإقليمي. وقد تم اختيار هذه النظم بناءً على ثلاثة معايير: (1) وجود مبادرات قضائية أو تنظيمية تتعلق بالذكاء الاصطناعي، (2) تنوع نماذج الرقابة الدستورية، (3) توفر أطر تشريعية أو مؤسسية مرتبطة بالتحول الرقمي القضائي. كما تقوم الدراسة بتحليل المبادئ الدستورية، والممارسات القضائية، والأدوات التنظيمية، وبعض القرارات القضائية ذات الصلة باستخدام الذكاء الاصطناعي في المجال القضائي.

النتائج والاستنتاجات:

تُظهر الدراسة أن تقنيات الذكاء الاصطناعي تُستخدم بشكل متزايد في البيئات الدستورية والقضائية لدعم الوظائف الإدارية والتحليلية، بما في ذلك معالجة البيانات القانونية، وتصنيف القضايا، واسترجاع السوابق القضائية، وإدارة عبء العمل، والمساعدة في صياغة المذكرات القانونية. ومع ذلك، يؤكد التحليل المقارن أن الذكاء الاصطناعي يظل محصوراً في دور مساعد، ولا يمكنه أن يحل محل القضاة الدستوريين في ممارسة التفسير الدستوري أو في إصدار الأحكام القائمة على القيم. إذ إن القضاء الدستوري يعتمد بطبيعته على التحليل السياقي، والموازنة بين المبادئ الدستورية، وحماية الحقوق والحريات الأساسية، وهي مهام تتطلب تقديراً قضائياً بشرياً. كما تشير النتائج إلى أن نطاق وشرعية إدماج الذكاء الاصطناعي يتأثران بشكل كبير بالبنية الدستورية، والضمانات التنظيمية، والقدرات

المؤسسية داخل كل نظام قضائي. وتخلص الدراسة إلى أن الإدماج المسؤول للذكاء الاصطناعي في المحاكم الدستورية يتطلب إطاراً تنظيمياً متوازناً يحقق التوازن بين تعزيز كفاءة القضاء وتشجيع الابتكار التكنولوجي، وبين حماية الضمانات الدستورية، واستقلال القضاء، والشفافية، وضمانات المحاكمة العادلة، وتعزيز ثقة الجمهور في العدالة الدستورية.

الكلمات المفتاحية:

الذكاء الاصطناعي، المحاكم الدستورية، العدالة الرقمية، القضاء الإلكتروني، التحول الرقمي، الابتكار التكنولوجي

Research Article

CIVIL TORT LIABILITY FOR AI-INDUCED HARM: LESSONS FROM EU LAW FOR VIETNAM'S EMERGING LEGAL FRAMEWORK

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ABSTRACT

Background: Artificial intelligence increasingly causes harm that challenges conventional civil liability rules built around human fault, linear causation, and tangible products. This article examines how the European Union's evolving approach to AI-related civil liability can inform Vietnam's emerging legal framework. Its aim is to identify the main liability models developed in EU law, clarify the doctrinal difficulties that AI creates for traditional tort principles, and assess which elements may be adapted to Vietnam in a context-sensitive manner.

Method: Methodologically, the study employs a qualitative legal case study design following Yin, treating the EU as an instrumental case, and analyses secondary legal and scholarly sources through thematic analysis in the Braun and Clarke sense.

Results and Conclusions: The findings show that the EU is moving towards a layered, risk-based regime combining *ex ante* regulation with *ex post* liability, especially through Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 (the EU AI Act), the proposed

AI Liability Directive, and the Revised Product Liability Directive. Product liability and operator liability emerge as complementary mechanisms, while evidentiary facilitation becomes central where opacity and distributed responsibility hinder proof. The article concludes that Vietnam should pursue incremental reforms focused on risk differentiation, digital product liability, stronger operator duties, and improved access to evidence, all within a coherent AI governance framework.

1 INTRODUCTION

The rapid diffusion of artificial intelligence (AI) across public administration, commerce, healthcare, finance, transport, and digital platforms has transformed not only how decisions are made, but also how risks are created, distributed, and externalised. AI systems now perform predictive, classificatory, and quasi-decisional functions that can directly affect property, bodily integrity, privacy, reputation, and economic interests. While these technologies undoubtedly improve efficiency and support innovation, they also expose the limits of conventional private law when harm stems from complex socio-technical systems rather than readily identifiable human conduct. In classical tort doctrine, liability generally rests on fault, a sufficiently direct causal nexus, and reasonably foreseeable damage.¹ However, AI disrupts each of these elements. Machine learning systems may generate harmful outcomes through adaptive processes that are opaque, probabilistic, and only partially controllable by any single actor. As a result, it becomes difficult to determine whether responsibility should lie with the developer who designed the model, the deployer who integrated it into a service, the operator who supervised its functioning, or the end user who relied on the output. This problem has been recognised in the literature for some time. Scholars have consistently argued that AI-induced harm places pressure on traditional doctrines of fault, causation, and proof, especially where the “black box” nature of algorithmic systems prevents injured parties from understanding how a harmful result was produced.² Moreover, the issue is not merely technical. It is also normative because civil liability must still perform its core functions of compensation, deterrence, and risk allocation in an environment where agency is fragmented, and harm may arise from

- 1 Mohammed Razzaq Ali and Bzhar Abdullah Ahmed, 'Modernizing civil liability rules for damages arising from AI-generated works' (2025) 8(4) Twejer 345, doi:10.31918/twejer.2584.eli.16; Yurii Burylo, 'Civil Liability for Damage Caused by Artificial Intelligence: The Modern European Approach' (2022) 6 Entrepreneurship Economy and Law 5, doi:10.32849/2663-5313/2022.6.01; Roman A Maydanyk, Nataliia I Maydanyk and Maryna M Velykanova, 'Liability for damage caused using artificial intelligence technologies' (2021) 28(2) Journal of the National Academy of Legal Sciences of Ukraine 150, doi:10.37635/jnalsu.28(2).2021.150-159.
- 2 Andrea Bertolini, *Artificial Intelligence and Civil Liability: Legal Affairs* (PE 621.926, European Parliament's Committee on Legal Affairs 2020); 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; Baris Soyer and Andrew Tettenborn, 'Artificial Intelligence and Civil Liability – Do We Need a New Regime?' (2022) 30(4) International Journal of Law and Information Technology 385, doi:10.1093/ijlit/eaad001.

distributed chains of design and deployment. From a law-and-economics perspective, liability rules must encourage efficient precautions without unduly discouraging socially beneficial innovation.³ At the same time, from a corrective justice perspective, victims should not be denied redress simply because the technology that harmed them is difficult to explain. Accordingly, the central challenge is no longer whether AI can cause legally cognisable harm; that is now beyond serious dispute. Rather, the pressing question is whether existing tort law can respond coherently, fairly, and effectively to harms generated by systems characterised by autonomy, opacity, and technical complexity.⁴

Against this background, the European Union (EU) has emerged as the most developed regulatory laboratory for addressing AI-related harm through a combination of preventive governance and compensatory liability. Importantly, the EU does not treat AI liability as a matter that can be resolved by a single instrument. Instead, it has pursued a layered framework linking ex ante obligations to ex post remedies. The EU AI Act establishes a risk-based framework that classifies AI systems by the level of risk they pose and imposes corresponding duties on providers and deployers of high-risk systems.⁵ In parallel, the proposed AI Liability Directive seeks to reduce evidentiary asymmetries by facilitating access to evidence and introducing rebuttable presumptions of causality under certain conditions.⁶ The Revised Product Liability Directive complements this approach by expanding the notion of “product” to include software and AI-enabled systems, thereby allowing claimants to seek compensation under an updated strict liability framework when defective digital products cause damage.⁷ Taken together, these measures represent more than a technical adjustment of existing rules. They signal a broader movement towards a

3 Shu Li, Michael Faure and Katri Havu, ‘Liability Rules for AI-Related Harm: Law and Economics Lessons for a European Approach’ (2022) 13(4) *European Journal of Risk Regulation* 618, doi:10.1017/err.2022.26.

4 Yaniv Benhamou and Justine Ferland, ‘Artificial Intelligence & Damages: Assessing Liability and Calculating the Damages’ in Giuseppina D’Agostino, Aviv Gaon and Carole Piovesan (eds), *Leading Legal Disruption: Artificial Intelligence and a Toolkit for Lawyers and the Law* (Thomson Reuters - Yvon Blais 2021) 165; Ketan Ramakrishnan, Gregory Smith and Conor Downey, *US Tort Liability for Large-Scale Artificial Intelligence Damages: A Primer for Developers and Policymakers* (RAND 2024).

5 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 2024/1689 <<http://data.europa.eu/eli/reg/2024/1689/oj>> accessed 5 April 2026.

6 European Commission, Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) (COM/2022/496 final, 28 September 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0496>> accessed 5 April 2026.

7 Ahmed Oudah Mohammed Al-Dulaimi and Mohammed Abd-Al Wahab Mohammed, ‘Legal Responsibility for Errors Caused by Artificial Intelligence (AI) in the Public Sector’ (2026) 68(4) *International Journal of Law and Management* 695, doi:10.1108/ijlma-08-2024-0295; Miriam C Buiten, ‘Product Liability for Defective AI’ (2024) 57(1-2) *European Journal of Law and Economics* 239, doi:10.1007/s10657-024-09794-z.

victim-oriented and risk-sensitive model of civil liability, one that acknowledges the evidentiary and structural difficulties inherent in AI litigation.⁸ At the same time, the EU framework continues to generate debate. Commentators question whether the proposed reforms are sufficiently ambitious, whether they distribute responsibility appropriately across the AI value chain, and whether they strike the right balance between innovation and accountability.⁹ Even so, the EU experience remains highly significant, because it offers a comparatively coherent attempt to modernise civil liability without abandoning its foundational principles. Furthermore, its influence extends beyond Europe. The so-called “Brussels Effect” suggests that EU regulatory models often shape legal developments in other jurisdictions, especially those seeking internationally credible frameworks for emerging technologies.¹⁰

In contrast, Vietnam's legal framework remains in its early stages of addressing AI governance, and its current civil liability regime has not been systematically adapted to address AI-induced harm. The 2015 Civil Code provides general rules on non-contractual compensation and recognises fault-based liability as well as strict liability in limited situations. Nevertheless, it was drafted in a context where harmful conduct was still understood largely in terms of human action, tangible products, and relatively linear causal chains.¹¹ Consequently, several regulatory gaps become evident when those rules are applied to AI systems. First, Vietnamese law does not clearly define how liability should be allocated among developers, deployers, operators, owners, and users where damage results from autonomous or semi-autonomous outputs. Second, evidentiary mechanisms remain underdeveloped, particularly in cases where claimants need access to technical information to establish fault, defect, or causation. Third, the legal system has yet to adopt a coherent, risk-based approach that distinguishes between low- and high-risk AI applications and calibrates liability accordingly. Although recent legislative developments demonstrate growing awareness of digital risks, they do not yet amount to a dedicated regime for civil

8 Marek Świerczyński and Zbigniew Więckowski, 'Liability for Damages Caused by AI Systems' (2023) 54 *Prawo w Działaniu* 200, doi:10.32041/pwd.5407.

9 Andrea Bertolini and Francesca Episcopo, 'The Expert Group's Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: A Critical Assessment' (2021) 12(3) *European Journal of Risk Regulation* 644, doi:10.1017/err.2021.30; Wannes Ooms and Jan De Bruyne, 'Tort Liability and Artificial Intelligence: Some Challenges and (Regulatory) Responses' in Nathalie A Smuha (ed), *The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence* (CUP 2025) 158, doi:10.1017/9781009367783.011.

10 Shu Li, Béatrice Schütte and Suvi Sankari, 'The Ongoing AI-Regulation Debate in the EU and its Influence on Emerging Economies' in Mark Findlay, Li Min Ong and Wenxi Zhang (eds), *Elgar Companion to Regulating AI and Big Data in Emerging Economies* (Edward Elgar Publishing 2023) 22, doi:10.4337/9781785362408.00007; Nguyen Van Duong and Dao Gia Phuc, 'A risk-based approach to artificial intelligence regulation: Lessons from the European Union for Vietnam' (2025) 41(4) *VNU Journal of Science: Legal Studies* 1, doi:10.25073/2588-1167/vnuls.4799.

11 Law of Vietnam no 91/2015/QH13 'Civil Code' (adopted 24 November 2015). <<https://vanban.chinhphu.vn/default.aspx?pageid=27160&docid=183188>> accessed 5 April 2026.

liability arising from AI-caused harm.¹² This is precisely where the present study identifies its research gap. While existing scholarship has discussed EU AI liability in depth, and some Vietnamese scholars have begun examining EU-inspired regulatory approaches, there remains limited analysis of how EU civil liability principles can be meaningfully adapted to Vietnam's legal and institutional conditions. Accordingly, this article examines the evolution of EU civil liability for AI-induced harm and evaluates its relevance for Vietnam's emerging framework. Its contribution lies not simply in comparing two legal systems, but in identifying which elements of the EU model are normatively desirable, institutionally feasible, and contextually transferable in Vietnam. In doing so, the article seeks to contribute to the current debates on AI governance, legal transplantation, and the future development of tort law in emerging economies. This study makes three principal contributions to the emerging literature on artificial intelligence and civil liability. First, it provides a structured doctrinal analysis of the European Union's evolving liability framework for AI-induced harm, clarifying how risk-based regulation, product liability, and operator liability interact within a coherent legal architecture. Second, it advances a comparative perspective by critically assessing the transferability of EU legal principles to Vietnam, taking into account institutional capacity, legal culture, and developmental constraints. Third, and most importantly, the article proposes a context-sensitive hybrid liability model tailored to Vietnam, which integrates risk-based classification, differentiated liability regimes, and evidentiary facilitation mechanisms. In doing so, the study moves beyond descriptive comparison and contributes to the development of a normative framework for AI liability in emerging economies.

2 METHODOLOGY

This study adopts a qualitative legal research design grounded in case study methodology. More specifically, it uses the EU as an instrumental case to examine how a contemporary legal system is reshaping civil liability rules in response to AI-induced harm. The case study approach is appropriate because it allows close analysis of a complex and evolving legal phenomenon within its real regulatory setting.¹³ In this study, the EU is not treated merely as a descriptive jurisdictional example. Rather, it is selected because it currently offers the most developed and systematic approach to addressing AI-related harm through a combination of ex ante regulation and ex post liability mechanisms. The analysis, therefore, focuses on the core EU instruments that frame this development, namely the EU AI Act,¹⁴

12 Matthias Artzt and Trần Việt Dũng, 'Artificial Intelligence and Data Protection: How to Reconcile Both Areas from the European Law Perspective' (2022) 7(2) Vietnamese Journal of Legal Sciences 39, doi:10.2478/vjls-2022-0007; Daria Lunca, 'Towards a Coherent EU Civil Liability Regime for AI-Caused Harm' (2025) 12(1) European Journal of Law and Public Administration 23, doi:10.18662/eljpa/12.1/253; Nguyen and Dao (n 10).

13 Robert K Yin, *Case Study Research and Applications: Design and Methods* (6th edn, Sage Publications, 2018).

14 Regulation (EU) 2024/1689 (n 5).

the proposed AI Liability Directive,¹⁵ and the Revised Product Liability Directive,¹⁶ together with the scholarly debates that have emerged around them. This design enables the identification of the principal legal techniques, liability models, and evidentiary solutions developed in EU law, and evaluation of their potential relevance to Vietnam's emerging legal framework. The study relies exclusively on secondary sources. These sources include legislative texts, official policy documents, peer-reviewed journal articles, book chapters, institutional reports, and comparative legal scholarship on AI liability, tort law, and digital governance. This source base is suitable because the article is doctrinal and comparative in purpose. It does not seek to measure social behaviour or generate empirical data. Instead, it aims to interpret legal developments, clarify normative trends, and assess possible pathways for legal reform. The selection of materials was guided by three criteria: direct relevance to civil liability for AI-induced harm, analytical authority, and recency. Accordingly, priority was given to recent scholarship that addresses questions of fault, causation, defect, burden of proof, product liability, and operator responsibility in the context of AI. Vietnamese legal materials, especially the 2015 Civil Code,¹⁷ were also examined to assess the extent to which the current domestic framework can accommodate disputes involving AI-generated harm and to identify its main limitations. The collected materials were analysed using thematic analysis following Braun and Clarke.¹⁸ This method was chosen because it offers a systematic yet flexible framework for identifying recurring patterns across diverse legal and scholarly sources. The analysis proceeded through three stages: close reading and initial coding; grouping codes into broader doctrinal and policy themes; and comparative interpretation of those themes in light of Vietnam's legal context. Four themes structure the discussion: the evolution of EU civil liability for AI-induced harm; the relationship between product liability and operator liability; the limits of traditional tort principles when applied to AI systems; and the lessons that EU law may offer for Vietnam.

3 RESULTS AND DISCUSSION

3.1. Evolution of EU civil liability frameworks for artificial intelligence-induced harm

The evolution of civil liability for AI-induced harm within the EU reflects a gradual yet significant transformation from traditional, fault-based frameworks towards a more nuanced, risk-oriented and technology-sensitive legal regime.¹⁹ Liability was largely

15 AI Liability Directive (n 6).

16 European Commission, Proposal for a Directive of the European Parliament and of the Council on Liability for Defective Products (COM/2022/495 final, 28 September 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0495>> accessed 5 April 2026.

17 Law of Vietnam no 91/2015/QH13 (n 11).

18 Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (SAGE 2021).

19 Alexandre Lodie, Stephanie Celis Juarez and Theodoros Karathanasis, 'Towards a New Regime of Civil Liability for AI Systems' (*HAL*, 16 June 2023) hal-04130851 <<https://hal.science/hal-04130851>> accessed 5 April 2026.

governed by general tort principles and the Product Liability Directive (85/374/EEC),²⁰ which focused on defective products and required claimants to establish damage, defect, and causation. However, as AI technologies became more autonomous, adaptive, and embedded in critical decision-making processes, these traditional frameworks began to reveal structural limitations. In particular, difficulties in proving fault and causation in AI-related cases exposed gaps that could undermine effective victim compensation and legal certainty.²¹ In response, EU institutions progressively recognised that AI-induced harm presents not merely a technological challenge but a systemic legal problem requiring coordinated regulatory intervention. Early policy discussions, such as the European Parliament's 2020 Resolution on civil liability for artificial intelligence, emphasised the need to move beyond purely fault-based models and consider strict liability for high-risk AI systems.²² At the same time, the European Commission initiated consultations on adapting civil liability rules to the digital age, acknowledging that existing doctrines were not adequately equipped to handle issues such as algorithmic opacity, distributed responsibility, and evolving system behaviour.²³

A key milestone in this evolution is the adoption of the EU AI Act,²⁴ which introduces a risk-based regulatory framework that categorises AI systems into risk levels, including unacceptable, high, and limited risk. While the EU AI Act primarily functions as an ex ante regulatory instrument, its significance for civil liability should not be underestimated. By establishing clear obligations for providers and deployers of high-risk AI systems, such as requirements for transparency, human oversight, and risk management, it indirectly shapes the standard of care expected in liability assessments.²⁵ Moreover, the classification of AI systems by risk provides a structured basis for differentiating liability regimes, thereby moving EU law towards a more calibrated and context-sensitive approach. Alongside the EU AI Act, the proposed AI Liability Directive²⁶ is a direct attempt to address evidentiary challenges in civil litigation involving AI. One of its most notable features is the introduction of mechanisms to facilitate access to evidence and to establish rebuttable presumptions of causality under certain conditions. Specifically, where a claimant can demonstrate that a

20 Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products [1985] OJ L 210/29.

21 Bertolini (n 2); Čerka, Grigienė and Sirbikytė (n 2).

22 Nikos Th Nikolinakos, 'The European Parliament's 2020 Resolution: Proposal for a Regulation on Ethical Principles for the Development, Deployment and Use of Artificial Intelligence, Robotics and Related Technologies' in Nikos Th Nikolinakos, *EU Policy and Legal Framework for Artificial Intelligence, Robotics and Related Technologies - The AI Act* (Springer 2023) 281, doi:10.1007/978-3-031-27953-9_6.

23 Bernhard A Koch and others, *European Commission's Public Consultation on Civil Liability: Adapting Liability Rules to the Digital Age and Artificial Intelligence* (ELI 2022).

24 Regulation (EU) 2024/1689 (n 5).

25 *ibid*

26 AI Liability Directive (n 6).

defendant has failed to comply with relevant obligations under EU law and that such non-compliance is reasonably likely to have influenced the AI system's output, a presumption of causation may arise.²⁷ This approach does not entirely eliminate the need to prove causation; rather, it alleviates the burden on claimants in situations where technical complexity would otherwise render proof practically impossible.²⁸ In doing so, the Directive seeks to strike a balance between fairness to victims and the preservation of procedural safeguards for defendants.²⁹

At the same time, the Revised Product Liability Directive³⁰ reflects another important dimension of the EU's evolving approach. By expanding the definition of "product" to include software, digital services, and AI systems, the Directive ensures that victims of harm caused by defective AI can benefit from a strict liability regime. This is particularly significant because strict liability does not require proof of fault, thereby reducing the evidentiary burden on claimants. Furthermore, the revised framework addresses issues such as updates, cybersecurity vulnerabilities, and the integration of AI into complex product ecosystems.³¹ As a result, the Directive contributes to a more comprehensive liability landscape in which both fault-based and strict liability mechanisms coexist and complement each other. Importantly, the evolution of EU civil liability for AI-induced harm is not limited to legislative reform. It is also shaped by broader theoretical and policy debates concerning the appropriate allocation of risk in technologically advanced societies. For instance, some scholars advocate for a more extensive use of strict liability or even insurance-based models, arguing that these approaches better reflect the inherent risks of AI systems and ensure effective compensation for victims.³² These debates highlight the tension between promoting technological progress and safeguarding fundamental legal values, a tension that lies at the heart of the EU's regulatory strategy. Despite its conceptual sophistication, the EU framework is not without limitations, particularly regarding the fragmentation of liability across multiple actors and the absence of a fully unified standard for high-risk AI systems.

Another notable aspect of the EU's approach is its emphasis on coherence and integration across different areas of law. Rather than creating an entirely new and isolated liability

27 OECD, *Governing with Artificial Intelligence: The State of Play and Way Forward in Core Government Functions* (OECD Publishing 2025) doi:10.1787/795de142-en.

28 Beatriz Botero Arcila, 'AI liability in Europe: How Does it Complement Risk Regulation and Deal with the Problem of Human Oversight?' (2024) 54 Computer Law & Security Review 106012, doi:10.1016/j.clsr.2024.106012; Świerczyński and Więckowski (n 8).

29 AI Liability Directive (n 6).

30 European Commission, Proposal for a Directive on Liability for Defective Products (n 16).

31 Buiten (n 7); Curzio Fossati, 'AI Systems and Product Liability in the EU: A Private International Law Analysis' (2025) 9 EU and Comparative Law Issues and Challenges Series 545, doi:10.25234/eclic/38130.

32 Li, Faure, and Havu (n 3); Reza Farajpour, 'The Role of Civil Liability in Artificial Intelligence Laws from the Perspective of Major Global Legal Systems' (2025) 5(1) Journal of Law and Political Studies 182, doi:10.48309/jlps.2025.518711.1353.

regime for AI, the EU has chosen to adapt and extend existing legal instruments while introducing targeted innovations where necessary. This incremental yet coordinated strategy allows for continuity with established legal principles while accommodating the unique challenges posed by AI.³³ Consequently, the EU framework can be seen as part of a broader ecosystem of AI governance that combines preventive and corrective mechanisms. Finally, the evolution of EU civil liability for AI-induced harm has broader implications beyond the European context. Through mechanisms often described as the “Brussels Effect”, EU regulatory standards tend to influence legal developments in other jurisdictions, particularly those seeking to align with international best practices or to access European markets.³⁴ In this sense, the EU’s approach to AI liability is not only a regional development but also a potential reference point for global legal reform. Its emphasis on risk-based regulation, evidentiary facilitation, and the coexistence of multiple liability models offers valuable insights for countries grappling with similar challenges.

3.2. Key EU liability models: Product liability and operator liability for AI

The evolution of civil liability for AI-induced harm in the EU has not only required doctrinal adaptation but also led to the consolidation of two central, increasingly complementary liability models: product liability and operator liability. In conventional settings, harm could often be traced either to a defective product or to negligent human conduct. Product liability remains essential because it captures defects embedded in the system as an object placed on the market. Together, these models signal a shift away from a narrow, actor-specific understanding of responsibility toward a more distributed and functional allocation of legal risk across the AI lifecycle.³⁵ This development is particularly significant in the EU context, where policymakers have sought to preserve doctrinal continuity while also ensuring that victims of AI-induced harm are not left without effective remedies. It also reflects a deeper policy judgement: responsibility should attach not only to those who create technological risks, but also to those who operationalise them, benefit from them, and are best positioned to prevent avoidable harm. In that sense, the EU’s emerging dual-model approach is not merely technical. It embodies a normative rethinking of accountability in digitally mediated societies, where risk is often generated collectively and materialises through interaction between product architecture and human deployment choices.

Within this framework, product liability remains a cornerstone of EU civil liability, yet its scope and conceptual foundations are being significantly expanded to accommodate digital

33 Katri Havu and others, ‘Regulating Liability for AI-Induced Harm: Developments in EU Law and Insights from a Research Project’ (Legal Studies Research Paper Series no 87, University of Helsinki 2024) doi:10.2139/ssrn.4861450.

34 Li, Schütte and Sankari (n 10).

35 Bertolini (n 2); Nadia Yas and others, ‘Civil Liability and Damage Arising from Artificial Intelligence’ (2023) 20(5) *Migration Letters* 430, doi:10.59670/ml.v20i5.3554.

and AI-based technologies. AI exposes these tensions with unusual clarity. An AI system may be unsafe not because of a manufacturing flaw in a physical device, but because of biased training data, inadequate model architecture, faulty updates, or vulnerabilities that emerge after deployment. The Revised Product Liability Directive³⁶ responds to these developments by explicitly extending the concept of “product” to software and AI-enabled systems, thereby bringing them within a modernised strict liability regime.³⁷ This move is highly consequential. First, it affirms that digital products are not beyond the reach of classical compensation mechanisms simply because they are intangible. Second, it recognises that defectiveness in AI must be assessed dynamically, considering not only the condition of a system when it enters the market, but also subsequent modifications, cybersecurity failures, and interactions between hardware and software components.³⁸ Third, strict liability remains especially attractive in the AI context because producers are usually better placed than victims to understand technical risks, maintain documentation, spread costs, and obtain insurance. Nevertheless, product liability has inherent limits. It is most effective where harm can plausibly be linked to a defect in the product itself. It is less effective where the system functions as designed but is used inappropriately, inadequately supervised, or deployed in unsuitable contexts. Thus, while the revised product liability model is indispensable, it cannot by itself address the full range of harms associated with AI. That is precisely why the EU debate has increasingly turned to operators as a separate locus of responsibility.

Operator liability has, therefore, emerged as a necessary complement to product liability because AI-induced harm often results from deployment decisions rather than from a defect alone. This category may include employers, hospitals, financial institutions, platform providers, public authorities, and other entities that rely on AI to structure decisions or deliver services. The justification for operator liability is both practical and normative. Practically, operators are often the actors closest to the harmful event. They choose whether to use a system, how to configure it, whether to maintain human oversight, and whether to rely on automated outputs in high-stakes settings. Normatively, they are often the actors who benefit most directly from AI's efficiency, scale, and predictive capacity and are, therefore, the appropriate bearers of the risks that accompany those benefits. This logic becomes particularly compelling where harm arises even though the AI system is not defective in the narrow product sense. For these reasons, scholars and policy debates increasingly support the development of operator-based liability rules, especially for high-

36 *ibid*

37 Farajpour (n 32); Nikos Th Nikolinakos, 'Reforming the EU Civil Liability Framework Applicable to Artificial Intelligence and Other Emerging Digital Technologies: Defective Products—the Revised Product Liability Directive' in Nikos Th Nikolinakos, *Adapting the EU Civil Liability Regime to the Digital Age: Artificial Intelligence, Robotics, and Other Emerging Technologies* (Springer 2024) 477, doi:10.1007/978-3-031-67969-8_9.

38 Buiten (n 7); Fossati (n 31).

risk AI applications.³⁹ In earlier EU discussions, operator liability was even associated with strict or quasi-strict liability for certain high-risk systems, reflecting the view that proof of individual fault may be too burdensome for victims where control is exercised through complex organisational processes. Even where strict liability is not adopted, operator liability remains important because it helps translate regulatory duties, such as monitoring, transparency, human oversight, and risk management, into civil accountability.⁴⁰ In that sense, it functions as a bridge between *ex ante* governance and *ex post* compensation.

The interaction between product liability and operator liability is, therefore, central to the EU's emerging approach to AI-induced harm.⁴¹ These models should not be treated as rivals. Instead, they address different but overlapping dimensions of technological risk. Product liability primarily concerns risks embedded in the design, manufacture, updating, and market placement of AI systems. Operator liability, by contrast, addresses risks arising from deployment, supervision, reliance, and contextual use. When combined, they create a layered liability structure that reflects the distributed nature of AI ecosystems. Nevertheless, the EU trajectory suggests that such complexity is not grounds for preserving outdated doctrinal boundaries. Rather, it is a reason to build a more flexible liability architecture, one that recognises that AI harm is often the cumulative result of design choices, organisational decisions, and deployment practices. In this respect, the coexistence of product liability and operator liability is one of the most important features of the EU model. It allows private law to move beyond the false choice between blaming the machine's maker and blaming its user, and instead to distribute accountability across the full chain of technological activity in a principled and pragmatic manner.⁴²

3.3. Challenges in applying traditional tort liability principles to artificial intelligence

The application of traditional tort principles to AI-induced harm reveals a series of structural challenges that stem from the distinctive characteristics of artificial intelligence systems. Classical tort law is built upon relatively stable assumptions about human agency, linear causation, and the foreseeability of harm. Unlike conventional tools, AI systems may generate outputs that are not directly programmed but instead emerge from training data, iterative learning, and probabilistic inference. As a result, the relationship between human action and harmful outcome becomes indirect and often opaque. This undermines the foundational requirement that liability be grounded in identifiable conduct attributable to

39 Arcila (n 28); Şamil Demir, 'Legal Liability of Artificial Intelligence (AI) Operators: A Global Analysis' (*Zenodo*, 12 June 2025) doi:10.5281/zenodo.15647905; Iwona Gredka-Ligarska, 'Employer's Vicarious Liability for Damage Caused by an AI Worker: Comparative Law Perspective' (2025) 21(1) *Utrecht Law Review* 36, doi:10.36633/ulr.1063.

40 Lodie, Juarez, and Karathanasis (n 19).

41 Lunca (n 12).

42 Havu and others (n 33).

a specific actor. In particular, the fragmentation of responsibility across developers, deployers, operators, and users complicates the allocation of liability, as no single actor may fully control or predict the system's behaviour. Scholars have, therefore, argued that AI challenges the anthropocentric foundations of tort law, which presuppose that harm can be traced back to a human decision or omission.⁴³ Moreover, the increasing reliance on AI in high-stakes domains such as healthcare, finance, and public administration amplifies these concerns, as errors may have significant and far-reaching consequences. Consequently, the difficulty is not merely one of adapting existing rules, but of reconsidering whether those rules remain conceptually adequate in the context of autonomous and adaptive technologies.

One of the most significant challenges concerns the concept of fault, which has traditionally served as a central organising principle of tort liability.⁴⁴ However, applying this standard to AI-related cases is far from straightforward. First, determining the appropriate standard of care becomes more complex when decisions are mediated by advanced technologies that require specialised technical knowledge. Judges and litigants may lack the expertise needed to assess whether the design, training, or deployment of an AI system met reasonable expectations. Second, even where a standard of care can be articulated, proving a deviation from that standard may be difficult due to the opacity of AI systems. The so-called "black box" problem means that it is often unclear how a particular output was generated, making it challenging to identify whether an error resulted from negligence, system limitations, or inherent uncertainty in the data. Third, AI systems may evolve over time, raising questions about whether faults should be assessed at the moment of design, deployment, or operation. These issues collectively weaken the effectiveness of fault-based liability as a mechanism for addressing AI-induced harm. As a result, scholars and policymakers have questioned whether traditional fault concepts can adequately capture the complexities of AI or whether alternative approaches, such as strict liability or hybrid models, are needed.⁴⁵

Closely related to the problem of fault is the challenge of establishing causation, which is another essential element of tort liability. However, AI systems disrupt this framework by introducing multiple layers of interaction and uncertainty. Harm may result from a combination of factors, including data quality, algorithmic design, system updates, user input, and environmental conditions. In such cases, isolating a single causal factor may be impossible or conceptually misleading.⁴⁶ Furthermore, the probabilistic nature of many AI systems means that outcomes are often expressed in terms of likelihood rather than certainty, which complicates the application of traditional causation tests such as the "but-for" test. The opacity of AI systems further exacerbates these difficulties, as claimants may lack access to the information necessary to reconstruct the causal chain. In response, some

43 Bertolini (n 2); Čerka, Grigienė and Sirbikytė (n 2).

44 Arcila (n 28).

45 Li, Faure, and Havu (n 3); Soyer and Tettenborn (n 2).

46 Yas and others (n 35).

legal scholars have proposed using presumptions of causation or burden-shifting mechanisms to address these evidentiary asymmetries.⁴⁷ Thus, the challenge of causation in AI cases highlights a fundamental tension between the need for effective victim protection and the preservation of coherent legal standards.

In addition to fault and causation, the principle of foreseeability, often used to limit liability to reasonably predictable harm, also becomes problematic in the context of AI.⁴⁸ However, AI systems, particularly those based on machine learning, may produce outcomes that are not fully foreseeable even to their creators. This is especially true for systems that learn from large datasets and adapt over time, as their behaviour may change in response to new inputs or evolving conditions. Consequently, the scope of foreseeable risk becomes difficult to define, raising questions about the fairness and effectiveness of imposing liability. If foreseeability is interpreted too narrowly, victims may be left without compensation for harm that could not reasonably have been anticipated. Conversely, if it is interpreted too broadly, developers and operators may face excessive liability for outcomes beyond their control, potentially discouraging innovation. Furthermore, foreseeability interacts with issues of standard-setting and regulatory compliance, as emerging legal frameworks such as the EU AI Act⁴⁹ may influence what risks are considered foreseeable by establishing baseline obligations for AI systems.

Beyond these doctrinal challenges, the application of traditional tort principles to AI also raises broader concerns about access to evidence and procedural fairness. This creates significant asymmetry between claimants and defendants, making it difficult for victims to gather the evidence needed to support their claims. Without adequate mechanisms for disclosure or access to information, the effectiveness of tort law as a tool for compensation and accountability may be severely limited.⁵⁰ At the same time, expanding access to such information raises concerns about confidentiality, security, and commercial interests. Legal systems must, therefore, balance the need for transparency with the protection of legitimate proprietary rights. These tensions further illustrate that the challenges posed by AI are not confined to substantive legal doctrines but also extend to procedural and institutional dimensions. Ultimately, the difficulties in applying traditional tort principles to AI-induced harm underscore the need for legal innovation, whether through adapting existing rules, introducing new liability mechanisms, or integrating regulatory and liability-based approaches.

47 Al-Dulaimi and Mohammed (n 7); Burylo (n 1).

48 Ali and Ahmed (n 1).

49 Regulation (EU) 2024/1689 (n 5).

50 Fikret Ertan, 'Artificial Intelligence and Liability for Damages' (2025) 9(40) *International Journal of Social Sciences* 297, doi:10.52096/usbd.9.41.16.

3.4. Implications of EU AI liability law and lessons for Vietnam

3.4.1. Transferability Criteria from the EU to Vietnam

Assessing the transferability of EU civil liability principles for artificial intelligence to the Vietnamese context requires a multidimensional framework that accounts for legal, institutional, technological, and socio-cultural factors. Legal compatibility entails evaluating how EU fault-based, strict, and operator liability rules align with existing provisions under Vietnam's Civil Code and broader tort law, while institutional capacity considers the readiness of regulatory bodies and courts to implement, monitor, and enforce AI liability effectively. Technological maturity addresses the sophistication and prevalence of high-risk AI applications, as well as the availability of expertise necessary for oversight, whereas cultural and legal norms involve understanding domestic expectations regarding accountability, risk allocation, and legal precedent. Integrating these criteria provides a structured and context-sensitive approach to determine which elements of the EU framework are normatively desirable, technically feasible, and practically adaptable, thereby informing the development of a hybrid AI liability regime that balances innovation with effective risk management and victim protection in Vietnam.

Table 1. Comparison of EU vs Vietnam applicability

Liability Type	EU Application	Vietnam Applicability	Notes
Fault-based	Standard tort liability; requires proof of negligence	Applicable for low-risk AI; traditional tort principles	Evidence burden high; courts need technical expertise
Strict liability	Revised Product Liability Directive; applies to software/AI	Could apply to high-risk AI products; would require legal amendment	Reduces burden on claimants; aligns with digital products
Operator liability	Emerging; covers deployment, supervision, benefit from AI	Could be introduced; requires clear legal definition of "operator"	Targets entities controlling AI deployment; complements product liability

Furthermore, an “operator” is conceptualised as any entity that exercises meaningful control over the deployment, configuration, supervision, or application of an AI system and derives economic, institutional, or operational benefits from its use. Legal thresholds for identifying an operator include the authority to: (i) alter system behaviour or settings, (ii) monitor outputs and performance, (iii) implement safeguards or mitigation measures,

and (iv) decide the scope, context, or domain in which the AI is applied. Entities meeting one or more of these thresholds should bear responsibility for AI-induced harm under a liability framework. This definition ensures that liability attaches not only to creators or developers but also to those who operationalise AI, providing clarity and enforceability in complex socio-technical systems.

3.4.2. Transferability Criteria: Adapting EU AI Liability Principles to Vietnam

The evolution of civil liability for AI-induced harm in the EU offers a valuable reference framework for Vietnam as it begins to confront similar regulatory challenges amid rapid digital transformation. However, any attempt to draw lessons must proceed cautiously. Legal transplantation is never a purely technical exercise; it involves adapting foreign legal concepts to domestic institutional conditions, legal culture, and levels of technological development. In Vietnam, the existing civil liability regime, primarily grounded in the 2015 Civil Code,⁵¹ reflects a traditional approach centred on fault, causation, and compensable damage. While these principles provide a necessary foundation, they are not specifically tailored to address the complexities of AI systems.⁵² As a result, the Vietnamese legal framework currently lacks clear guidance on allocating liability in situations involving autonomous or semi-autonomous technologies, particularly where harm arises from distributed and opaque processes. In this context, the EU model does not offer a ready-made solution, but it does provide a structured set of principles that can inform a gradual and context-sensitive reform process.⁵³

One of the most significant lessons for Vietnam lies in adopting a risk-based approach to AI regulation and liability. The EU AI Act⁵⁴ demonstrates how categorising AI systems by risk level can serve as a foundation for differentiated legal obligations and liability standards. For Vietnam, this approach could help address the current lack of prioritisation in regulatory responses to emerging technologies. Not all AI systems pose the same level of danger, and imposing uniform liability rules across all applications may be both inefficient and impractical.⁵⁵ In contrast, a risk-based framework would allow lawmakers to impose stricter requirements and potentially stricter liability regimes on high-risk applications, such as those used in healthcare, finance, or public decision-making. This would not only enhance protection for individuals but also provide greater legal certainty for businesses and developers. Moreover, linking liability standards to regulatory compliance, an approach implicit in the EU framework, could create incentives for adherence to safety and

51 Law of Vietnam no 91/2015/QH13 (n 11).

52 Law of Vietnam no 116/2025/QH15 ‘On Cybersecurity’ (adopted 10 December 2025) <<https://english.luatvietnam.vn/lawoncybersecurityno116-2025-qh15dateddecember102025ofthenationalassembly-422396-doc1.html>> accessed 5 April 2026.

53 Nguyen and Dao (n 10).

54 Regulation (EU) 2024/1689 (n 5).

55 Artzt and Dung (n 12); Ertan (n 50).

transparency requirements. Such an approach would be consistent with broader trends in comparative law, where liability increasingly interacts with regulatory standards to ensure both prevention and compensation.⁵⁶

A second important implication concerns the modernisation of product liability rules to encompass AI systems and digital products.⁵⁷ In Vietnam, existing product liability provisions remain largely oriented toward tangible goods, creating a gap in cases involving purely digital harm or harm arising from software-driven processes. Adapting these rules to include AI systems would require not only legislative amendment but also conceptual clarification of what constitutes a “defect” in a digital environment. Unlike traditional products, AI systems may evolve over time through updates or machine learning, raising questions about when and how to assess defectiveness. The EU’s approach, which considers factors such as post-market changes and cybersecurity vulnerabilities, provides a useful reference point in this regard.⁵⁸ At the same time, introducing strict liability for certain categories of AI-related harm could significantly reduce the evidentiary burden on claimants, thereby enhancing access to justice. However, such reforms must be carefully calibrated to avoid imposing excessive burdens on domestic enterprises, particularly small and medium-sized firms that may lack the resources to manage complex liability risks.

In addition to product liability, Vietnam can draw important lessons from the concept of operator liability to address gaps in accountability.⁵⁹ In such cases, focusing exclusively on producers would leave significant areas of responsibility unaddressed. Recognising operator liability would allow Vietnamese law to capture the role of organisations and individuals who exercise control over AI systems and benefit from their use. This is particularly relevant in sectors such as finance, healthcare, and public administration, where AI is increasingly used to support or automate decisions with significant consequences. Introducing operator-based liability does not necessarily require the creation of entirely new legal categories; rather, it may involve clarifying and extending existing doctrines related to fault, vicarious liability, and professional responsibility. For example, organisations that deploy high-risk AI systems could be subject to heightened duties of care, including obligations to ensure human oversight, conduct risk assessments, and monitor system performance. Failure to meet these duties could then form the basis for liability in the event of harm.⁶⁰

Another critical area for reform concerns evidentiary rules and procedural mechanisms. As highlighted in the EU AI Liability Directive,⁶¹ one of the main obstacles to effective

56 Ertan (n 50); Li, Schütte and Sankari (n 10); Havu and others (n 33).

57 Al-Dulaimi and Mohammed (n 7); Tomasz Braun, ‘Liability for Artificial Intelligence Reasoning Technologies – A Cognitive Autonomy that Does not Help’ [2025] *Corporate Governance*, doi:10.1108/cg-09-2024-0471; Farajpour (n 32).

58 Buiten (n 7); Fossati (n 31).

59 Artzt and Dung (n 12).

60 Demir (n 39); Gredka-Ligarska (n 39).

61 AI Liability Directive (n 6).

compensation in AI-related cases is the information asymmetry between claimants and defendants. In Vietnam, this problem is likely to be even more pronounced due to limited technical expertise and the absence of specialised procedures for handling complex technological disputes. Therefore, adopting mechanisms that facilitate access to evidence, such as disclosure obligations or judicial powers to order the production of relevant information, could significantly improve the effectiveness of the liability system. For instance, where a claimant can demonstrate that a defendant has violated established safety or regulatory standards, a presumption could arise that such a violation contributed to the harm. While such measures must be carefully designed to avoid abuse, they offer a pragmatic way to address the evidentiary challenges posed by AI systems.⁶² Furthermore, capacity-building within the judiciary, including training in digital technologies and the use of expert evidence, will be essential to ensure that courts can effectively adjudicate AI-related disputes.

Finally, it is important to emphasise that legal reform in this area should proceed incrementally and in coordination with broader policy developments. The EU experience demonstrates that civil liability cannot be considered in isolation but must be integrated with regulatory frameworks, data protection laws, and sector-specific rules.⁶³ At the same time, policymakers should remain attentive to the risks of over-regulation, particularly in a context where technological innovation is still developing. Striking an appropriate balance between encouraging innovation and ensuring accountability will require continuous evaluation and adjustment of legal rules. In this regard, the EU model offers not only substantive lessons but also methodological insights, particularly in its use of phased reform, stakeholder consultation, and evidence-based policymaking.⁶⁴ Ultimately, the goal for Vietnam should not be to replicate the EU framework in its entirety, but to develop a coherent and context-sensitive approach that draws on international experience while addressing domestic needs and constraints.

3.5. A proposed hybrid civil liability framework for AI in Vietnam

The preceding analysis demonstrates that neither traditional fault-based liability nor a purely strict liability regime is sufficient to address the complexities of AI-induced harm. Accordingly, this article proposes a Hybrid AI Liability Model for Vietnam (VHAIL Model) that combines risk-based differentiation, functional allocation of responsibility, and procedural adaptation. First, the framework adopts a risk-based classification of AI systems, drawing inspiration from the EU AI Act.⁶⁵ This classification serves as the foundation for calibrating liability rules. For low-risk systems, traditional fault-based liability remains appropriate, as the risks are limited and manageable. For high-risk systems, such as those used in healthcare, finance, or public administration, a stricter liability regime should be

62 Arcila (n 28); Havu and others (n 33).

63 Maydanyk R, Maydanyk N and Velykanova (n 1); Świerczyński and Więckowski (n 8).

64 Lunca (n 12); Fossati (n 31).

65 AI Liability Directive (n 6).

introduced, either as strict liability or a rebuttable presumption of fault. Second, the framework distinguishes clearly between product liability and operator liability. Product liability should apply to defects embedded in AI systems, including errors in design, training data, and updates, as well as cybersecurity vulnerabilities. This requires expanding the legal definition of “product” in Vietnamese law to include software and AI-enabled systems. At the same time, operator liability should apply to entities that deploy, control, or benefit from AI systems in practice. Operators should be subject to heightened duties of care, including obligations to provide human oversight, conduct risk assessment, and monitor systems.

Third, the framework introduces evidentiary facilitation mechanisms to address information asymmetry. Courts should be empowered to order the disclosure of relevant technical information, subject to safeguards for trade secrets. This approach balances fairness to claimants with procedural protections for defendants. Fourth, the framework emphasises functional allocation of liability across the AI value chain. Rather than seeking a single liable party, the law should recognise that AI-induced harm often results from the interaction of multiple actors. This ensures that responsibility is distributed among those best positioned to prevent harm and absorb its costs. Finally, the proposed model adopts an incremental and adaptive approach to legal reform. Instead, pilot regulations, sector-specific rules, and gradual legislative amendments should be used to test and refine liability mechanisms over time. Practically, the VHAIL Model seeks to reconcile three key objectives: effective victim compensation, fair allocation of risk, and the promotion of responsible innovation. By integrating lessons from EU law with domestic legal conditions, it offers a practical and theoretically grounded pathway for developing AI liability in Vietnam. The VHAIL Model, thus, represents a structured normative contribution to AI liability discourse in emerging legal systems.

4 CONCLUSION

The rise of artificial intelligence has exposed the growing inadequacy of civil liability frameworks built for an earlier technological era. AI-induced harm does not fit neatly within the conventional architecture of tort law. The difficulty lies not in recognising that AI can cause legally cognisable damage, but in determining how responsibility should be attributed when harm arises from distributed design, probabilistic inference, adaptive learning, and context-dependent deployment. For that reason, the challenge facing contemporary legal systems is not simply one of doctrinal extension. Rather, it is one of structural recalibration: the law must preserve its core functions of compensation, deterrence, and corrective justice while responding to a new technological environment in which agency, control, and risk are no longer concentrated in a single human actor. Within this broader transformation, the European Union provides the most developed contemporary example of how civil liability can be rethought without being conceptually abandoned. The EU response is significant precisely because it does not rely on a single legal

instrument or a single doctrinal solution. Instead, it combines *ex ante* risk regulation with *ex post* liability mechanisms, thereby recognising that prevention and compensation must operate together. The EU AI Act establishes a risk-based governance structure that differentiates AI systems by the level of risk they pose, while the proposed AI Liability Directive and the Revised Product Liability Directive seek to modernise evidentiary rules and expand pathways to compensation. This development is especially important because it reflects a shift from a purely fault-centred logic toward a more victim-oriented and risk-sensitive model of accountability, particularly in situations where technical opacity would otherwise make legal redress illusory. Product liability remains indispensable because it addresses defects embedded in software, digital systems, and AI-enabled products. Yet it cannot fully capture harms arising from unsafe deployment, deficient human oversight, or inappropriate institutional reliance on algorithmic outputs. Therefore, operator liability has become an equally important conceptual development. By linking accountability to control, supervision, and benefit, operator liability fills a critical gap left by product-centred models and recognises that many AI risks emerge not only from design, but from implementation.

For Vietnam, the comparative lessons are both clear and qualified. They are clear because the current domestic framework, centred largely on the 2015 Civil Code,⁶⁶ is not yet equipped to respond coherently to AI-induced harm. It lacks explicit rules for allocating liability among developers, deployers, and operators; it offers limited procedural tools for addressing evidentiary asymmetry; and it does not yet incorporate a risk-based approach capable of distinguishing between low- and high-risk AI applications. Nevertheless, the lessons are also qualified because legal transplantation cannot be mechanical. Vietnam should not replicate the EU model in its entirety, nor should it assume that regulatory sophistication alone guarantees legal effectiveness. In that sense, the principal value of the EU framework lies not in providing a rigid template, but in offering a set of transferable principles: risk differentiation, clearer allocation of responsibility, expanded product liability for digital systems, stronger operator duties, facilitated access to evidence, and closer coordination between regulatory obligations and civil remedies. Accordingly, the most appropriate path for Vietnam is one of incremental and context-sensitive reform. The first step is conceptual: Vietnamese law must acknowledge that AI-induced harm raises problems that cannot always be resolved through conventional tort reasoning alone. The second step is legislative: product liability rules should be modernised to encompass software and AI systems, while existing doctrines on fault, professional responsibility, and organisational liability should be clarified to capture the conduct of deployers and operators. The third step is procedural: courts must be given more effective tools to address information asymmetry, including access to technical evidence and, where appropriate, carefully designed presumptions linked to violations of legal or regulatory duties. Finally, these reforms should be embedded within a broader national framework for AI governance so that civil liability functions not as an isolated

⁶⁶ Law of Vietnam no 91/2015/QH13 (n 11).

corrective device, but as one component of a coherent system of technological accountability. The EU experience demonstrates that such a balance is difficult but achievable. For Vietnam, the task ahead is to translate that insight into a legal framework that effectively protects victims, allocates risk fairly, and supports responsible innovation in an increasingly intelligent digital economy. The proposed model for Vietnam illustrates how such a transformation can be achieved in practice, thereby contributing to broader debates on AI governance and liability in emerging economies.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЦИВІЛЬНО-ПРАВОВА ВІДПОВІДАЛЬНІСТЬ ЗА ШКОДУ, ЗАВДАНУ ШТУЧНИМ ІНТЕЛЕКТОМ: УРОКИ ЗАКОНОДАВСТВА ЄС ДЛЯ НОВОЇ ПРАВОВОЇ БАЗИ В'ЄТНАМУ

Ву Тхі Тхань Хуєн, Ву Тхі Лан Хионг, Нгуєн Тхі То Нью, Фам Фионг Тхао та До Тхі Хоа*

АНОТАЦІЯ

Вступ. Штучний інтелект дедалі частіше завдає шкоди, яка видає виклик традиційним підходам до цивільно-правової відповідальності, які побудовані довкола вини людини, прямого причинно-наслідкового зв'язку та матеріальних об'єктів. У цій статті розглядається, як підходи Європейського Союзу до цивільної відповідальності, пов'язаної зі штучним інтелектом, можуть вплинути на правову базу В'єтнаму. Мета дослідження — охарактеризувати основні моделі відповідальності, розроблені в законодавстві ЄС, з'ясувати доктринальні труднощі, які штучний інтелект створює для традиційних принципів деліктного права, та оцінити, які елементи можуть бути адаптовані до В'єтнаму з урахуванням відповідного контексту.

Методи. З методологічного погляду в дослідженні застосовано дизайн якісного правового кейс-стаді за Йіном (Yin), де ЄС розглядається як інструментальний кейс, а також проведено тематичний аналіз вторинних правових і наукових джерел у розумінні Браун та Кларк (Braun and Clarke).

Результати та висновки. Результати показують, що ЄС рухається до багаторівневого режиму на основі оцінки ризиків, який поєднує попереднє регулювання (*ex ante*) з подальшою

відповідальністю (*ex post*), зокрема через Регламент (ЄС) 2024/1689 Європейського Парламенту та Ради від 13 червня 2024 року (Закон ЄС про ШІ), запропоновану Директиву про відповідальність за шкоду, заподіяну ШІ, та Оновлену директиву про відповідальність за продукцію. Відповідальність за продукцію та відповідальність оператора постають як взаємодоповнювальні механізми, тоді як полегшення доказування стає центральним елементом там, де непрозорість та розподілена відповідальність ускладнюють доведення вини. Відповідно, у статті зроблено висновок, що В'єтнаму слід проводити поетапні реформи, зосереджені на диференціації ризиків, відповідальності за цифрові продукти, посиленні обов'язків операторів та покращенні доступу до доказів — і все це в межах цілісної системи управління ШІ.

Ключові слова: штучний інтелект; відповідальність ШІ; цивільно-правова відповідальність; Акт ЄС про ШІ; відповідальність за якість продукції.

TÓM TẮT BẰNG TIẾNG VIỆT*

Bài báo nghiên cứu

TRÁCH NHIỆM BỒI THƯỜNG THIẾT HẠI NGOÀI HỢP ĐỒNG DÂN SỰ ĐỐI VỚI THIẾT HẠI DO TRÍ TUỆ NHÂN TẠO GÂY RA: BÀI HỌC TỪ PHÁP LUẬT LIÊN MINH CHÂU ÂU CHO VIỆC HOÀN THIỆN KHUNG PHÁP LÝ CỦA VIỆT NAM

Vũ Thị Thanh Huyền, Vũ Thị Lan Hương, Nguyễn Thị Tố Như, Phạm Phương Thảo, Đỗ Thị Hoa*

TÓM TẮT

Bối cảnh: Sự phát triển nhanh chóng của trí tuệ nhân tạo đang làm phát sinh nhiều dạng thiệt hại mới, đặt ra thách thức đối với các quy định truyền thống về trách nhiệm bồi thường thiệt hại ngoài hợp đồng, vốn chủ yếu dựa trên lỗi của con người, mối quan hệ nhân quả trực tiếp và các sản phẩm hữu hình. Bài viết phân tích cách tiếp cận đang được Liên minh châu Âu xây dựng đối với trách nhiệm dân sự liên quan đến trí tuệ nhân tạo, qua đó rút ra những kinh nghiệm có giá trị tham khảo cho Việt Nam trong quá trình hoàn thiện khung pháp lý về lĩnh vực này. Mục tiêu của bài viết là nhận diện các mô hình trách nhiệm chủ yếu trong pháp luật của liên minh Châu Âu, làm rõ những khó khăn về mặt lý luận pháp lý mà trí tuệ nhân tạo đặt ra đối với các nguyên tắc truyền thống của trách nhiệm ngoài hợp đồng, đồng thời đánh giá khả năng vận dụng một số yếu tố phù hợp với điều kiện thực tiễn của Việt Nam.

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Phương pháp: Về phương pháp nghiên cứu, bài viết sử dụng phương pháp nghiên cứu trường hợp pháp lý định tính theo cách tiếp cận của Yin, trong đó các quy định của pháp luật liên minh Châu Âu được xem là một trường hợp nghiên cứu mang tính công cụ. Nghiên cứu phân tích các nguồn tài liệu pháp lý và học thuật thứ cấp bằng phương pháp phân tích chủ đề theo cách tiếp cận của Braun và Clarke.

Kết quả và Kết luận: Kết quả nghiên cứu cho thấy pháp luật của Liên minh Châu Âu đang từng bước hình thành một cơ chế pháp lý nhiều tầng, dựa trên mức độ rủi ro, kết hợp giữa quản lý phòng ngừa trước khi thiệt hại xảy ra và cơ chế trách nhiệm sau khi thiệt hại phát sinh, thể hiện rõ qua Đạo luật Trí tuệ nhân tạo, Dự thảo Chỉ thị về Trách nhiệm đối với Trí tuệ nhân tạo và Chỉ thị Trách nhiệm Sản phẩm sửa đổi. Trong cơ chế này, trách nhiệm sản phẩm và trách nhiệm của người vận hành được xem là hai công cụ bổ trợ cho nhau. Đồng thời, việc hỗ trợ, tạo thuận lợi cho bên bị thiệt hại trong tiếp cận và chứng minh chứng cứ trở thành vấn đề then chốt, nhất là trong bối cảnh tính thiếu minh bạch của hệ thống trí tuệ nhân tạo và sự phân tán trách nhiệm giữa nhiều chủ thể khiến việc chứng minh thiệt hại, lỗi và quan hệ nhân quả trở nên khó khăn. Từ đó, bài viết cho rằng Việt Nam nên lựa chọn hướng cải cách từng bước, tập trung vào phân loại trách nhiệm theo mức độ rủi ro, mở rộng trách nhiệm đối với sản phẩm số, tăng cường nghĩa vụ của chủ thể vận hành hệ thống trí tuệ nhân tạo và cải thiện cơ chế tiếp cận chứng cứ trong một khuôn khổ quản trị trí tuệ nhân tạo thống nhất.

Từ khóa: Trí tuệ nhân tạo; trách nhiệm pháp lý đối với AI; trách nhiệm dân sự; Đạo luật Trí tuệ nhân tạo của Liên Minh Châu Âu; trách nhiệm sản phẩm.

Research Article

THE INTERNATIONAL LEGAL FRAMEWORK FOR THE DIGNIFIED RETURN AND SECURITY OF AZERBAIJANIS DEPORTED FROM THE PRESENT-DAY ARMENIA

Afsar Sadigov and Saftar Rahimli*

ABSTRACT

Background: *The forced displacement of the Western Azerbaijani population, initially uprooted from territories occupied by Russia in 1920 and subsequently transferred to the jurisdiction of Armenia, constitutes a critical nexus in international law regarding the repatriation, security, and restoration of rights for displaced cohorts. Under the doctrine of jus cogens, the prohibition of deportation is categorised as a peremptory norm of international law, mandating universal adherence and triggering state responsibility for its breach. The legal framework governing such cases is multifaceted, drawing on International Humanitarian Law (IHL) to address populations displaced by military aggression, while also invoking the principles of State responsibility for international wrongful acts. These principles necessitate comprehensive reparations, including restitutio in integrum (restoration of the status quo ante), compensation, rehabilitation, satisfaction, and robust guarantees of non-repetition.*

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From a normative perspective, the Turkic-Muslim population deported from Armenia remains under the protective umbrella of the 1907 Hague Regulations (IV) and the 1949 Geneva Convention (IV). While extant scholarship has extensively documented the historical and normative dimensions of deportation, a significant analytical lacuna persists regarding the specific international legal mechanisms required to operationalise a dignified return and ensure long-term security. This study seeks to address this gap by synthesising international legal norms, individual criminal accountability, and comparative state practices to propose a definitive framework for legal remedies and international protective instruments.

Method: *This study employs a legal-doctrinal and comparative-legal methodology, supplemented by a historical-legal review of archival sources to reconstruct the context and intent of the 1920, 1948–1956, and 1988 deportations. The research systematically interrogates international instruments and scholarly literature to define the parameters of deportation, genocide, and State responsibility under jus cogens norms. By synthesising international jurisprudence, including rulings from the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), the European Court of Human Rights (ECtHR), and the Eritrea-Ethiopia Claims Commission (EECC), with comparative reparations practices, the study proposes a remedial framework encompassing model treaties, monitoring systems, and domestic legislative measures.*

Results and Conclusions: *The displaced Western Azerbaijani population maintains an inalienable right to a dignified return and holistic security under international law, predicated upon the jus cogens prohibition of forced displacement. Under the international legal regime of State responsibility, the breach of these peremptory norms requires a multi-layered remedial approach, encompassing restitutio in integrum, financial compensation, rehabilitation, satisfaction, and robust guarantees of non-repetition, as well as the rigorous prosecution of individuals for international crimes. Normatively, the Turkic-Muslim population expelled from Armenia remains under the continuous protection of both historical and contemporary instruments, bridging the gap between IHL and International Human Rights Law (IHRL). Practical enforcement of these rights may be sought through international judicial fora, such as the ICJ and the ECtHR, further bolstered by domestic legislative frameworks that accord formal recognition to their status as victims of genocidal intent. Collectively, these legal architectures provide a definitive and actionable basis for restoring historical rights, ensuring institutional accountability, and facilitating a safe, sustainable, and dignified repatriation to their ancestral homelands.*

1 INTRODUCTION

The aim of this research is to identify the international legal solutions for the dignified and secure return of Azerbaijanis deported from the territory of present-day Armenia. Central to this study is determining the legal status of the deported population and formulating proposals and conclusions based on the legal consequences of that status. Furthermore, the

research aims to establish the substantive legal and institutional mechanisms necessary to ensure a return that adheres to international safety standards.

The primary object of this study is the deportation of the Azerbaijani (Turko-Muslim) population from present-day Armenia, alongside the complex issues regarding their dignified return and security. This article seeks to provide a comprehensive legal qualification of the forced displacements. It critically analyses whether these deportations constitute crimes against humanity, war crimes, or ethnic cleansing driven by racial and religious discrimination. Finally, the research examines these actions within the context of genocide, assessing whether they were executed under a systematic plan and policy aimed at the total or partial physical or biological destruction of the group.

In international legal scholarship, deportation measures, categorised as crimes against humanity, ethnic cleansing, and genocide, have been extensively studied by prominent scholars such as W. Schabas, A. Bossow, V. Chetail, and H. Travis, among others.¹ However, the specific legal status of Azerbaijanis deported from Armenia, as well as the international legal frameworks governing their dignified return and security, have largely remained outside the scope of comprehensive academic inquiry. A notable exception is the analysis provided by Malcolm Shaw and Naomi Hart in their report, *"Report on War Crimes committed during the occupation of the territories of the Republic of Azerbaijan and the responsibility of the Republic of Armenia."*² Yet, even this significant contribution primarily serves as a factual finding (constatation of facts) rather than a dedicated legal exploration of the mechanisms for repatriation and long-term security. Consequently, this study seeks to fill this critical gap by providing a rigorous legal analysis of the status and rights of the displaced Azerbaijani population. Furthermore, these existing works do not address the legal status of Azerbaijanis deported from West Azerbaijan (present-day Armenia). While Azerbaijani historiography features various studies in this field, notably the research conducted by scholars such as A. Gurbanli, A. Pashayev, J. Gasimov, and B. Najafov, based on archival materials from the USSR (Russian Federation), the Republic of Azerbaijan, and the Republic of Turkiye, these remain primarily historical in nature.³ The relevance of the

- 1 William A Schabas, *An Introduction to the International Criminal Court* (6th edn, CUP 2020); William A Schabas, *Genocide in International Law: The Crime of Crimes* (3rd edn, CUP 2025); William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010); Anja Bossow, 'Deportation as Torture' (2025) 57 New York University Journal of International Law and Politics 323; Vincent Chetail, 'Is There any Blood on my Hands? Deportation as a Crime of International Law' (2016) 29(3) Leiden Journal of International Law 917, doi:10.1017/S0922156516000376; Hannibal Travis, 'On the Original Understanding of the Crime of Genocide' (2012) 7(1) Genocide Studies and Prevention 30, doi:10.3138/gsp.7.1.30.
- 2 Malcolm Shaw and Naomi Hart, *Report On War Crimes in the Occupied Territories of the Republic of Azerbaijan and the Republic of Armenia's Responsibility* (Red N Line LLC 2020).
- 3 Asad Gurbanli, *From the History of the Deportation of Azerbaijanis from the Armenian SSR (1947–1953)* (Turxan NPB 2018) [in Azerbaijani]; Atakhan Pashayev, *Resettlement* (Azernashr 1995) [in Azerbaijani]; Jalal Gasimov, *From Repression to Deportation* (Mutercim 1998) [in Azerbaijani]; Bakhtiyar Najafov, *Deportation* (Chashioglu 1998) [in Azerbaijani].

proposed topic is directly linked to the geopolitical processes currently unfolding in the Caucasus and the broader region. Regional peace and security remain precarious; without a foundation in the strict rule of law, unfounded mutual claims, disputes, and ethnic conflicts become inevitable. Regrettably, the establishment of such a rigorous legal order often contradicts the interests of certain political "leaders." The contemporary international system faces significant challenges, including the gross violation of universally accepted **jus cogens** norms and international obligations (such as sovereign equality and the prohibition of the use or threat of force). This is often manifested through the prioritisation of domestic law over international obligations, contrary to Article 27 of the 1969 Vienna Convention on the Law of Treaties—as seen in the "Special Military Operation" justification for military intervention or the extraterritorial application of national laws for "national interests."⁴ The deliberate obstruction or failure of international security mechanisms continues to encourage various nihilistic views regarding the efficacy of international law. Undoubtedly, the core of the problem lies in the fact that the victors of World War II established "extraordinary powers" within the UN Charter,⁵ which act in contradiction of and in violation of the principle of sovereign equality of states. It must not be forgotten that the blood of millions of victims from two world wars rests upon the conscience of those who "operate" the international legal institutions. Despite the inherent weaknesses in enforcement mechanisms, international law remains the essential framework through which we define what is moral and humanitarian.

Modern international law is the culmination of lessons learned from the catastrophes of two world wars. Crimes against modern international law trace their roots back to the violations of the 1907 Hague Convention on the Laws and Customs of War on Land, the Treaty of Versailles (which formalised the end of World War I and incorporated the Wilsonian principles), and the Covenant of the League of Nations.

The Azerbaijani people are among those who have endured the consequences of these systemic violations. By violating the international legal norms of the time, many of which remain in force today, Russia occupied the Azerbaijan Democratic Republic, the first democratic republic established in the East, through military aggression and subsequently partitioned its territories. In a blatant breach of international humanitarian law, a systematic alteration of the demographic structure of these territories ("West Azerbaijan") was initiated. The deportation of hundreds of thousands of indigenous Azerbaijanis was compounded by a secondary crime: the illegal settlement of the occupying state's population into their ancestral homelands.

4 Vienna Convention on the Law of Treaties (adopted 23 May 1969) [1987] UNTS 1155/331.

5 United Nations Charter (adopted 26 June 1945) <<https://www.un.org/en/about-us/un-charter>> accessed 15 January 2026.

2 THE PROHIBITION AND NORMATIVE LEGAL CONCEPT OF DEPORTATION AS AN INTERNATIONAL CRIME

Derived from the Latin term *deportation*, meaning "expulsion" or "exile," deportation is generally defined as the forced removal of an individual or a specific group (population) from their state of residence to another territory, typically escorted by military forces.⁶ It constitutes a legal violation or a criminal measure of a collective nature, perpetrated during both peacetime and periods of armed conflict against civilian populations, including individuals, minorities, and indigenous peoples.⁷

The initiatives to regulate deportation as a legal violation initially emerged within the domestic legislative frameworks of sovereign states.⁸ However, as the phenomenon acquired a more pervasive and transboundary character, it necessitated organised international legal cooperation. Through subsequent adoption of international norms and landmark judicial decisions, the legal regulation of deportation has been formalised, and its definitive legal definition has been strictly codified.

The classification of deportation as a prohibited act under international law is fundamentally grounded in four intertwined constituent elements. Primarily, the act must be conducted in a manner that is contrary to international law⁹ and specifically directed against a civilian population.¹⁰ A critical factor in this legal qualification is the forcible nature of the displacement, where individuals are removed from their permanent or ancestral homelands through coercion, force, or the threat thereof.¹¹ Furthermore, for such actions to constitute international crimes, they must be carried out as part of a widespread or systematic policy, indicating a planned and deliberate intent by the perpetrators.¹² When analysing deportations that are contrary to international law, it is observed that such violations typically manifest in three distinct standard scenarios. The first involves the mass or collective deportation of aliens, a practice currently observed in the domestic policies of several states, including the USA, the UK, and the Russian Federation.¹³ This practice stands

6 Rome Statute of the International Criminal Court (adopted 17 July 1998) [2004] UNTS 2187/3, art 7, para 2(d); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) [1950] UNTS 75/287, art 49. See also, Emily Haslam, 'Population, Expulsion and Transfer' *Max Planck Encyclopedias of International Law* (2011) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e861>> accessed 15 January 2026.

7 *Prosecutor v Delalić and others* Case no IT-96-21-T, Celebici (ICTY Chamber II, 16 November 1998) para 583.

8 Bossow (n 1) 329.

9 Schabas, *The International Criminal Court* (n 1) para 139.

10 *Prosecutor v Ruto, Kosgey, and Sang* Case no ICC-01/09-01/11 (ICC Pre-Trial Chamber II, 23 January 2012) para 164.

11 *Prosecutor v Krstić* Case no IT-98-33-T (ICTY, 2 August 2001) para 529.

12 *Prosecutor v Kordić and Čerkez* Case no IT-95-14/2-A (ICTY Appeals Chamber, 17 December 2004) para 94.

13 Lukas Schmid, 'Deportation, Harms and Human Rights' (2021) 14(2) *Ethics & Global Politics* 98, doi:10.1080/16544951.2021.1926083.

in direct violation of major international instruments, such as Article 4 of Protocol No. 4 to the European Convention on Human Rights (ECHR), Article 22(1) of the International Convention on the Protection of the Rights of All Migrant Workers, and Article 13 of the International Covenant on Civil and Political Rights (ICCPR).¹⁴

The second scenario concerns individual deportations carried out against specific persons in total disregard of the procedural guarantees required by international law, particularly those stipulated under the ICCPR.¹⁵ Finally, the most egregious form of this violation is discriminatory deportation, where forced displacement is motivated by ethnic, religious, or racial prejudice. This form of deportation often serves as a primary tool for demographic engineering and systemic persecution. The Universal Declaration of Human Rights (UDHR), as a cornerstone of international human rights law, explicitly states in Article 9 that "no one shall be subjected to arbitrary arrest, detention, or exile."¹⁶ However, Protocol No. 4 of the 1950 European Convention on Human Rights (ECHR) links the prohibition of deportation to the institution of citizenship, specifying in Article 3.1 that "no one shall be expelled, by means either of an individual or a collective measure, from the territory of the State of which he is a national."

In our view, tethering legal protection solely to citizenship status inadvertently limits the safeguards afforded by other instruments, such as the 1951 Convention Relating to the Status of Refugees.¹⁷ Consequently, we contend that Article 9 of the UDHR and Article 12.1 of the International Covenant on Civil and Political Rights (ICCPR), which stipulates that "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence", offer a more accurate and comprehensive legal framework. This broader interpretation aligns more effectively with the fundamental concepts of international humanitarian law.

Furthermore, it is legally inconsistent to link the prohibition of deportation to a citizenship status imposed through illegal military occupation. The legal focus must remain on the population's established residency in a specific territory. It is illogical to bind the right not to be deported to a citizenship (such as that of the USSR or Armenia) that was forcibly instituted following military aggression, specifically, the 1920 occupation of the Azerbaijan Democratic Republic and the subsequent transfer of indigenous lands to Armenia.

14 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); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990) [2004] UNTS 2220/3; International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966 UNGA Res 2200 (XXI) [1983] UNTS 999/171.

15 Chetail, 'Is There Any Blood on My Hands?' (n 1) 918.

16 Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948 UNGA Res 217 A) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 15 January 2026.

17 Convention Relating to the Status of Refugees (adopted 28 July 1951) <<https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention>> accessed 15 January 2026.

Therefore, the relevant provisions of Protocol No. 4 should have implemented the inclusive wording of Article 9 of the UDHR, ensuring that "no one", regardless of imposed citizenship, can be forcibly expelled from their country.

Massive, systematic, and widespread crimes of deportation as fundamental human rights violations were a defining characteristic of the USSR, an entity established by the Russian Federation. In an attempt to partially mitigate the consequences of these crimes, a framework agreement was signed in 1992 by several post-Soviet states (with the exception of Georgia and the Baltic states), titled the "Agreement on Issues Related to the Restoration of the Rights of Deported Persons, National Minorities, and Peoples". The Azerbaijani people were among the numerous ethnic groups subjected to forced displacement during the Soviet era, a list that includes Ukrainians, Crimean Tatars, Jews, Poles, Lithuanians, Latvians, Estonians, Meskhetian Turks, Talysh, and others. These state-sponsored actions were not merely isolated incidents but were part of a broader, systemic policy of demographic manipulation and political repression. Despite being strictly prohibited under international law, specifically the 1907 Hague Convention (IV) on the Laws and Customs of War on Land and the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War¹⁸, the Azerbaijani Turkic-Muslim population, as an indigenous people, has been subjected to repeated waves of mass deportation.

In blatant defiance of these legal frameworks, hundreds of thousands of Azerbaijanis were forcibly expelled from Armenia through systematic military and administrative measures, most notably during the periods of 1948–1956 and 1988. These actions, characterised by their massive scale and coercive nature, constitute a direct violation of the protections afforded to civilian populations under international humanitarian law and represent a profound breach of the established norms governing the treatment of indigenous inhabitants.¹⁹ To ensure the punishment of these crimes and establish comprehensive international legal responsibility, it is first necessary to address the normative definition and the grounds for prosecuting this offence. Given that deportation predominantly occurs during armed conflicts, its normative definition must be sought within the framework of International Humanitarian Law.

International Humanitarian Law distinguishes deportation, which constitutes a criminal offence, from internment and evacuation.²⁰ Regarding internment or evacuation, as stated in Article 49 (paragraph 2) of the Fourth Geneva Convention, "the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or

18 Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907) <<https://www.refworld.org/legal/agreements/hague/1907/31788>> accessed 15 January 2026; Geneva Convention (IV) (n 6).

19 State Archive of the Republic of Azerbaijan, f 411, op 38, d 13, l 38.

20 Vincent Chetail, 'The Transfer and Deportation of Civilians' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 1213.

imperative military reasons so demand". This provision is intended to ensure the safety of the population. Specifically, internment is carried out if individuals pose a threat to the occupying power, with their return subject to the cessation of hostilities (Articles 41-42 and 132-134 of the Fourth Convention, "right of return").²¹

In contrast to internment, deportation is strictly prohibited under international humanitarian law. Article 49 of the Fourth Convention specifies that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." Furthermore, the legal nature of this act is established within the same instrument; deportation is categorised as a violation of international law that entails individual criminal responsibility (Article 147). In the event of a breach of this established international obligation, what responsibilities arise for states, and how should accountability be ensured?

3 THE INTERNATIONAL LEGAL RESPONSIBILITY OF THE STATE FOR DEPORTATION (REPARATIONS)

International legal responsibility of a State arises from the breach of its accepted international legal obligations. It entails the duty of the state that has committed an internationally wrongful act to eliminate the consequences of the damage caused to another state or to states. In international law, internationally wrongful acts (international delicts) are classified as crimes of an international character and international crimes. Particularly dangerous delicts are crimes that violate the fundamental principles and norms of international law that concern the international community as a whole and, as a result, negatively impact the entire system of international relations. International crimes include acts of aggression, genocide, apartheid, crimes against humanity, war crimes, including deportation, and others. According to a general principle of international law, an internationally wrongful act by a subject gives rise to its international legal responsibility. A number of provisions of the UN Charter, including Articles 39, 41, 42, and 51, determine the procedures for enforcing responsibility for international crimes against international peace and security. The purposes of international legal responsibility include:

- prevention (ensuring the prevention of future violations by holding the delinquent state accountable),
- elimination of the harmful consequences of the wrongful act.

²¹ Geneva Convention (IV) (n 6).

Measures of international legal responsibility include:

- restitution, including legal restitution, in the form of restoring rights by annulment of unlawful acts (for example, provisions in Armenia's Declaration of Independence and Constitution containing territorial claims against neighbouring states, or the well-known 1989 decision of the Supreme Soviet on the incorporation of the territory of the Republic of Azerbaijan into Armenia), as a form of reparation; and
- punitive (repressive) measures against the delinquent state (for example, measures taken against Germany at the end of the Second World War, or against Iraq for its intervention in Kuwait).

A state's international legal responsibility arises for all unlawful criminal acts committed by its own organs and officials, as well as by its nationals.²² State responsibility for criminal acts committed by its organs and officials has been affirmed in judicial decisions in accordance with international legal instruments.²³ In 2007, the International Court of Justice held that Serbia bore responsibility for violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in relation to acts committed in Bosnia and Herzegovina between 1991 and 1995. However, the Court stated that Serbia itself had not committed genocide; rather, it was responsible for failing to prevent the genocide committed in Srebrenica in 1995 and for failing to punish the perpetrators. Nevertheless, according to international legal doctrine, states also bear criminal responsibility for violations of international law norms, alongside the individuals acting on their behalf.²⁴ This position has been supported, *inter alia*, by Professor P. Ago²⁵ and others.²⁶

In international humanitarian law, the issue of state responsibility for the actions of members of its armed forces was first codified in the 1907 Hague Convention (IV). All acts committed by military personnel, including international crimes, are attributed to the state to which they belong. The same rule is also enshrined in the 1949 Geneva Conventions. The regulation of international legal responsibility for deportation, as well as for other crimes, is also reflected in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, adopted by a resolution of the UN General Assembly. According to Article 1 of this instrument, any internationally wrongful act of a state (including acts of deportation, author's emphasis) entails the international legal responsibility of that state.

22 State Archive of the Republic of Azerbaijan (n 19) 187; Afsar Isa Sadigov (ed), *International Law: General Part* (Laman Publishing 2018) 317.

23 *Shimoda case (Ryuichi Shimoda and others v The State)* (District Court of Tokyo, 7 December 1963) 636-7.

24 Lassa Oppenheim, *International Law: A Treatise*, vol 1: Peace (Longmans, Green 1948) pt 1.

25 Mohammed Bedjaoui, 'Eighth Report on Succession of States in Respect of Matters Other than Treaties: Draft Articles on Succession to State Property, with Commentaries, Document A/CN.4/292' (1976) 2(1) Yearbook of the International Law Commission 57-63.

26 Igor Lukashuk, *Law of International Responsibility* (Wolters Kluwer 2004) 356.

Internationally wrongful conduct is expressed through specific acts or omissions. According to the Articles, this includes the conduct of state organs; actions carried out by individuals or bodies exercising state authority; conduct that exceeds authority or violates orders; and acts carried out under state control. Rules for assessing an international legal violation establish the conditions under which the conduct is legally attributable to the state.

Under the Articles, the actions of government organs, as well as all persons and entities acting under their direction and control, are attributable to the state. The principle that “the conduct of an organ or an official is attributable to the state” reflects a peremptory customary law norm confirmed by the consistent practice of international tribunals.

A state’s international legal responsibility entails ensuring the fulfilment of breached international obligations through:

1. The prosecution and adjudication of individuals who have committed the crime.
2. *Restitutio in integrum* - the restoration of the material situation (*status quo ante*) that existed prior to the violation.
3. Payment of material and moral damages, including *compensation, rehabilitation, satisfaction, and guarantees of non-repetition*.²⁷
4. State Policy, Intent, and Individual Criminal Responsibility in the Execution of Deportation

4 STATE POLICY, INTENT, AND INDIVIDUAL CRIMINAL RESPONSIBILITY IN THE EXECUTION OF DEPORTATION

Professor E. David, referring to the extensive practice of international criminal tribunals, correctly notes that the deportation of a population from occupied territory constitutes a war crime, and ignorance of the fact that it constitutes a war crime does not exempt one from responsibility.²⁸

The Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia established a practical basis for implementing the principle that individuals are responsible for crimes such as genocide and deportation regardless of their official status (official positions do not exempt individuals from responsibility).

The obligation to determine punishment for acts creating individual criminal responsibility, including deportation, is defined under international law. Article 146 of the Fourth Geneva Convention stipulates that State Parties must adopt effective legislative

27 James Crawford, *State Responsibility: First report* (A/CN.4/490 and Add 1–7, 12 August 1998) <https://legal.un.org/ilc/documentation/english/a_cn4_490.pdf> accessed 15 January 2026.

28 Eric David, *Principles of the Law of Armed Conflict* (ICRC 2011) 786.

measures to punish persons responsible for the crimes enumerated in that Article, including those who carried out or ordered deportations, and must ensure that such persons are brought to justice in their courts, irrespective of their nationality.

Deportation as an international crime must form part of a widespread or systematic attack or threat. Deportation is considered an element of crimes against humanity as an intentional act (Statute of the International Criminal Court, Art. 7.1(d). Furthermore, deportations carried out during or following military occupation (for example, after Russia's invasion of the territory of the Azerbaijan Democratic Republic on 28 April 1920 and the subsequent unlawful transfer of territory to Armenia) constitute a violation of international humanitarian law.²⁹

Under the First Protocol of the 1949 Geneva Conventions (Arts. 85(4) (a)-85(5), violations of Article 49 of the Fourth Geneva Convention-such as the occupying power transferring part of its civilian population into the occupied territory or deporting or transferring all or part of the population of the occupied territory, whether within the territory's borders or outside them-constitute war crimes. According to the ICC Statute, deportation is defined as unlawful expulsion or displacement, and the deportation or transfer of the population of occupied territory by an occupying power is explicitly recognised as a war crime (Art. 8.2(a) (vii).

A defining characteristic of war crimes is that they are carried out on a large-scale, either as part of a planned operation or within the framework of a general policy.³⁰ Historical practice from international criminal tribunals, including the Nuremberg Military Tribunal Statute (Art. 6), the Statute of the International Criminal Tribunal for the former Yugoslavia (Art. 5(d), the Statute of the International Criminal Tribunal for Rwanda (Art. 3(d), the Statute of the Special Court for Sierra Leone (Art. 2(d), and the Rome Statute of the ICC (Art. 7(1) (d)-shows that deportation can be carried out both in peacetime and during military aggression or conflict. In such cases, deportation forms part of the general plan or policy of the state (ICC Statute, Art. 8.1) and is executed by the political elite and officials with intent (ICC Statute, Art. 7.1).

The deportation of the population from Western Azerbaijan, present-day Armenia, was conducted as a planned state policy beginning in April 1920. Shortly after the military aggression, on 29 November 1920, by order of the Moscow authorities, the occupying

29 Rahim Kamil Mammadov, *International Criminal Law and International Criminal Legislation of the Republic of Azerbaijan* (NAT Co LLC, 2012) [in Azerbaijani].

30 *Prosecutor v Kordić and Cerkez* (n 12) para 94; *Prosecutor v Kunarac, Kovac and Vukovic* Cases no IT-96-23-T & IT-96-23/1-T (ICTY, 22 February 2001) para 460; *Prosecutor v Kunarac, Kovac and Vukovic* Case no IT-96-23 & IT-96-23/1-A (ICTY Appeals Chamber, 12 June 2002) para 127-8; *Prosecutor v Deronjić* Case no IT-02-61-A (ICTY Appeals Chamber, 20 June 2005) para 109; *Prosecutor v Blagojević and Jokić* Case no IT-02-60-T (ICTY, 17 January 2005) para 596. See also, Thomas De Vaal, *Karabakh: Azerbaijan and Armenia Between Peace and War* (İlay MMC 2008) [in Azerbaijani].

Bolshevik regime in Baku³¹ transferred the known territories of the Azerbaijan Democratic Republic to Armenia. Although the 1907 Fourth Hague Convention (Regulations, Art. 42) effectively ended the period of military occupation, any territorial change was required to be based solely on the will of the people (referendum). The central Soviet authorities were unable to justify this illegality on legal grounds. The formalisation was delayed and only carried out in 1929.

Initially, following the notorious mass repressions and crimes of genocide of the 1930s and shortly after the conclusion of World War II, a process of deportation was initiated between 1948 and 1956. This process was carried out 'as part of a plan or policy' or on a 'widespread scale,' as explicitly defined in Article 8.1 of the Rome Statute of the ICC.³²

The USSR operated a system of camps for the physical and biological elimination of primarily non-Russian populations, deporting various ethnic groups, including Latvians, Poles, Germans, and others. For example, Decree No. 776-120 (1936) of the Council of People's Commissars of the USSR mandated the "resettlement of Polish and German households from the Ukrainian SSR to economic structures in the Karaganda region of the Kazakh MSSR". In relation to all deported peoples within the USSR, the fundamental principles of the Fourth Geneva Convention were severely violated. The dire sanitary conditions, or their total absence, initial lack of housing, food shortages, restrictions on movement, and mandatory military-police registration led to a humanitarian catastrophe.³³

These violations were similarly perpetrated against the Azerbaijani population, instigated by the Armenian Church and the "Dashnaktsutyun" party, and executed through the measures of the Soviet government. However, unlike other groups, the rehabilitation and right of return for the Azerbaijani population were never ensured. The first significant legislative measure toward recognising the violation of the rights of Azerbaijanis deported from Armenia was the 1997 Decree of the President of the Republic of Azerbaijan, titled "On the Mass Deportation of Azerbaijanis from Their Historical and Ethnic Lands in the Territory of the Armenian SSR in 1948–1953."

At that time, challenging the Soviet Union (Russia), a victor of World War II, was perceived as an unattainable task. For the Soviet authorities, the provisions of the 1907 Hague Convention (IV) (Article 42 of the Regulations) and the newly adopted 1949 Fourth Geneva Convention (Article 49), which embodied customary international law, were treated as

31 Bakhtiyar Rafiyev, *The Underwater Part of the Iceberg: The 20s* (Azerneshr 1995) 26 [in Azerbaijani].

32 Afsar Isa Sadigov, 'Crime of Khojaly Genocide: The Intention and International Law Manifested within the Framework of a General Plan and Policy' (2014) 37(1) *International Law and Problems of Integration* 93 [in Azerbaijani]; Jamil Guliyev (ed), *History of Azerbaijan*, vol 6: April 1920–June 1941 (ELM 2000) [in Azerbaijani]; 'Report of the Deputy Investigative Commission on the Khojaly Tragedy' (1995) 5-9 *Muhakime* [in Azerbaijani].

33 Dmitry Pantyo, 'On Foreign Soil... Reasons and Conditions for the Deportation of Poles and Germans to Kazakhstan in 1936: An Analysis of Documents' (2015) 1(8) *Rocznik Instytutu Polsko-Rosyjskiego* 83-4.

mere "scraps of paper." To evade responsibility for the deportations carried out during this period, the lack of ratification of these conventions (first by Russia, and subsequently by the USSR at the time) might be cited as a defence. However, it must not be overlooked that the Nuremberg Tribunal explicitly affirmed that these norms constituted customary international law, rendering them binding regardless of formal ratification.³⁴

The criminal state policy directed against populations protected under international law persisted into subsequent stages. The deportation of hundreds of thousands of people forcibly expelled from Armenia in 1988 leaves no room for any justification or pretext. Under the full weight of international humanitarian law, this creates a clear international legal responsibility for the Russian Federation, as the founding entity and legal successor (by continuity) of the USSR.³⁵

In this context, the obligation to prosecute the perpetrator individually rests primarily with the Russian Federation. Furthermore, the official status of the individuals who committed these crimes does not relieve them of their criminal responsibility, a principle firmly established in international criminal jurisprudence.³⁶

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Krstić* case regarding the total or partial destruction of a group, emphasised the targeting of the Muslim male population in Srebrenica.³⁷ However, in the case of Armenia, it was not merely a portion of the Turkic-Muslim population, but the entire Azerbaijani community that was expelled based on special hatred and racial discrimination due to their ethnic and religious identity.³⁸

The deportation carried out by Armenia contains all the constituent elements of the crime of genocide. According to the International Criminal Court, systematic and planned actions by the authorities of a particular region against a civilian population constitute an indicator of a "policy against a state or group." Even if this policy is not formally formalised, the crime is considered to have been committed in the case of deportation.³⁹ The deportation of the Azerbaijani (Turkic-Muslim) population is a formalised (documented) fact by both the USSR and Armenian authorities, in violation of customary international law (Article 8(2)(e)(viii) of the Rome Statute). This is evidenced by Decree No. 4083 of the Council of Ministers of the USSR, dated December 23, 1947, "On the resettlement of

34 'International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41(1) American Journal of International Law 248-9.

35 Saftar Rahimli, 'Analysis of Russia's Military Aggression against the Azerbaijan Democratic Republic from the International Legal Perspective' (2023) 6(2) Access to Justice in Eastern Europe 43, doi:10.33327/AJEE-18-6.2-a000201.

36 De Vaal (n 30).

37 *Prosecutor v Radislav Krstić* Case no IT-98-33-A (ICTY Appeals Chamber, 19 April 2004).

38 Sadigov (n 32).

39 *Prosecutor v Jean-Pierre Bemba Gombo* Case no ICC-01/05-01/08-424 (ICC Pre-Trial Chamber II, 15 June 2009) para 75, decision pursuant to arts 61(7)(a) and (b) of the Rome Statute.

collective farmers and other Azerbaijani populations from the Armenian SSR to the Kura-Araz lowlands of the Azerbaijani SSR," and Decree No. 754, dated March 10, 1948. Furthermore, the well-known anti-Azerbaijani ("Turkic-Muslim") statements by Armenian presidents should be noted as evidence that the deportation in this study constitutes an element of the crime of genocide and a planned state policy.

The speech by the Armenian President L. Ter-Petrosyan, on July 23, 1993, before the "Yerkrapah" military-terrorist group, states: "Armenia and Karabakh have been cleared of other nations; this was a 600-year-old problem, the significance of which the Armenian people will feel for another 600 years. If the 170,000 people of other nationalities who lived here until 1988 were still living here today, we would not have our state. Azerbaijanis constituted the majority in our northern and eastern regions, including Sevan... and Zangezur. These problems did not fall from the sky; we solved them ourselves, we solved them through our movement."⁴⁰

This speech explicitly contains the constituent elements of ethnic cleansing related to "physical and biological destruction" (as defined in the Genocide Convention). The criminal nature of ethnic cleansing regarding "physical and biological destruction" has also been manifested in the actions of other presidents of Armenia. Regarding the crimes committed in Khojaly on February 25-26, 1992, S. Sarkisyan, who directly led the criminal Armenian military units in the deportation of the population and later became the President of Armenia, stated in an interview: "Before Khojaly, the Azerbaijanis (*the targeted group subjected to genocide – author*) thought that they could joke with us. They thought that the Armenians were incapable of raising a hand against the civilian population (*war crime and genocide – author*). We were able to break that stereotype. That is what happened."⁴¹

The second president of Armenia, R. Kocharyan, while speaking in parliament within the context of ethnic and racial discrimination, stated that they "cannot live together because they are genetically different from Azerbaijanis." This statement serves as a clear indicator of genocidal intent under Article II of the Genocide Convention.

Numerous examples of such anti-group positions held by the state or political elite can be cited. Z. Balayan, an Armenian "writer" and former deputy of the Supreme Soviet of the USSR, writes in his work *The Revival of Our Souls*: "...our soldiers had nailed a 13-year-old Turkish child (*referring to an Azerbaijani – author*) to a window. I flayed the skin from his head, chest, and abdomen. I looked at my watch; the Turkish child died of blood loss 7 minutes later... my soul swelled with pride and joy for avenging one per cent of my people. In the evening, we did the same thing to three more Turkish children..."⁴²

40 Levon Ter-Petrosyan, 'The Majority of Azerbaijanis in Three Regions Was a Threat to Armenia' (ICTIMAİ TV, *You Tube*, 4 January 2025) [in Azerbaijani] <<https://www.youtube.com/watch?v=00FkamBTZqQ>> accessed 15 January 2026.

41 'Report of the Deputy Investigative Commission on the Khojaly Tragedy' (n 32).

42 *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

As a result of the state policy to which the aforementioned officials belonged, the deportation of Azerbaijanis from the territory of present-day Armenia was carried out as an “act of genocide based on specific intent”.⁴³

It is sometimes asserted that genocide is an aggravated form of crimes against humanity. Alternatively, crimes against humanity are occasionally regarded as a more severe form of crime than genocide. Crimes against humanity manifest through widespread or systematic acts of violence. However, genocide involves the specific intent to destroy or eliminate a group protected under international law, an intent that is absent in crimes against humanity. The objective element of genocide, the concept of “destruction,” refers to the deprivation of life through physical or biological impact. A general awareness of the timing of the acts and their possible consequences is not sufficient for them to be characterised as genocide. In this context, it is required to reveal the criminal prejudice or specific intent (*dolus specialis*) regarding the negative consequences of the action.⁴⁴

Officials of Armenian origin within the authorities of the Azerbaijan SSR also continued various forms of repeated persecution against the deported population. For instance, Azerbaijanis who had been exiled to the Shamkhor (now Shamkir) district of the Azerbaijan SSR were subjected to exile once again.⁴⁵ Analysing the Genocide Convention and the practice of the International Criminal Court (Myanmar, Ukraine, Gaza), Professor W. Schabas notes that genocide is the refusal to recognise the right to existence of a distinct, protected human group.⁴⁶ In the interpretation of the crime of genocide by the International Criminal Tribunal for Rwanda, it is stated that an act of genocide is committed against individuals because they are members of a specific group; since the intent is a policy to destroy that specific group, the individuals are the victims, but the group is the target.⁴⁷

The killing of a single person is characterised as a refusal to recognise the right to life of a specific individual. Correspondingly, the *actus reus* (the prohibited act) may be limited to one person, but the *mens rea* (the intent) must be directed against the existence of the group.⁴⁸

43 Western Azerbaijan Community, *Return Concept: A Concept for Ensuring the Safe and Dignified, Peaceful Return of Azerbaijanis Expelled from the Territory of Present-Day Armenia* (Science and Education 2023) [in Azerbaijani]; Rahim Mammadov, ‘Deportation of Azerbaijanis from their Historical Lands is an International Crime’ *Xalq Qazeti* (Baku, 18 March 2023) <<https://xalqqazeti.az/musahibe/123574-azerbaycanlilarin-tarixi-torpaqlarindan-deportasiyasi-beynelxalq-cinayetdir>> accessed 15 January 2026.

44 Fahir Armaoglu, *19 Yüzyil Siyasi Tarihi (1789–1914)* (18th edn, Kronik Kitap 2019); Karma Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (OUP 2005) 209.

45 Archive of the Ministry of Defence of the USSR, f 77, op 410068, d 8, l 2.

46 Schabas, *Genocide in International Law* (n 1) 14-5.

47 *Prosecutor v Akayesu* Case no ICTR-96-4-T (ICTR, 2 September 1998) para 512.

48 Shaw and Hart (n 2) 22.

If deportation is committed on the grounds of ethnic, religious, or racial discrimination (by "...deliberately creating living conditions that will lead to the total or partial physical destruction of a specific group..."), it shall be accepted as a constituent element of the crime of genocide (Article II (c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; Article 6 (c) of the ICC Statute). Naturally, genocidal hatred must be proven in this context. At the same time, the targeting of a civilian group (national, ethnic, religious, or racial) characteristic of international crimes, and the "widespread" and "systematic" (repetitive) nature of the acts against the deported persons, must complement the element of hatred.⁴⁹

The population of Western Azerbaijan had been settled at high altitudes (approximately 900–1,300 metres above sea level) for millennia, with a lifestyle adapted to this specific biogeographical mountainous environment. Despite this, they were deported to the lowlands (Aran) of Azerbaijan, areas located below sea level, where malaria was widespread. However, it would have been entirely possible to deport this population to the mountainous regions of Soviet Azerbaijan that bordered present-day Armenia.⁵⁰ However, this desire was also severely obstructed. The humanitarian crisis reached such a point that some of the deportees attempted to return; however, they were deprived of citizenship, and their identification documents were confiscated. By 1956, one out of every three of the 100,000 people deported from Armenia had perished due to hunger, disease, and the inability to adapt to the new conditions, the hot and arid climate, and the lack of basic household provisions.⁵¹

This is where the genocidal intent, the intent to destroy a distinct ethnic, religious, or racial group (*dolus specialis*), emerges.

According to opponents, the deportation was an economic measure related to the settlement of the Kura-Araz lowlands.⁵² Even if this were the case, international treaty bodies categorise "exploitation," "forced labour," and "degrading treatment" as human rights violations⁵³ and crimes against humanity. However, regarding Azerbaijanis, their deliberate deportation to areas below sea level (an indicator of physical destruction as stipulated in the Genocide Convention), essentially "leaving them to a slow death", has been confirmed by international judicial practice as a standard for genocide.⁵⁴

49 *Prosecutor v Katanga and Chui* Case no ICC-01/04-01/07-717 (ICC Pre-Trial Chamber I, 30 September 2008) 395; *Prosecutor v Gbagbo* Case no ICC-02/11-01/11 (ICC Pre-Trial Chamber I, 12 June 2014) para 222.

50 Nazim Mustafa, *Iravan City* (Red N Line 2020) 3.

51 Jamil Guliyev (ed), *History of Azerbaijan*, vol 7: 1941–2002 (ELM 2003) 151 [in Azerbaijani].

52 Galust A Galoyan and Konstantin S Khudaverdyan (eds), *Nagorny-Karabakh: Historical Reference* (Academy of Sciences of the Armenian SSR 1988) 57-8.

53 CERD, *Concluding Observations on the Thirteenth and Fourteenth Periodic Reports of the Dominican Republic* (CERD/C/DOM/CO/13-14, 19 April 2013) para 19.

54 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (ICJ, 26 February 2007) ICJ Rep 2007/43.

The publication of information regarding the deportation in the press was prohibited. The adoption of the secret Decree No. 605 of the Council of Ministers of the USSR in 1951 concerning the resettlement plan stemmed from the genocidal nature of the deportation.

The inclusion of a normative basis for territorial claims against neighbouring states, including Azerbaijan, Turkey, and Georgia, in the Armenian constitution should be evaluated as a motive for the deportation. The deportation of Azerbaijanis as a distinct ethno-religious group served as a tool for the realisation of the "Great Armenia" idea.⁵⁵ It is evident from the characteristics of this deportation that the primary goal was the dispersal of the population through physical and biological destruction. To destroy a group of people is an act of genocide.⁵⁶ The constitutional ("Great Armenia") idea could only be realised by destroying the group (the Azerbaijani population) that had formed over centuries. This idea in the Armenian constitution, as a project of the "Dashnaktsutyun" party and the Echmiadzin Church⁵⁷, gained the support of the USSR, having been presented as the "Armenian question" at the Tehran Conference (1945).⁵⁸

In some literature, the acts of genocide committed by Armenian military forces in Azerbaijani towns and villages are referred to as "ethnic cleansing".⁵⁹ We consider this assessment to be, at the very least, controversial. The deportation of Azerbaijanis differs from ethnic cleansing. When carried out by the deporting party, ethnic cleansing aims to create a "homogenised ethnic" society. In such cases, there may not be an intent to destroy the deportee based on ethnic hatred. If the opposite occurs, then while ethnic cleansing is being carried out on one hand, genocide is being implemented on the other. In accordance with a planned policy, the deportation of Azerbaijanis began with the Treaty of Turkmenchay (1828, Art. 5), which concluded the Qajar-Russian war, and the Treaty of Adrianople (1829, Art. 16), which concluded the Ottoman-Russian war. Local Turkic-Muslims who did not conform to Russian Tsarism saw their religious centres abolished, were expelled from local self-governing structures, and were often exiled to Siberia. Armenians were settled in the vacated territories. Deportation toward large-scale genocide began after the Soviet-Russian military occupation of the Azerbaijani territories in April 1920 (this will be discussed in the next section).

55 Assad Gurbanli, 'On the Study of the Deportation Policy of the Soviet State and the Problem of the Deportation of Azerbaijanis' (2001) 2 History and its Problems 85-6.

56 *Prosecutor v Al Bashir* Case no ICC-02/05-01/09-3 (ICC Pre-Trial Chamber I, 4 March 2009) para 190.

57 Davut Kilic, 'The Role of the Echmiadzin Church in Russia's Eastern Anatolia Policy (1828–1915)' (2001) 461 Turkish Culture 535 [in Turkish].

58 Aghasi Arshak Yesayan, *The "Armenian Question" and International Diplomacy* (Mitk 1965) [in Armenian].

59 Jessica A Stanton, *Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law* (CUP 2016) 35, doi:10.1017/9781107706477.

In the *Krstić* and other cases, the court stated that an assessment of deportation must be made on a case-by-case basis, taking into account the specific circumstances.⁶⁰ Relevant circumstances include the use of force and other associated violence in carrying out the deportation, as well as the age, gender, and health of the victims. Although deportation is not explicitly listed in the non-exhaustive list of serious harms within the elements of the crime, the International Criminal Court (ICC) reached the same conclusion. In the first *Al-Bashir* case⁶¹, the Pre-Trial Chamber of the ICC determined that forcible transfer falls under the material element of the crime of genocide by causing serious bodily or mental harm.

When looking at the nature, degree of public danger, scale, and systematic connection of the crimes committed in the city of Khojaly on the night of February 25–26, 1992, by the 366th regiment—which belonged to Russia but was under the command of officers of Armenian origin—the genocidal intent (*dolus specialis*) becomes evident. Armenian military forces killed 613 people⁶² with particular cruelty against the civilian population (including violence against infants, piercing the abdomens of women, cutting off breasts, scalping men, and mutilating genitals).

Based on reports from international organisations and human rights NGOs,⁶³ the European Court of Human Rights characterised the Khojaly crime as a "war crime or a crime against humanity".⁶⁴ The Organisation of Islamic Cooperation has called for the mass killing of civilians in Khojaly by Armenian military forces to be recognised both internationally and nationally as an "act of genocide" and a "crime against humanity".⁶⁵

Incidentally, the genocidal nature of the crime committed in the city of Khojaly was also confirmed by a court of the Republic of Azerbaijan in 2026. In the Baku Military Court, 15 defendants were convicted of crimes related to the forced displacement of the population, along with planning, preparing, initiating, and conducting an aggressive war,

60 *Prosecutor v Krstić* (n 11) para 529; *Prosecutor v Stakić* Case no IT-97-24-A (ICTY Appeals Chamber, 22 March 2006) para 281.

61 *Prosecutor v Al Bashir* Case no ICC-02/05-01/09-94 (ICC Pre-Trial Chamber I, 12 July 2010) para 38.

62 Human Rights Watch, *Bloodshed in the Caucasus: Escalation of the Armed Conflict in Nagorno Karabakh* (Helsinki Watch 1992) 20, 32; 'The Khojaly Tragedy: A Crime against Humanity!' (*UkrInform*, 19 February 2013) <https://www.ukrinform.ua/rubric-other_news/1459146-hodgalinska_tragediya_zlochyn_proti_lyudstva_1798541.html> accessed 15 January 2026.

63 Human Rights Watch (n 62) 24; UN Permanent Representative of Azerbaijan, *Report on the international legal responsibilities of Armenia as the belligerent occupier of Azerbaijani territory: Annex to the Letter of 23 January 2009 addressed to the Secretary-General* (UN Doc A/63/692-S/2009/51, 27 January 2009) para 18.

64 *Fatullayev v Azerbaijan* App no 40984/07 (ECtHR, 22 April 2010) para 87; *Chiragov and Others v Armenia* App no (ECtHR, 16 June 2015) para 19.

65 OIC, 'Cairo Final Communiqué' (OIC/SUM-12/F.C./ FINAL, 12th Session of the Islamic Summit Conference "The Muslim World: New Challenges & Expanding Opportunities", Cairo, Arab Republic of Egypt, 6-7 February 2013) para 117; OIC Resolution No 8/43-C on Affiliated Institutions (43rd Ses of the OIC Council of Foreign Ministers (CFM) (Session of Education and Enlightenment: Path to Peace and Creativity), Tashkent, Republic of Uzbekistan, 18-19 October 2016) B) para 8.

genocide, and other crimes committed on Azerbaijani territory under the direct leadership, participation, and strict control of the Armenian state, its state bodies, and military forces.⁶⁶

Some well-known crimes of genocide (e.g., the Srebrenica genocide) were accompanied by deportation. During the genocide committed in Khojaly, Lachin, Fuzuli, Aghdam, and other territories, similar to the crimes committed in Rwanda, the civilian population was physically destroyed without being deported and without being provided a "humanitarian corridor." Civilians attempting to flee the city besieged by Armenian military forces were lured into ambushes through deliberate misdirection and subsequently destroyed.⁶⁷

Characterising the crimes committed by Armenian military forces and the military units of "Nagorno-Karabakh" under its control⁶⁸ against the civilian population in Azerbaijan, especially against children, women, and the elderly, Professor Malcolm Shaw and Naomi Hart note that "many of these acts can be evaluated as both war crimes and crimes against humanity".⁶⁹ They correctly point out that crimes against humanity are typically committed during peacetime. Therefore, it is impossible to evaluate the crimes committed against the civilian population (children, women, and the elderly) on Azerbaijani territory solely as crimes against humanity. Considering that Azerbaijan has been under occupation since 1920, these listed acts are either war crimes or crimes of genocide. Professor Shaw and Naomi Hart further state: "...certain behaviours constituting the indicated war crimes also targeted ethnic Azerbaijanis because of their nationality and or ethnicity, and the relevant intent was to partially destroy the group. The same behaviour may also constitute the crime of genocide".⁷⁰ In the cases we have expressed, deportation was committed as a crime of genocide.

Neither Article II of the Genocide Convention nor Article 6 of the Rome Statute explicitly defines the concept of "deportation." However, the five forms of conduct set out in those Articles may fall within the scope of three acts of genocide. Specifically (especially considering the systematic killing of children in Azerbaijan – author), it can include the forcible transfer of children of the group to another group. At the same time, transfer can include any forced deportation both within the territory (in the occupied territories of Azerbaijan – author) and outside of it (from the territory of Armenia – author). Excluding these instances from the scope of deportation would render the relevant provision meaningless.⁷¹

66 'Verdict Announced in the Trial of Armenian Citizens' (*Azertag*, 5 February 2026) [in Azerbaijani] <https://azertag.az/xeber/ermenistan_vetendaslarinin_mehkemesinde_hokm_elan_olunub_video-4005923> accessed 15 January 2026.

67 Human Rights Watch (n 62) 20, 32.

68 Shaw and Hart (n 2) 38.

69 *ibid* 123.

70 *ibid* 39.

71 Chetail (n 1); Denys Azarov and others, 'Understanding Russia's Actions in Ukraine as the Crime of Genocide' (2023) 21(2) *Journal of International Criminal Justice* 233, doi:10.1093/jicj/mqad018.

Thus, the deportation of Azerbaijanis was a large-scale and systematic threat or part of a military attack against the civilian population. It is an international crime committed intentionally and knowingly by officials as part of a general state plan and policy, thereby creating corresponding international legal responsibility. In cases where a group protected by international law is targeted for physical and biological destruction, deportation manifests as a constituent element of the crime of genocide.

5 THE INTERNATIONAL LEGAL STATUS OF THE TURKIC-MUSLIM POPULATION (PEOPLE) DEPORTED FROM ARMENIA FROM 1920

Hague Law, beginning with the 1899 and 1907 norms, laid the foundation for modern international humanitarian law. Articles 42 and 43 of the Regulations annexed to the 1907 Hague Convention (IV) established the obligation to "respect public order," while Articles 46 and 50 mandated the "protection of the rights of the civilian population." These universal norms affirmed the illegality of military aggression on one hand and guaranteed the rights of civilians on the other.

According to Article 10 of the Statute of the League of Nations (1920), which dictates that a state's territory cannot be the object of another state's aggressive aims, member states declared they would respect each other's territorial integrity and resist external aggression. Following the 1907 Hague Convention, the League of Nations Statute, and the 1929 Briand-Kellogg Pact, the 1933 London Convention on the Definition of Aggression was adopted with the participation of many states (including the USSR, Turkey, and Iran). Furthermore, Article 11 of the 1933 Montevideo Convention on the Rights and Duties of States clearly sets out an obligation for states not to recognise territorial acquisitions or special advantages obtained by the use of force.

A state's territory is inviolable and cannot be the object of military occupation or other coercive measures by another state, directly or indirectly, regardless of the motive. The illegality of military aggression is rooted in the IV Hague Convention. Specifically, under the principle that "sovereignty does not pass to the occupying power during military occupation" (Hague Regulations, Arts. 27-33, 42, 47), the civilian population's link to their state and their national identity status cannot be forcibly altered.

According to the Martens Clause expressed in the preamble of the IV Hague Convention, "populations and belligerents remain under the protection and empire of the principles of international law, even in cases not covered by the adopted regulations. These derive from the established customs among civilised peoples, from the laws of humanity, and the dictates of the public conscience." The Martens Clause is linked to the principle of *clausula si omnes* and stipulates that sovereignty remains with the people during occupation. In this case, the status of the population is not subject to the will of the military aggressor; rather, that

population acts as a subject of international law. Therefore, Russia's occupation of Baku on April 27, 1920, its military aggression against the Azerbaijan Democratic Republic, and the subsequent measures, including the deportation of the population, are illegal under the international humanitarian law norms of that period.

To ensure the legal force of these norms is not called into question, it is appropriate to refer to the judgement of the Nuremberg International Military Tribunal. The Tribunal stated that by 1939, the rules of the IV Hague Convention had become recognised as international customary law, binding upon all states. This precedent has been significant for other courts, including *Nicaragua v. United States* (1986) and *Congo v. Rwanda* (2006). The 1907 Hague Regulations established the core of modern international humanitarian law regarding the administration of occupied territories and the treatment of civilians and combatants.⁷²

Thus, according to the judgement of the Nuremberg International Military Tribunal, the legal force of the 1907 Hague Convention (IV) was also binding for Soviet Russia in 1920. In other words, since the Regulations concerning the Laws and Customs of War on Land (norms of the IV Convention) as international customary law were in legal force for Soviet Russia, and later the USSR, during the military aggression against Azerbaijan⁷³, it establishes the responsibility of the Russian Federation, as the successor to those states, for all crimes committed against the peaceful population, including the deported population. On the other hand, this keeps the status of the population, who were expelled under military convoy from territories recognised as Azerbaijani lands and illegally transferred to Armenia after the occupation, within the sphere of operation of international humanitarian law norms.

Russia (the USSR) did not only violate its specific international treaty provisions regarding Azerbaijan; it also breached its international obligations under comprehensive norms that, by this period, were already recognised as customary law and *opinio juris*. The 1907 Hague Convention (IV) (the Regulations), specifically Articles 42 and 43 (concerning respect for public order) and Articles 46 and 50 (concerning the protection of the rights of the civilian population), which were later implemented into Article 47 of the 1949 Geneva Convention (IV) (regarding inviolable rights), formulated a specific rule of international law.

According to the 1907 Hague Convention, the occupation of a state's territory by a foreign power does not alter the legal status of that territory. Even a long-term period of occupation imposes strict limitations on the occupier. Under existing rules, the occupier's jurisdiction over the occupied territory is temporary in nature and requires the fulfilment of minimum standards of international human rights law and international humanitarian law. The

72 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (ICJ, 27 June 1986) ICJ Rep 1984/39.

73 Constitution Act of the Republic of Azerbaijan No 222-XII 'On Recovery of the State Independence of the Azerbaijan Republic' (adopted 18 October 1991) <<https://cis-legislation.com/document.fwx?rgn=2889>> accessed 15 January 2026; Statement of the Supreme Council of the Republic of Azerbaijan No 181-XII of 30 August 1991 [1991] Bulletin of the Supreme Council 15-16/264.

temporary jurisdiction of the occupier must ensure the application of the legislative and other jurisdictions of the occupied state, rather than its own. In accordance with the universally recognised principle that "sovereignty does not pass to the occupying power during occupation," the political, social, economic, and legal systems of the state subjected to aggression cannot be altered.⁷⁴

In accordance with the legal framework set forth in Articles 42 through 56 of the Hague Regulations (1907), the occupying power lacks the authority to dismantle the existing state administration or to assume control over its coercive apparatus.⁷⁵

However, Russia's military aggression against Azerbaijan effectively dismantled the pre-existing political order, waged an assault on the social fabric of the nation, and culminated in acts of genocide. Following the illegal transfer of Azerbaijani lands, from which the population had already been deported, to Armenia in 1929, the Bolshevik regime intensified its repressions. During this period, 1,142 members of the Musavat Party and 474 supporters of the Ittihad Party were arrested; while many were subjected to extrajudicial physical elimination, others were forcibly exiled to the Far North.⁷⁶

Under the 1907 Hague Convention (IV) Regulations concerning the Laws and Customs of War on Land, and subsequently the 1949 Geneva Convention (IV), the forced alteration of the demographic composition within occupied territories is codified as a war crime. Although the strategic resettlement of Armenians into Azerbaijani territories originated with the Treaty of Turkmenchay (Art. 16), this process reached systemic proportions under the Soviet-Russian (USSR) administration. This era was characterised by the deliberate settlement of ethnic Armenians in regions from which the indigenous Azerbaijani population had been forcibly removed.

From April 1920 to August 1921 alone, approximately 48,000 Azerbaijanis and Turkic-Muslims fell victim to coordinated Russian-Armenian terror. During the purges of 1936–1937, Armenian-led investigative units within the Azerbaijan SSR fabricated evidence leading to the execution of 29,000 intellectuals as "enemies of the people."⁷⁷ Furthermore, the dual imposition of alphabet changes under the guise of the "Cultural Revolution"⁷⁸ and the forced modification of surnames constituted acts aimed at cultural and biological erosion, aligning with elements of the crime of genocide. Between 1948 and 1953, the systematic deportation of Azerbaijanis from the Armenian SSR was initiated; of the more

74 Afsar Isa Sadigov, "Recognized" Territory Established for Armenia as a Result of Russia's Military Aggression against the Azerbaijan Democratic Republic' (2023) 2 News of Baku University: Socio-Political Sciences Series 138; David (n 28) 564-7.

75 Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents* (Martinus Nijhoff Publishers 1998) 10.

76 Rafiyev (n 31) 40.

77 Guliyev (n 32) vol 6, 385-6

78 ibid 210, 320.

than 150,000 deportees, one in three perished due to famine and disease, resulting from an inability to adapt to the harsh conditions of their relocation. These acts of genocide, war crimes, and military aggression persisted in subsequent decades. Starting in 1988, with direct support from Moscow, "Armenia's military aggression against Azerbaijan culminated in the occupation of the former Nagorno-Karabakh Autonomous Oblast and other adjacent Azerbaijani territories."⁷⁹

These recent criminal acts can be characterised not only within the historical framework of the 1907 Hague Convention (IV) but also as continuing international crimes under the contemporary international legal order. Since the legal and humanitarian consequences of these acts have not been fully addressed, including the denial of the right to return and the lack of restitution, they persist, thereby invoking the ongoing state responsibility of the successor entities under modern international criminal and human rights law.

The armed struggle against the occupation never ceased; following the April 1920 invasion, there were 54 armed uprisings against the Soviet occupation regime in Azerbaijan through 1924,⁸⁰ and resistance against the Russian-Soviet occupation continued in subsequent years. In November 1920, the Politburo of the CC of the RCP(b) dispatched I. Stalin went to the Caucasus to oversee the suppression of anti-Soviet revolts and lead military operations. During this period, the Russian occupation army in Azerbaijan numbered nearly 80,000.⁸¹ These facts demonstrate the scale of the military aggression and highlight the illegality of the subsequent annexation. Despite attempts to crush the national will through later crimes, Russia's "Sovietisation" of Azerbaijan failed to achieve a legitimate appropriation of the state.

Article 55 of the Regulations annexed to the 1907 Hague Convention (IV) stipulates that an occupying state shall be regarded only as administrator and usufructuary (emphasis added) of public buildings, real estate, forests, and agricultural estates belonging to the hostile State and situated in the occupied country. It must safeguard the capital of these properties (in accordance with the property right concepts of the territory). As Professor Christopher Greenwood notes, under international law, an occupying power's attempts to alter the legal status of an occupied territory or its struggling population lack legal validity.⁸² While we oppose any territorial change via military force, we advocate for the preservation of objective legal assessments. The concept of "Present-day Armenia" used in this subject carries the context of "ex injuria jus non oritur" (law does not arise from injustice).

79 Shaw and Hart (n 2) 123.

80 Mirza Bala Mammadzade, *National Azerbaijan Movement* (Nijat 1992) 154 [in Azerbaijani].

81 Rafiyev (n 31) 19.

82 Christopher Greenwood, 'The Administration of Occupied Territory in International Law' in Emma Play Fair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Oxford Academic 1992) 245, doi:10.1093/oso/9780198252979.003.0008.

In telegrams dated July 2 and 8, 1920, Russian Foreign Minister G. Chicherin instructed G. Ordzhonikidze, Chairman of the Caucasus Bureau of the RCP(b), to ensure that the government of the Azerbaijan SSR accepted the Sharur-Daralayaz district as Armenian territory and recognised Karabakh and Zangezur as disputed territories. Chicherin stated that the international situation required a treaty between Russia and Armenia and that it was "essential" for the Azerbaijani side to "consent" to the transfer of these lands. Consequently, on August 10, 1920, a Russo-Armenian treaty was signed without the participation of Soviet Azerbaijan. This "treaty," which contradicts peremptory norms and thus lacks legal validity (reflecting customary law as later codified in Article 53 of the 1969 Vienna Convention on the Law of Treaties), transferred Sharur-Daralayaz to Dashnak-governed Armenia against the will of the Azerbaijani people. Upon Stalin's "proposal," the transfer of Nakhchivan and Zangezur was made conditional upon the Sovietisation of Armenia.⁸³

On November 29, 1920, in exchange for the establishment of Soviet rule in Armenia, the Bolshevik Baku organisation of the occupying regime (Ordzhonikidze, Ter-Danielyan, Stasova, Kaminski, Narimanov, Serebrovsky, et al.) decided to transfer Zangezur and Nakhchivan to Armenia and granted the "right to self-determination" to the ethnic Armenian minority in the mountainous part of Karabakh.⁸⁴ The decision was announced by N. Narimanov, a representative of the military aggressor regime. Following the withdrawal of the Azerbaijani army (150,000 troops) from Zangezur, Russia divided the Zangezur district into two parts: the western part (Gorus, Gafan, Qarakilsa, and Meghri) was ceded to Armenia, while the eastern part (Lachin, Gubadli, and Zangilan) remained within Azerbaijan. In gross violation of the 1907 Hague Convention (IV), a "geopolitical regime change" was carried out without regard to the will of the local population. The dismantling of local political institutions began, laying the political groundwork for the deportations of 1948–1956.

Prior to the military aggression, the Azerbaijan Democratic Republic (ADR) established its political-territorial sovereignty (borders) and territorial affiliation based on historical, geographical, and ethnographic scientific-practical standards. In relation to the collapsed Tsarist Russia, the territory of the ADR encompassed regions historically and geographically situated within the Azerbaijani space, inhabited by the ethno-religious Turkic-Muslim population (*uti possidetis juris*). That is, the territory of the ADR reflected the interstate borders existing prior to 1828 (the Treaty of Turkmenchay) and subsequently included the compact settlements of the ethnically linked population. In this context, the principle of *uti possidetis juris* serves as an indicator of the objective reality of the Azerbaijan Democratic Republic's territorial authority.⁸⁵

83 Resolution on the Distribution of the Rolling Stock of the Transcaucasian Railways (Treaty of Batum, 4 June 1918) Archive of Political Documents of the Presidential Administration of Azerbaijan, f 277, op 2, case 9, l 30.

84 Rafiyev (n 31) 26

85 Sadigov (n 74).

Consequently, from the perspective of international legal status, the population of Western Azerbaijan is not merely a population deported from Armenia but rather a population deported from Azerbaijani territory That Russia occupied in 1920. Under these circumstances, the legal regime of international humanitarian law regarding deported populations remains in effect. Regardless of their refugee status, the Turkic-Muslim population deported from Armenia remains under the protection of the IV Hague Convention and the IV Geneva Convention (Art. 4). Furthermore, this rule does not exclude the application of international human rights law to the affected population.

6 THE RIGHT TO REPARATION FOR VICTIMS OF DEPORTATION: JUDICIAL PRACTICE AND LEGAL CONSEQUENCES

Deportation, alongside criminal legal liability, also gives rise to **material legal responsibility**. The right to claim damages resulting from crimes against international law, including deportation, belongs both to the injured state and the victims of the crime.

As a result of prolonged military aggression, the Republic of Azerbaijan was also deprived of its economic development. The Eritrea-Ethiopia Claims Commission rejected Eritrea's claim that it was "deprived of economic development," citing a lack of judicial precedent.⁸⁶ However, Article 36.2(d) of the Statute of the International Court of Justice (concerning the nature and extent of the reparation to be made for the breach of an international obligation) and the Convention on Cluster Munitions (Dublin/Oslo) (which contains a norm encouraging assistance for socio-economic recovery disrupted by the use of cluster munitions) establish an obligation or right to compensation for member states. Because these norms were not brought to the Arbitration Commission's attention, a corresponding negative decision was rendered.

The rights of individuals who are victims of crime are expressed in the UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This Declaration serves as a systematisation act for customary norms previously shaped by judicial practice. As early as the 1907 Hague Convention (IV), a state is responsible for all acts committed by persons forming part of its armed forces. If the actions of a belligerent party violating the laws and customs of land warfare provide grounds for damage, then that party must pay compensation.

In some instances, Japanese courts have ruled that individuals do not have a direct right to compensation under the Hague Convention IV, holding that the right to receive damages belongs only to the state and that individuals must exhaust domestic remedies.⁸⁷ Conversely,

86 Final Award: Ethiopia's Damages Claims between the Federal Democratic Republic of Ethiopia and the State of Eritrea (Eritrea Ethiopia Claims Commission, 17 August 2009) [2009] Rep IAA 26, para 207.

87 Case no 31 (District Court of Tokyo, Civil Division, 26 November 1996).

the Hellenic Supreme Court of Greece (Cassation, 2000), when investigating crimes committed by German National Socialists in Greece, relied on international practice.⁸⁸ The Greek Court of Cassation stated that Germany possesses no immunity regarding the international crimes committed, bears responsibility for the damage inflicted upon the victims, and that such damages must be paid.⁸⁹ In the event of an international crime, states cannot invoke their own immunity, as the authority itself assumes the status of a presumed criminal.⁹⁰ However, during the proceedings, because both the Greek Ministry of Justice and the Greek courts invoked German immunity, the plaintiff appealed to the European Court of Human Rights (ECHR), citing a violation of the "fair trial" principle. The ECHR ruled against Germany and in favour of the plaintiff.⁹¹ Similar decisions in favour of victims have been adopted by other national courts.⁹²

Contradictory decisions, ultimately favouring the victims, have also been characteristic of the United States. A U.S. District Court rejected Germany's invocation of immunity. Although a U.S. citizen of Jewish descent initially applied to Germany for compensation, the claim was denied. The U.S. District Court upheld the right of a relative of a citizen of Jewish origin who was victimised and killed in Czechoslovakia in 1942 to sue; however, the Court of Appeals (referring to the Foreign Sovereign Immunities Act) accepted Germany's objection. Ultimately, law gave way to politics, and in 1995, a bilateral agreement was signed between the U.S. and Germany regarding compensation for U.S. citizens persecuted on religious or political grounds. Later (2006), contrary to the decisions of lower courts,⁹³ the U.S. Supreme Court directly applied Common Article 3 of the 1949 Geneva Conventions as a precedent for individuals.⁹⁴

Correctly, the International Criminal Tribunal for the former Yugoslavia (ICTY) linked the "requirement for individuals to exhaust domestic remedies for compensation"⁹⁵ to the existence of diplomatic relations during normal times. However, during military conflict, individuals (including those deported) are under the protection of the IV Geneva Convention (Art. 4).⁹⁶ In other words, despite the unsubstantiated decisions of national courts in some cases, the individual right to compensation for deported

88 Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts' (2010) 21(4) *European Journal of International Law* 815, doi:10.1093/ejil/chq080; Elena Vounas, 'Prefecture of Voiotia v Federal Republic of Germany: Sovereign Immunity and Jus Cogens Violations' (2002) 21(3) *NYLS Journal of International and Comparative Law* 629.

89 *Voiotia v Federal Republic of Germany* Case no 11/2000 (Greek Court of Cassation, 4 May 2000).

90 *United States v Wilhelm List* (US Military Tribunal Nuremberg, 19 February 1948) 636.

91 *Kalogeropoulou and others v Greece and Germany* App no 59021/00 (ECtHR, 12 December 2002); Judgment no 36 and 37/200 (Court of Cassation Greece, 28 June 2002).

92 *Shimoda case* (n 23) 636-7.

93 *Hamdan v Rumsfeld* (US Supreme Court, 29 June 2006) [2006] US Rep 548/557.

94 *Hamdi v Rumsfeld* (US Court of Appeals 4th Cir, 8 January 2003) F3d 316/450.

95 Case no 31 (District Court of Tokyo, Civil Division, 26 November 1996).

96 *Prosecutor v Tihomir Blaskic* IT 95-14-A (ICTY Appeals Chamber, 29 July 2004) paras 187, 188.

persons is recognised. Specifically, international humanitarian law (1907 Hague Convention IV, Art. 3; Geneva Law, Additional Protocol I, Art. 91) recognises the right of private individuals to compensation.⁹⁷

The International Court of Justice (ICJ), in its 2004 Advisory Opinion, stated that Israel must compensate all natural and legal persons subjected to material damage by the construction of the separation wall in the occupied Palestinian territory.⁹⁸ On July 20, 2004, the UN General Assembly, through Resolution ES-10/15, requested the Secretary-General to establish a Register of Damage for the relevant persons in accordance with paragraphs 152 and 153 of the Advisory Opinion. This practice is also being implemented by national administrative and judicial authorities.

Universal jurisdiction has been established for the crime of deportation as a violation of international humanitarian law. As early as the London Agreement of August 8, 1945, it was stipulated that an International Military Tribunal would be established to try war criminals whose offences had no particular geographical location (emphasis added). While this primarily concerned interstate cooperation in the extradition of criminals, the principle was subsequently integrated into the judicial processes of both the Nuremberg Tribunal and national courts. In a 1948 Allied (Nuremberg) Tribunal judgement, citing Hugo Grotius, it was noted: *"...kings, or those who possess the power of kings, have the right to impose punishment not only for injuries committed against themselves or their subjects, but also for those which do not directly affect them but present a gross violation of the law of nature or of nations in regard to any person."*⁹⁹ This universally recognised (*erga omnes*) right is also characteristic of the legislation of the Republic of Azerbaijan. As provided by law, the courts of the Republic of Azerbaijan possess universal jurisdiction (Criminal Code of AR, Art. 12.3) over the crime of deportation (Criminal Code of AR, Art. 107). Consequently, the victims of this crime (persons deported from Armenia) may realise their right to compensation against Armenia within the courts of the Republic of Azerbaijan.

In the struggle against international crimes, the role of national courts appears increasingly effective. Domestic courts remain the most reliable avenue for the application of international criminal law. Legal proceedings against international crimes, including deportation, can be initiated by domestic courts in any state in accordance with the principle of universal jurisdiction. This rule is also underscored in the Rome Statute (Preamble, para 5), which emphasises the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."¹⁰⁰

97 Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85(851) International Review of the Red Cross 512.

98 David (n 28) 1144.

99 *German High Command case* (US Military Tribunal Nuremberg, 28 October 1948) LRTWC 12/61.

100 Rome Statute of the International Criminal Court (n 6) preamble, para 5.

Notably, although the Criminal Code of the Republic of Azerbaijan (Art. 107) categorises deportation as a crime against humanity, it qualifies the broader phrasing found in the Rome Statute (...deportation or forcible transfer of population, Art. 7.1(d)) with the condition of "expulsion to another country (emphasis added) or displacement by other coercive acts." This specific aspect has, in the authors' opinion, been correctly criticised in the legal literature.¹⁰¹ Applying the "expulsion to another country" clause of the AR Criminal Code to the population expelled from Armenia might be problematic if the Azerbaijan SSR is regarded as an integral part of the USSR at that time. We believe that the "expulsion to another country" condition should be removed to ensure alignment with the Rome Statute. Furthermore, the failure to categorise deportation as a war crime within the AR Criminal Code is a legislative flaw. The proposal to classify this crime solely as a "crime against humanity"¹⁰² is unacceptable, as it may inadvertently sideline the crime of military aggression. The status of the population expelled from Armenia cannot be accepted merely as "victims of a crime against humanity"; they are victims of a crime of military aggression that commenced in 1920 and persisted throughout the Soviet era. This distinction preserves the relevant state's international legal responsibility for the crime of aggression.

7 RIGHT TO RESTITUTION AND COMPENSATION FOR DAMAGES: METHODS OF CALCULATION, CONDITIONS FOR PAYMENT, AND NATUR

There are a number of theoretical and practical problems in ensuring the right to restitution for internationally wrongful acts, including deportation, and in determining compensation (compensation, "emenda", the amount to be awarded to the injured party (victim) for wrongful conduct or an international crime). Restitution, compensation, and satisfaction must be provided as forms of reparation for the damage caused.

Article 75 of the Statute of the International Criminal Court states that... the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation. The Statute of the International Criminal Court provides not only the right to receive reparations but also the establishment of a Trust Fund for Victims (Art. 79). Articles 35-37 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts regulate all forms of such reparations.

As Professor J. Crawford noted, although restitution is the primary form of reparation, the injured State has the right to elect the form of reparation.¹⁰³ Theoretically, the damage caused

101 Mammadov, *International Criminal Law* (n 29) 129.

102 *ibid* 139.

103 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002); Daniel Bodansky and John R Crook, 'Symposium: The International Law Commission's State Responsibility Articles' (2002) 96(4) *American Journal of International Law* 773, doi:10.2307/3070677.

must be addressed in the form of restitution (*restitutio in integrum*). This implies that the population deported from Armenia, or their successors, should primarily be returned to the territories where they historically resided. However, changes brought about by time and differing objective realities (e.g., those of 1948–1956) may prevent full restitution. Therefore, alongside the right of return, other forms of reparation must also be ensured. To this end, Article 35 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts stipulates that a State responsible for an internationally wrongful act is under an obligation to make restitution, provided and to the extent that restitution: a) is not materially impossible; b) does not involve a burden out of all proportion to the benefit derived from restitution instead of compensation.

A specific position on restitution (restoration of the *status quo ante*) has been established through international arbitration and the domestic judicial mechanisms of States. The Eritrea-Ethiopia Claims Commission (2001), established in Algiers under the signed peace agreement, noted that the right of return for 722 individuals expelled by Ethiopia must be ensured.¹⁰⁴ The legal resolution of the Eritrea-Ethiopia conflict, although different in scale and character from Armenia's aggression against Azerbaijan, may also be applicable to the population deported from Armenia or their successors. This implies that, as a matter of restitution, the return of the population must be ensured, and regarding property rights, both restitution and compensation should be provided. In other words, a specific amount must be determined for each case. For instance, in the aforementioned precedent, the Arbitration Commission determined a payment of 45 million USD for the forced displacement of the population and 8.5 million USD for cases of death and injury.¹⁰⁵ The practice of national courts in this field is also substantial. A US court determined 745 million USD in compensation and 4.5 million USD in legal costs against the Bosnian "butcher" Karadzic for the international crimes he committed.¹⁰⁶ If restitution, that is, the full restoration of the *status quo ante*, is practically impossible, then compensation serves as the primary form of reparation. This form of payment is the most common in international practice. Regarding the military conflict in the Congo in 2000, the UN Security Council noted that Rwanda and Uganda must pay compensation for the damage caused to the civilian population in Kisangani.¹⁰⁷ According to Article 36, Paragraph 1 of the 2001 Articles, the damage caused must be compensated. In 2009, the Eritrea-Ethiopia Claims Commission also determined the amount of compensation to be paid. In such cases, when determining the amount of compensation, arbitral tribunals pay close attention to the establishment of future peace and mutual trust.

104 Partial Award: Civilians Claims, Eritrea's Claims 15, 16, and 27-32 between the State of Eritrea and the Federal Democratic Republic of Ethiopia (Eritrea Ethiopia Claims Commission, 17 December 2004) para 16.

105 Final Award: Ethiopia's Damages Claims (n 86) paras 250, 261, 311-2, 328.

106 *Doe v Karadzic* (SDNY, 13 June 2000) FRD 192/133.

107 Resolution UN Security Council 1304 (2000) [Situation in the Democratic Republic of the Congo] (adopted 16 June 2000).

In practice, international treaties have been signed both on a bilateral basis for the voluntary compensation of damages caused to individuals, and norms on compensation have been adopted in the judgements of well-known tribunals. In 1995, a bilateral agreement was signed between the United States and Germany regarding the payment of compensation to US citizens (Germany had previously concluded similar agreements with other states). Furthermore, under a 1956 agreement between the Netherlands and Japan, compensation of 415 guilders was provided for each deported individual.¹⁰⁸

For well-known reasons and due to its disinclination toward a peace treaty, the prospect of Armenia voluntarily providing financial compensation to the Azerbaijanis it deported is very low. Therefore, resolving the issue through judicial means could be significant, at least from a political perspective. Naturally, the primary experience in this field is international. The first international legal precedents in this area are related to the aftermath of World War II. In resolving this problem, there are established decisions of international criminal tribunals.

Certainly, to avoid the emergence of a perception of injustice even toward the aggressor, the compensation of damages, its calculation, and the conditions of payment must be fair and well-founded. In international practice, assessing damages can be complicated. In such cases, the nature of the breached obligations, the parties' conduct, and many other factors are taken into account.

When determining compensation, a "causal link" between the alleged violation and the damage caused must be demonstrated.¹⁰⁹ As a prerequisite for liability to arise, the damage must result from the violation. In its commentary on Article 31 of the Articles on State Responsibility, the International Law Commission refers to "proximate cause" as the justification for the obligation to make reparation. This condition was also reaffirmed in the 2009 decision of the Eritrea-Ethiopia Claims Commission.¹¹⁰ The primary purpose of compensation is to ensure full reparation for all violated rights. In this context, compensation must encompass damages arising from violations of both International Humanitarian Law (IHL) and International Human Rights Law (IHRL). The UN Special Committee, established in 1968 to investigate Israeli practices affecting the human rights of the Arab population of the occupied territories, notes that its activities are based not only on the Hague Conventions of 1899, 1907, and 1954, and the Third and Fourth Geneva Conventions of 1949, but also on the UN Charter and the 1966 International Covenants of the United Nations.¹¹¹

108 RCR Siekmann, 'Netherlands State Practice for the Parliamentary Year 1990-1991' (1992) 23 *Netherlands Yearbook of International Law* 378-9, doi:10.1017/S0167676800002245.

109 UN ILC, *Report of the International Law Commission, 53rd session (23 April-1 June and 2 July - 10 August 2001)* (UN 2001) 245.

110 Final Award: Ethiopia's Damages Claims (n 86) para 39.

111 Special Committee to Investigate Israeli Practices Affecting, *Report Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories* (UN Doc A/47/509, 21 October 1992) 13.

The necessity of the mutual application of norms from both fields is expressed in Article 72 of Protocol I (1977) to the 1949 Geneva Conventions. In this context, elementary norms for the protection of human rights must be applied alongside International Humanitarian Law (IHL) regarding the protection of the rights of refugees and stateless persons (Art. 73), all persons in the power of a party to the conflict (Art. 75), women (Art. 76), children (Art. 77-78), and others.

Judgements of the European Court of Human Rights (ECHR) can serve as examples of this. The ECHR applied the European Convention on Human Rights (specifically Article 2, the right to life) to situations involving Russian military operations in Chechnya—such as the aerial bombardment of civilians not participating in hostilities and extrajudicial killings by Russian servicemen—thereby upholding the plaintiffs' right to compensation.¹¹²

In cases where deportation is not committed with genocidal intent (for instance, when carried out as a war crime), fundamental human rights norms, such as the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, must be applied. In such instances, the damage caused should be determined in accordance with the 1984 UN Convention.

According to Article 36, Paragraph 2 of the 2001 Articles on State Responsibility, compensation shall cover any financially assessable damage, including loss of profits (*lucrum cessans*). Damage calculated in monetary terms includes both the injury to the State itself and to its nationals. Under international law, damage resulting from both lawful and internationally wrongful acts must be compensated. Since damage caused by wrongful conduct involves the breach of *erga omnes* obligations, its reparation regime is subject to international public order (*ordre public*). In decisions adopted regarding the commission of international crimes (in relation to Germany, Iraq, and other states), compensation has been calculated across all liability categories. By its Resolution 692 (1991) concerning Iraq's military aggression against Kuwait, the UN Security Council decided that Iraq is liable under international law for any direct loss or damage resulting from its unlawful invasion of Kuwait.¹¹³

112 Legal Education Society, *European Court of Human Rights: Comments and Normative Acts* (GISO Enterprise KRINB 2006) 862; *Khashiyev and Akayeva v Russia* App nos 57942/00 and 57945/00 (ECtHR, 24 February 2005).

113 Resolution UN Security Council 446 (1979) [On Establishment of a Commission to Examine the Situation Relating to Settlements in the Arab Territories Occupied by Israel] (adopted 22 March 1979); Resolution UN Security Council 452 (1979) [On Israeli Settlement Policies in the Occupied Territories] (adopted 20 July 1979); Resolution UN Security Council 605 (1987) [On Protection of Palestinian Civilians under Israel Occupation] (adopted 22 December 1987); Resolution UN Security Council 626 (1988) [On Establishment of the UN Angola Verification Mission] (adopted 20 December 1988); David (n 28).

As previously stated, the amount of compensation must reflect the actual damage caused. When determining compensation, both material losses and non-material (moral) damages can be established. The assessment should be conducted for each type of damage, including health, material (economic), and cultural-moral dimensions. For instance, in the case of material (economic) assessment, the value of property, loss of profits (*lucrum cessans*), and additional expenses are taken as the basis.

With certain exceptions, the practice of the Eritrea-Ethiopia Claims Commission included compensation for damages resulting from committed crimes, such as injury to health, including rape, killing, and wounding, unlawful deprivation of liberty, deprivation of food and medical assistance, and the creation of unacceptable conditions of detention. It also covered damages for the violation of *jus contra bellum*, the deprivation of the civilian population of education and medical services, and attacks on cultural values. The decision of the Arbitration Commission separately resolved the issue of compensation for unlawful expulsion, unacceptable conditions of transportation and resettlement, and the obstruction of the repatriation of prisoners of war and civilians.

As noted, loss of profits and additional expenses must also be compensated. The Arbitration Commission also ruled on compensation for the lost profits resulting from the loss of employment.¹¹⁴ One form of reparation in the event of an internationally wrongful act is satisfaction, which includes acknowledgement of the breach, an expression of regret, a formal apology, and similar acts. According to Professor I.I. Lukashuk, damage encompasses any harm caused by a State's internationally wrongful act, including both material and moral damage.¹¹⁵ Regarding satisfaction, according to Article 37, Paragraph 1 of the 2001 Articles, a State is liable in the form of satisfaction insofar as the damage caused by an internationally wrongful act cannot be made good by restitution or compensation. Judicial practice is known to apply satisfaction alongside both restitution and compensation. Article 37, Paragraph 2 identifies forms of satisfaction such as an acknowledgement of the breach, an expression of regret, or a formal apology. However, this is not an exhaustive list. Satisfaction may be carried out in other forms, and numerous such cases are known in practice. Generally, in judicial practice, victims are awarded compensation for both material and moral damage.¹¹⁶

The extensive practice of the ECHR can be cited as evidence of this. Article 1 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly on November 29, 1985, states that the term "victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of

114 Final Award: Ethiopia's Damages Claims (n 86) paras 250, 261, 311-2, 328.

115 Lukashuk (n 26) 387.

116 Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill 2023) 158, doi:10.1163/9789004479074.

their fundamental rights, through acts or omissions that are in violation of national criminal laws, including those laws proscribing criminal abuse of power.¹¹⁷

In cases of deportation as an international crime, the method for calculating moral damage must be determined on a case-by-case basis for each deported person.¹¹⁸ Moral damage, being non-pecuniary damage, is a legal violation that does not possess economic content or value. Such damage causes moral distress and suffering to a natural person by violating their inherent or law-based non-material assets (honour, dignity, business reputation, personal and family secrets, freedom of movement, freedom to choose a place of residence, the right to a name, copyright, personal non-property rights, etc.). Moral damage is compensated either alongside the inflicted property damage or in cases where no property damage has been caused. When paying for moral damage, it is necessary to take into account the nature and degree of moral and physical suffering, as well as the fault of the respondent, their financial status, and other important circumstances; the specifics regarding the payment of such damage in each specific case must be determined at the discretion of the court.¹¹⁹ Of course, a complex and long-term process must be carried out in this case. When the reasoned positions of international bodies regarding the assessment of damages are presented as evidence, tribunals can determine compensation.

8 REPARATION IN THE FORM OF IMMOVABLE PROPERTY ARISING FROM THE VIOLATION OF JUS CONTRA BELLUM: THE RIGHT OF THE REPUBLIC OF AZERBAIJAN TO OBTAIN COMPENSATION

As noted, the right to claim damages caused by crimes against international law, including deportation, also belongs to the injured State. If state organs, persons acting under its authority, or individuals and populations associated with that State, along with their interests, have suffered harm, the right to invoke responsibility lies with that State. The Republic of Azerbaijan has the right to receive compensation for the hundreds of thousands of people deported from territories ceded to Armenia following the Russian military aggression against Azerbaijan starting in April 1920 (based on the 1898 and 1907 Hague Regulations, IV Hague Convention (Regulations Art. 42); Article 10 of the Covenant of the League of Nations; bilateral treaties signed by the Azerbaijan Republic with neighbouring states in 1918–1919; the 1991 Declaration of the Supreme Soviet on the Restoration of State Independence; and Articles 1–3 of the 1991 Constitutional Act on State Independence).

117 Resolution of the Constitutional Court of the Republic of Azerbaijan of 31 May 2002 'On the Interpretation of Articles 21 and 23 of the Civil Code of the Republic of Azerbaijan' <<https://constcourt.gov.az/az/decision/600>> accessed 15 January 2026.

118 Final Award: Ethiopia's Damages Claims (n 86) paras 250, 261, 311-2, 328.

119 Resolution of the Constitutional Court of the Republic of Azerbaijan of 31 May 2002 (n 117).

How should the right to claim compensation be realised in this case? In accordance with Article 33 of the UN Charter, and as previously stated, there is an established practice of resolving such issues by concluding international treaties based on claims between states. However, a positive approach from Armenia toward the Republic of Azerbaijan's right to receive compensation does not appear realistic. According to Article 42 of the 2001 Articles on State Responsibility, the Republic of Azerbaijan, as the injured State, has the right to invoke the responsibility of the aggressor, Armenia.

Although Armenia's aggression against the Republic of Azerbaijan was not directly recognised in formal legal terms due to well-known reasons (direct support for Armenia by Russia and France in the UN Security Council), Armenia was indirectly accepted as a party to the conflict in UN Security Council Resolutions 822 (1993), 853 (1993), 874 (1993), and 884 (1993).

The UN General Assembly Resolution A/RES/62/243 of March 14, 2008, titled "The situation in the occupied territories of Azerbaijan," states that the General Assembly... declaring respect for and defence of the sovereignty and territorial integrity of the Republic of Azerbaijan within its recognised international borders; demands the immediate, complete, and unconditional withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan.¹²⁰

Similarly, Resolution 1416 (2005) of the Parliamentary Assembly of the Council of Europe (PACE) states that ...a significant part of Azerbaijan's territory is still occupied by Armenian forces, and the Nagorno-Karabakh region is still under the control of separatist forces. In its resolution, the Parliamentary Assembly further confirms Armenia's status as a party to the conflict: "...the Assembly reaffirms that the secession or independence of a specific region from the territory of any state must only occur through legal, democratic processes and not through military conflict leading to the expulsion of the population based on ethnic affiliation via the de facto annexation of this territory by another state".¹²¹

The primary instrument confirming Armenia's aggression against the Republic of Azerbaijan is the Trilateral Statement of November 9-10, 2020, signed between the Republic of Azerbaijan, Armenia, and the Russian Federation. In numerous Articles of the Statement, Armenia's obligation to cease military aggression against Azerbaijan and to withdraw its forces from the territory of the Republic of Azerbaijan is enshrined. The Republic of Azerbaijan has the authority to take lawful countermeasures (Art. 49) in response to Armenia's reparation obligations arising from military aggression. In accordance with Article 52 of the 2001 Articles on State Responsibility, the lawful countermeasures of the Republic of Azerbaijan can primarily be implemented at a non-

120 PACE Resolution 1416 (2005) 'The Conflict over the Nagorno-Karabakh Region Dealt with by the OSCE Minsk Conference' (25 January 2005); UNGA Resolution 62/243 'The Situation in the Occupied Territories of Azerbaijan' (A/RES/62/243, 14 March 2008).

121 *ibid*

military level (e.g., imposing economic sanctions against the state that committed the violation in other countries or confiscating its assets).

A recent precedent in this field involves the economic sanctions imposed by other states against the Russian Federation in response to its military aggression against Ukraine.¹²² At the recent summit on December 19, 2025, the condition for the repayment of the European Union's 90 billion euro financial support to Ukraine was linked to the reparations that the Russian Federation must pay to Ukraine as a result of its military aggression. It must be noted that the international community has struggled to reach a definitive resolution regarding the transfer of Russian assets to Ukraine as a victim of military aggression. The international legal basis for the seizure of assets of an aggressor state or the confiscation of property belonging to supporters of its policies (2001 Articles; Protocol No. 1, Article 1 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms) aims to hold that state accountable. If a sanction is multilateral, national courts can implement such rulings once the sanction regime has been implemented into domestic law.

The UN Security Council,¹²³ the General Assembly, and the International Court of Justice (Statute Art. 36) have the authority to mandate economic sanctions, including the seizure of assets. It is possible for Ukraine to appeal to the UN Security Council to apply established practices¹²⁴ to resolve this issue. According to Article 27, Paragraph 3 of the UN Charter, the participation of, or interference by Russia, as a 'permanent member' that is a party to the dispute, in the voting process shall have no legal weight. In the context of the seizure of an aggressor state's assets, an appeal to international courts can, in itself, facilitate the resolution of the problem on the basis of goodwill.¹²⁵ In accordance with the right of self-defence (UN Charter Art. 51), if a state imposes individual sanctions or countermeasures, a legislative act must be adopted to confiscate property (Protocol No. 1, Art. 1 of the 1950 Convention).

Even if an aggressor state is defeated but not subjugated, it continues to bear responsibility for the military conflict. In such a case, the state that has repelled the aggression may, in accordance with Article 53 of the 2001 Articles (within the context expressed in Part II of

122 Anton Moiseienko, 'Legal: The Freezing of the Russian Central Bank's Assets' (2023) 34(4) European Journal of International Law 1007, doi:10.1093/ejil/chad050; Laurence H Tribe and others, *The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine* (Renew Democracy Initiative 2023).

123 Resolution UN Security Council 692 (1991) [On Establishment of the UN Compensation Fund and the UN Compensation Commission under Security Council resolution 687 (1991)] (adopted 20 May 1991); Resolution UN Security Council 705 (1991) [On Payment of War Damage Compensation by Iraq] (adopted 15 August 1991); Resolution UN Security Council 706 (1991) [Authorizing States to Permit the Import of Petroleum and Petroleum Products Originating in Iraq Sufficient to Produce a Sum to be Determined by the Council] (adopted 15 August 1991).

124 *ibid*

125 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (ICJ, 27 June 1986).

the Articles), confiscate property owned by that state. This must be done without prejudice to the provision of food and medical supplies for the population of the aggressor state (Articles 23, 55, 59, etc., of the IV Geneva Convention and Articles 69-71 of Additional Protocol I).

The first historical instance of the right to receive reparations in the form of immovable property for violations of *jus contra bellum* dates back to the Treaty of Versailles, adopted at the Paris Peace Conference. Reparation (from Latin *reparatio*, a form of material liability) was imposed on Germany and its allies, who were defeated in World War I.

As compensation under the Treaty of Versailles, Germany lost 13.5% of its territory and 10% of its population.¹²⁶ Along with other indemnities and territories, Poland secured the Danzig (Vistula) Corridor, granting it access to the sea; France obtained the rights to exploit the Saar coal mines; and other states acquired various other rights. Germany was even subjected to indemnities for the maintenance of the "occupation forces." The judgements of the Nuremberg and Tokyo International Tribunals following World War II also imposed reparation obligations on Germany and Japan for aggression, deportation, and other international crimes. The territorial reparation obligations applied to Germany at the Versailles Peace Conference were also adopted at the 1945 Potsdam Conference. The treaties signed upon the repelling of military aggression govern the parties' mutual obligations.

A number of German territories, including Königsberg, were transferred to the USSR; Memelland to Lithuania; and Eupen-Malmedy to Belgium. Saarland remained under French protectorate until the 1957 referendum. In 1949, the Netherlands waived its claim for 25 billion guilders in reparations in exchange for 69 square kilometres of territory. Certain territories (Silesia, Danzig, southern East Prussia, etc.) came under Polish jurisdiction.

In total, Germany's territory was reduced by 25% compared to 1937. Along with territory, various other assets of the aggressor were taken as reparations. In 1947, Yugoslavia received German factory equipment valued at 36 billion US dollars (in 1938 purchasing power) as reparations.¹²⁷ The USSR, meanwhile, seized factories and plants not only within Germany but also in the territories of its other allies. The German naval fleet was divided among Great Britain, the United States, and the USSR.¹²⁸ The reparation regime established against Germany formally continued until the Treaty on the Final Settlement with Respect to Germany (German Reunification) on October 3, 1990. As noted, treaties signed upon the repelling of military aggression regulate the parties' mutual obligations; the regime of such treaties falls under the protection of general international law, ensuring

126 Margaret MacMillan, *Paris 1919: Six Months That Changed the World* (Random House 2001) 584.

127 Special Representative of the Secretary-General in the Republic of the Congo, *Report dated 24 February 1961 to the Secretary-General from his Special Representative in the Congo on the civil war situation in the 3 main sectors of the Congo: addendum dated 1 March 1961* (UN 1961); Alan Kramer, *The West German Economy 1945–1955* (Berg Publishers 1991).

128 Giles MacDonogh, *After the Reich: The Brutal History of the Allied Occupation* (Basic Books 2007).

erga omnes obligations. Even setting aside the conclusion procedure, the regime of obligations expressed for Armenia (for example, under Paragraph 9) in the Trilateral Statement (2020) between the Republic of Azerbaijan, the Republic of Armenia, and the Russian Federation is also under the protection of general international law (UN Charter Art. 51). The guarantors of the relevant obligation (including the Trilateral Statement as a partial act of demilitarisation) are the international community and the Republic of Azerbaijan as the injured State.

9 INTERNATIONAL LEGAL GUARANTEES OF RESTITUTION AND THE VOLUNTARY, SAFE, AND DIGNIFIED RETURN OF THE DEPORTED POPULATION

As noted, restitution should involve restoring the prior situation to ensure a dignified, safe, and honourable way of life. The UN Office of the High Commissioner for Human Rights' document '*Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*' states that restitution for victims includes:

- Restoration of the situation that existed prior to the gross violations of international human rights law or serious violations of international humanitarian law, such as the restoration of human rights and freedoms, and personal, family, and citizenship status documents.
- Return to one's original place of residence.
- Measures for the return of property (restitution of property).¹²⁹

The measures expressed in this document must also be ensured for the Turkic-Muslim population who were mass deported from Armenia. Substantive legal guarantees also require the implementation of a number of procedural measures. A certain practice has already been established in this field. There are well-known resolutions of the UN Security Council¹³⁰ and the General Assembly¹³¹ against the forcible change of demographic structure (population composition), as seen in the case of Iraq's invasion of Kuwait, as well as in the territories occupied by Israel. There is also a quasi-judicial practice regarding the return of deported persons, regardless of the nature and intensity of the military conflict. The Eritrea-Ethiopia Claims Commission (2001) noted that the right to return must be ensured for the 722 individuals expelled by Ethiopia.¹³²

129 Office of the UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (HR/PUB/08/1, UN Publication 2008) 7.

130 Resolution UN Security Council 692 (1991); 705 (1991); 706 (1991) (n 123).

131 UN Human Rights Council, *Report of the United Nations Fact Finding Mission on the Gaza Conflict* (A/HRC/12/48, 15 September 2009) 540.

132 Partial Award: Civilians Claims (n 104) para 16.

Furthermore, through a well-known resolution of the UN General Assembly¹³³, the forcible expulsion of the population from their homes in Bosnia and Herzegovina was strictly condemned. The peace agreement signed on June 3, 1993, between NATO, the Russian Federation, and Yugoslavia provided for the voluntary return of displaced populations from the military conflict to their homes under conditions of full security.

International law has established a practice for the unimpeded and voluntary return of persons who have acquired refugee or internally displaced person (IDP) status as a result of military conflict. In such cases, the direct intent to deport by a party to the conflict may not always be evident. According to UN General Assembly Resolution 194 of December 11, 1948, in accordance with the principles of international law, refugees should be permitted to return to their places of residence at the earliest practicable date, with compensation for damages provided by the respective governments. This resolution was subsequently reaffirmed by both the General Assembly (e.g., 2000, 156-2-2) and Security Council resolutions¹³⁴, thereby establishing the "international right to a voluntary, safe, and dignified return."

The 1907 Hague Regulations and Geneva Law (IV Convention: Art. 27 on respect for the rights and freedoms of protected persons; Art. 29 on the responsibility of a party to the conflict regarding the observance of individual rights; Art. 46 on the cancellation of restrictive measures; Art. 49 on the prohibition of deportation and the immediate return of persons to their homes upon the cessation of hostilities; Art. 132 on the temporary nature of evacuation and the absolute nature of release and repatriation; and Art. 133 on the termination of evacuation upon the end of hostilities) collectively encompass the rights and freedoms of deportation victims within the broad framework of the "international right to a voluntary, safe, and dignified return."

Although the population expelled from Armenia has been granted refugee status, they are direct victims of military aggression and deportation; in this sense, their status should be determined under the regime of International Humanitarian Law (IHL). The framework for the domestic legal implementation of international humanitarian law norms is operational under the legislation of the Republic of Azerbaijan (Constitution, Art. 148.II and Art. 10). The domestic protection of the rights of the Turkic-Muslim population subjected to mass deportation from Armenia can be realised by recognising their legal status as a deported population. Such recognition can be effected either through a legislative act of the Republic of Azerbaijan or by a court decision. Alternatively, the protection of their rights can be ensured through a judgement of an international court.

133 UNGA Resolution 51/116 'The Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)' (A/51/PV.82, 12 December 1996).

134 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (ICJ, 9 July 2004) ICJ Rep 2004/152-3; Resolution UN Security Council 259 (1968) [On the Special Representative of the Secretary-General for the Arab Territories under Military Occupation by Israel] (adopted 27 September 1968).

Undoubtedly, a judgement from the UN International Court of Justice (ICJ) could be more ambitious in resolving this issue. In particular, since 2023, the International Court of Justice (ICJ), where mutual jurisdiction is recognised, and reciprocal claims have been filed pursuant to Article 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), may offer greater prospects for resolving this issue. A demand should be made to Armenia through an ICJ judgement to evaluate the racial discrimination aspect and genocidal content of the deportation and to ensure the fulfilment of relevant obligations. In the application to be submitted to the International Court of Justice regarding the deportation of the Turkic-Muslim (civilian) population group, the following should be sought:

1. The evaluation of the acts as:
 - A) Genocide; or
 - B) War crimes; or
 - C) Crimes against humanity.
2. The determination of the State responsibility of Armenia regarding the obligation of reparation.

Another guarantee mechanism, in accordance with Protocol No. 4 to the 1950 European Convention on Human Rights (Art. 3.1: "No one shall be expelled, by means of an individual or collective measure, from the territory of the State of which he is a national"), could involve:

1. A claim for compensation for the victims at the European Court of Human Rights (ECHR).
2. Simultaneously, a series of general measures at the ECHR:

A demand for the annulment of Armenia's acts that are contrary to international law.

Consistent with the ECHR's authority to order administrative or individual measures, a claim can be filed by the Republic of Azerbaijan for the return of our compatriots (the indigenous Turkic-Muslim people) who were subjected to mass deportation. Precedents are known¹³⁵ in accordance with Protocol No. 4 to the 1950 European Convention on Human Rights (Art. 3.1: "No one shall be expelled, by means of an individual or collective measure, from the territory of the State of which he is a national"; and Art. 4 regarding additional procedural guarantees).

The violation of the law in these cases differs from the violation of our compatriots' rights. The individuals in those precedents are subjects of the 'right to asylum' or 'migration law.' In contrast, the members of the 'Western Azerbaijan Community' are indigenous people.

135 *IM v France* App no 9152/09 (ECtHR, 2 February 2012); *Hirsi Jamaa and others v Italy* (n 42).

Therefore, regarding the mass deportation from Armenia, our compatriots may file claims based on the norms concerning violations of Article 2 (right to life), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life, and home) of the 1950 European Convention, and Article 1 of Protocol No. 1 (protection of property).

Physical violence was used against the population deported from Armenia. Within the framework of European human rights, the rights of these persons can also be exercised based on the European Convention on the Compensation of Victims of Violent Crimes (Strasbourg, 1983). The Convention (Art. 2.2) states that compensation shall be paid by the State in whose territory the crime was committed. Naturally, the requirement that a complaint regarding the same subject matter and the same parties must be submitted to only one international judicial mechanism (*lis alibi pendens*) must be observed. The judicial practice explaining the consequences of the principle that no person can be deprived of the right to enter the territory of the State of which he is a national is not very extensive. This right is also a consequence of general international law.¹³⁶

The consequence of general international law is that, under international human rights law, all persons, including indigenous populations, have the right to return to their homeland. Regardless of a peace treaty formalising the end of a war, the internment of evacuated persons must be terminated upon the cessation of active hostilities (IV Convention, Art. 133), and deported or interned persons must be repatriated (IV Convention, Art. 134).

This rule possesses the character of a customary norm of international humanitarian law. Although the repatriation of a deported population may be accompanied by certain military-political, administrative-economic, and other challenges, it is among the principles that must be executed 'unconditionally.' According to Additional Protocol I to the Geneva Conventions (Art. 85.4(b)), the unjustifiable delay in the repatriation of civilian persons, as well as prisoners of war, constitutes a war crime (entails criminal responsibility).

10 INTERNATIONAL LEGAL GUARANTEES OF SECURITY FOLLOWING A DIGNIFIED RETURN (MONITORING SYSTEM)

The voluntary, safe, and dignified return of deported persons, as established by International Humanitarian Law (IV Convention, Arts. 133 and 134), constitutes only the initial stage in resolving the issue. As a continuation of international legal guarantees, the primary challenge is establishing a secure way of life for the population upon their return.

A secure way of life, as an institution of international law, can be realised through the right to self-determination (in both its internal and external aspects). The selection of forms of cultural or ethno-political autonomy will depend on the host country's state

¹³⁶ Legal Education Society (n 112) 670.

form, particularly its administrative-territorial structure. Even in the simplest form, such as cultural autonomy, constitutional guarantees of the host state must be established, and these guarantees must be conditioned by the institution of international guardianship (guarantorship).

As a rule, the institution of international guardianship is implemented through a multilateral international treaty. Without entering into the civil law concept in the narrow sense, it should be noted that the term 'guaranty' (English: guarantee) signifies the securing of ownership of a property, while the term 'guarantor' (French: garant) conveys the meaning of one who protects or guards.¹³⁷ While various definitions are provided for guarantee treaties within international law doctrine, the general substance is that they are 'agreements intended to provide aid and support to one of the contracting parties, should the necessity arise, in order to compel a non-trusted party to fulfil its obligations'.¹³⁸

The aid and support provided through the institution of international guardianship are intended for the purpose of trusteeship, aimed at realising international peace and security, as well as the rights and freedoms of the population in the respective territory. According to international law (UN Charter, Chapter XII), the trusteeship system is generally established to maintain international peace and security in non-self-governing territories. However, the form of trusteeship that constitutes the regulatory object of a guarantee treaty is more specific.

Trusteeship as the object of a guarantee treaty is secured by an obligation undertaken with the possibility of intervention by the other party or parties in the event of a breach of the territorial guarantee obligation; or otherwise, the party is compelled to fulfil it. A guarantee treaty may be cited, for instance, as an agreement signed to strengthen a peace treaty and reinforce the consent of the parties¹³⁹, or as the guarantorship of individual powerful states in the realisation of major economic and commercial projects (for example, the role of the United States in the Ankara Declaration, which supported the construction of the Main Export Pipeline via the Baku-Tbilisi-Ceyhan route among Azerbaijan, Turkey, Georgia, Kazakhstan, Uzbekistan, and the USA). A guarantor state is a state that warrants that the conditions set forth in the treaty will be preserved.

A guarantee treaty establishes international obligations for one party and absolute rights for the other. It serves as a safeguard against bad faith and mistrust. One historical example is the treaty signed by England and the people of La Rochelle against France guaranteeing their right to autonomy.¹⁴⁰ In the Middle Ages, placing small or neutral states under the

137 Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund 2008) 398.

138 *ibid* 396.

139 Alan Dowty, 'International Guarantees with Special Reference to the Middle East' in David Carlton and Carlo Schaerf (eds), *The Dynamics of the Arms Race* (Wiley & Sons 1975) 215.

140 Armaoğlu (n 44) 261.

guardianship of guarantor states was a common practice. Under a guarantee treaty, the guarantor is recognised as having the right to use force against a non-trusted party should that party fail to fulfil its obligations.¹⁴¹

Currently, various alliances and blocs also operate with the characteristics of a guarantee. In the modern era, the UN Charter serves as the ultimate foundation for guarantee treaties. In accordance with the 1969 Vienna Convention on the Law of Treaties (Arts. 2 and 53), these treaties must be based on the use of 'just force', provided that the principles enshrined in the UN Charter (Arts. 2, 51, 103) are observed. This implies that guarantee treaties function as a mechanism to ensure the accountability of aggressor states that violate general international law. According to the UN Charter (Art. 51), a guarantee treaty is significant for the phase following the repatriation of the population and the elimination of the consequences of deportation crimes committed as a result of aggression.

For the Turkic-Muslim population expelled from Armenia, the 20th-century experience, specifically the 1960 Cyprus Treaty of Guarantee or the 1995 Dayton Agreement, can serve as a model. The parties to the 1960 Cyprus Treaty of Guarantee were states with international legal personality (Turkey, the United Kingdom, Cyprus, and Greece). On behalf of the Republic of Cyprus, it was signed by the Greek Cypriot head of state and his Turkish Cypriot deputy.

In the case of the Western Azerbaijan community, if the 1907 Hague Regulations (IV) are taken as a basis, the community could act as a party to the signed guarantee treaty. Alternatively, the Western Azerbaijan Community could constitute the regulatory object of the treaty. The Republic of Azerbaijan and the Western Azerbaijan Community, on the one hand, and Armenia, on the other, could agree to a treaty to ensure the security of Western Azerbaijanis under the guardianship of guarantor states (e.g., the United Kingdom and Turkey). The terms of the treaty could be adapted to the Cyprus model.

The 1960 Cyprus Treaty of Guarantee functioned as a complementary norm to the Cypriot Constitution. It aimed to guarantee the constitutional order governing the state and the rights and freedoms of both communities on the island. Similarly, the Dayton Agreement serves as a guarantee for the constitutional structure of Bosnia and Herzegovina. In the Guarantee Treaty (Art. 1), the right to self-determination of Western Azerbaijanis (including forms of local self-governance) can be enshrined in accordance with Article 2 of the International Covenant on Civil and Political Rights (ICCPR). In the Concept of Return¹⁴², which concerns the ensuring of a safe, dignified, and peaceful return of Azerbaijanis expelled from the territory of present-day Armenia, Armenia is expressed as a socio-political reality (4.4).

141 Dowty (n 139) 216.

142 Western Azerbaijan Community, *Concept for the peaceful, safe and dignified return of Azerbaijanis expelled from the territory of present-day Armenia (Return Concept)* (adopted 26 January 2023).

Article 2 of the Guarantee Treaty may reflect respect for Armenia's politico-legal independence. Article 3 could establish that Western Azerbaijanis shall have unimpeded communication and links with the Republic of Azerbaijan, while Article 4 could state that the autonomy of Western Azerbaijanis shall remain inviolable even if Armenia joins any politico-military blocs. Similar to the Dayton Agreement, security forces of the guarantor states could be deployed in the territories where Western Azerbaijanis are settled. In accordance with the principle of the peaceful settlement of disputes (UN Charter, Art. 33), any disagreements could be designated for adjudication by the UN International Court of Justice (ICJ) as the court of last resort. As the Guarantee Treaty pertains to human rights, it should be of indefinite duration. In the event of a 'fundamental change of circumstances' (*rebus sic stantibus*) as expressed in Article 62 of the 1969 Vienna Convention on the Law of Treaties, Western Azerbaijanis may rely on their right to self-determination as a fundamental basis.

11 CONCLUSION

The right not to be subjected to deportation is based on the *jus cogens* norm, which requires universal observance in international law. The international legal responsibility of a state for deportation involves the fulfilment of the breached international obligation through: *restitutio in integrum*—the restoration of the material situation that existed prior to the violation (*status quo ante*); compensation for material and moral damages, including rehabilitation, satisfaction, and guarantees of non-repetition; and the individual criminal responsibility and prosecution of the perpetrators.

From the perspective of international legal status, the population of Western Azerbaijan is considered a population deported from Azerbaijani territories that Russia occupied in 1920 and subsequently transferred to Armenia. In this case, the regime of International Humanitarian Law (IHL) governing populations deported from territories occupied as a result of military aggression applies. The fact that the Armenian political leadership refers to the ethnic differences of the Turkic-Muslim population deported from Armenia serves as evidence that this deportation was also carried out with genocidal intent.

Criminal cases can be initiated in the Republic of Azerbaijan under universal jurisdiction to establish the individual criminal responsibility of officials who carried out the deportation or obstructed the "right to return."

Regardless of the refugee status recognised under the 1951 Convention, the Turkic-Muslim population deported from Armenia is under the protection of the 1907 Hague Regulations (IV) and the 1949 Geneva Convention (IV, Art. 4). Hague and Geneva law, in turn, do not exclude the application of minimum standards of International Human Rights

Law (IHRL) toward this population. To ensure the right to return, international mechanisms may be utilised. A demand should be made to Armenia through a judgement of the UN International Court of Justice (ICJ) (based on Art. 22 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination) for the evaluation of the racial discrimination and genocidal content of the deportation, and for the fulfilment of relevant obligations, including the "right to return." The 1951 Convention Relating to the Status of Refugees (Art. 38) also allows the ICJ to evaluate deportation, where the hardships of the refugee condition can constitute the subject of the claim.

Victims can file a claim for compensation with the European Court of Human Rights (ECHR). Simultaneously, as general measures, the annulment of Armenia's acts contrary to international law should be demanded, and a claim for the return of the mass deported Turkic-Muslim people can be raised in accordance with the ECHR's authority to order administrative measures.

To implement these demands more effectively, a "Law of the Republic of Azerbaijan on the Dignified Return and Security of Azerbaijanis Deported from the Territory of Present-day Armenia on the Basis of Racial Discrimination and with Genocidal Intent" could be adopted. This law should emphasise that their Azerbaijani citizenship status is of a temporary and transitional nature, recognise them as victims of the crime of genocide and highlight their desire to return to their historical homeland. The granting of citizenship was linked to the desire to eliminate the legal vacuum regarding these persons in accordance with IHRL.

The citizenship granted by the Republic of Azerbaijan was necessitated by Armenia's long-term military aggression, alongside principles governing the institution of citizenship in international human rights, such as the prohibition of arbitrary deprivation of nationality (Universal Declaration of Human Rights, Art. 15), the prevention of statelessness, and the priority of the right to nationality in ensuring human rights. In this sense, the granted Azerbaijani citizenship does not exclude their status as nationals of Armenia. There are no cases of loss of citizenship (expatriation, denaturalisation, denationalisation, etc.) for these persons. The provision of the 1966 International Covenant on Civil and Political Rights (Art. 15.2) that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality" remains an international obligation for Armenia. As long as these persons' specific desire to return persists or no declaration of renunciation of Armenian citizenship is made, the status quo ante formally remains in effect regarding them.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

МІЖНАРОДНО-ПРАВОВІ ЗАСАДИ

ГІДНОГО ПОВЕРНЕННЯ ТА БЕЗПЕКИ АЗЕРБАЙДЖАНЦІВ,
ДЕПОРТОВАНИХ ІЗ СУЧАСНОЇ ТЕРИТОРІЇ СУЧАСНОЇ ВІРМЕНІЇ

Афсар Садігов та Сафтар Рагімлі*

АНОТАЦІЯ

Вступ. Примусове переміщення населення Західного Азербайджану, спочатку вигнаного з територій, окупованих Росією в 1920 році, а згодом переданого під юрисдикцію Вірменії, є важливим предметом міжнародно-правового регулювання у сфері репатріації, безпеки та відновлення прав для переміщених груп населення. Відповідно до доктрини *jus cogens*, заборона депортації класифікується як імперативна норма міжнародного права, яка передбачає загальне дотримання та покладає на державу міжнародно-правову

відповідальність за її порушення. Правова база, яка регулює такі випадки, є багатогранною, спираючись на міжнародне гуманітарне право для вирішення проблем населення, переміщеного внаслідок військової агресії, водночас посилюючись на принципи відповідальності держави за міжнародні протиправні дії. Ці принципи вимагають комплексного відшкодування, зокрема *restitutio in integrum* (відновлення *status quo ante*), компенсації, реабілітації, сатисфакції та надійних гарантій неповторення.

З погляду нормативності, тюрксько-мусульманське населення, депортоване з Вірменії, залишається під захистом Гаазької конвенції (IV) 1907 року та Женевської конвенції (IV) 1949 року. Незважаючи на те, що наявна наука широко задокументувала історичні та нормативні виміри депортації, зберігається значна аналітична прогалина щодо конкретних міжнародно-правових механізмів, необхідних для того, щоб реалізувати право на гідне повернення та гарантувати довгострокову безпеку. Це дослідження має на меті усунути цю прогалину за допомогою синтезу міжнародно-правових норм, індивідуальної кримінальної відповідальності та порівняльної практики держав для розроблення комплексної системи правових засобів захисту та міжнародних механізмів гарантування безпеки.

Методи. У статті було застосовано доктринальний та порівняльно-правовий методи, доповнені історико-правовим аналізом архівних джерел з метою реконструкції історичного контексту та встановлення передумов депортації 1920, 1948–1956 та 1988 років. Проведено системний аналіз міжнародно-правових актів і наукової літератури для визначення змісту понять депортації, геноциду та міжнародно-правової відповідальності держав за порушення імперативних норм (*jus cogens*). На основі узагальнення міжнародної судової практики, зокрема рішень Міжнародного Суду Організації Об'єднаних Націй, Міжнародного кримінального трибуналу для колишньої Югославії, Європейського суду з прав людини та Комісії з розгляду претензій Еритреї та Ефіопії, а також порівняльного аналізу практики репарацій, дослідження пропонує систему правового захисту, що охоплює типові договори, системи моніторингу та національні законодавчі заходи.

Результати та висновки. Переміщене населення Західного Азербайджану має невід'ємне право на гідне повернення та цілісну безпеку згідно з міжнародним правом, що ґрунтується на забороні примусового переміщення *jus cogens*. Згідно з міжнародно-правовим режимом відповідальності держави, порушення цих імперативних норм вимагає багаторівневого підходу до вирішення проблем, що охоплює *restitutio in integrum*, фінансову компенсацію, реабілітацію, сатисфакцію та надійні гарантії неповторення, а також притягнення винних осіб до відповідальності за міжнародні злочини. Нормативно, тюрксько-мусульманське населення, вигнане з Вірменії, залишається під постійним захистом як історичних, так і сучасних документів, що усуває розрив між міжнародним гуманітарним правом та міжнародним правом прав людини (МППЛ). Практична реалізація цих прав може здійснюватися за допомогою звернення до міжнародних судових інституцій, зокрема Міжнародного Суду ООН та Європейського суду з прав людини, а також через ухвалення національного законодавства, яке офіційно визнає їхній статус як жертв дій, вчинених із геноцидним умислом. Разом зазначені міжнародно-правові механізми формують цілісну й практично застосовну основу для відновлення історичних прав, забезпечення інституційної відповідальності та створення умов для безпечної, сталої та гідної репарації до місць їхнього походження.

Ключові слова: депортація, міжнародне право, Женевські конвенції 1949 року, міжнародно-правова відповідальність держави, міжнародно-протиправне діяння.

Research Article

PROTECTION OF CHILDREN'S PRIVACY AND PERSONAL DATA: A PERSPECTIVE FROM VIETNAMESE LAW

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ABSTRACT

Background: *The protection of children's personal data is becoming an urgent issue in Vietnam and globally. This article analyses Vietnam's legal framework for the protection of children's personal data and addresses the specific legal question of how far Vietnam can adopt the legal elements currently set out in the General Data Protection Regulation (GDPR). It identifies structural limitations concerning age thresholds, consent mechanisms, sanctions, and the personal data protection authority. Finally, the article proposes recommendations and policy suggestions for improving the Vietnamese data protection law, including a developmentally stratified age-of-consent model and a specialised supervisory authority, with the broader aim of ensuring a safe digital environment oriented towards children's development.*

Method: *This article adopts a multi-method qualitative legal research design integrating three approaches: 1) a doctrinal legal analysis to identify, interpret, and evaluate Vietnam's normative framework; 2i) a functional comparative analysis is employed to compare Vietnamese law with the GDPR, to evaluate their degree of compatibility and to identify regulatory*

techniques that may be received into Vietnamese law; and 3) an interdisciplinary contextual analysis drawing on developmental psychology, cross-cultural psychology, and legal anthropology to evaluate children's decision-making capacity, family authority structures, and the influence of Confucian ethics, and 'Lang' culture on parent-child relationships, insights essential for adapting international models to Vietnam. Secondary sources, including peer-reviewed scholarship and international organisation reports, contextualise the findings.

Results and Conclusions: Although Vietnam has established a foundational framework, significant shortcomings persist: 1) the definition of "child" and age-based consent thresholds are inconsistent and insufficiently calibrated to children's evolving capacities; 2) the dual consent and suspension mechanisms lack clarity and sit uneasily with the cultural pressures that asymmetrically weaken a child's consent relative to a child's objection; 3) the sanctioning regime lacks adequate deterrent effect, notwithstanding recent amendments; and 4) Vietnam does not so much lack a supervisory authority as an independent one, its oversight function currently residing within the security apparatus, while it has no child-specific transparency, data protection by design, or data protection impact assessment (DPIA) obligations. On this basis, the article advances a framework of culturally conditioned legal transfer, classifying each GDPR technique as portable as it stands, requiring structural adaptation, or needing indigenous design, and proposes: (a) a tiered consent model with a qualified right for the child to object in high-risk processing; (b) child-specific transparency, data protection by design, and mandatory DPIAs; (c) a graduated, revenue-sensitive sanctioning regime; (d) a specialised data protection authority with relative independence and cross-border enforcement competence; (e) age-appropriate transparency in consent; and (f) deepened international cooperation. These reforms respect Vietnam's constitutional order and socio-cultural context.

1 INTRODUCTION

A recent study estimates that approximately one in three internet users worldwide is under eighteen.¹ In Vietnam, 83% of children aged twelve to thirteen use the Internet, rising to 93% among those aged fourteen to fifteen. A survey by the Institute for Research on Management of Sustainable Development (MSD Vietnam) and Save the Children International indicates that children spend five to seven hours per day on social media, while only 36%, primarily those aged sixteen to seventeen, have received education on online safety.² As a particularly vulnerable group, children benefit from the educational and recreational opportunities of digital technologies but also face significant risks of personal

1 Ingrida Milkaite and Eva Lievens, 'Children's Rights to Privacy and Data Protection Around the World: Challenges in the Digital Realm' (2019) 10(1) European Journal of Law and Technology 1.

2 Tổ Trang Lâm, 'Protect Children's Rights from Cyberviolence under the Vietnamese Law' (2025) 8(3) International Journal of Innovative Research and Scientific Studies 2689, doi:10.53894/ijirss.v8i3.7070.

data misuse and privacy infringements. Recognising this, many jurisdictions have adopted stringent legal frameworks to safeguard children online.³

In Vietnam, children's personal data protection has received increasing regulatory attention. Key instruments, including the Law on Personal Data Protection 2025 (LPDP),⁴ the Law on Children 2016,⁵ the Law on Cybersecurity 2018,⁶ and the Law on the Press 2016,⁷ have established a foundational framework. The Law on Advertising 2012,⁸ Decree 72/2013/ND-CP on Management, Provision and Use of Internet Services and Online Information 2013,⁹ and the Law on Handling of Administrative Violations 2012¹⁰ also play complementary roles. Nevertheless, academic research on this issue in Vietnam remains limited, resulting in persistent regulatory gaps that must be addressed to keep pace with the rapidly evolving digital environment.¹¹

Notably, the draft Decree on administrative sanctions in the field of personal data protection, currently under consideration by the Vietnamese government, represents a significant step toward enhancing deterrence. It is expected to introduce stringent penalties for violations involving personal data, including children's data. A cleaner sanctioning regime will strengthen children's privacy protection and contribute to a more transparent legal environment for digital sector businesses.¹²

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- 3 Kathryn C Montgomery and Jeff Chester, 'Data Protection for Youth in the Digital Age: Developing a Rights-Based Global Framework' (2015) 1(4) *European Data Protection Law Review* 277, doi:10.21552/EDPL/2015/4/6.
 - 4 Law of Vietnam No 91/2025/QH15 'On Personal Data Protection' (adopted 26 June 2025) <<https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Luat-Bao-ve-du-lieu-ca-nhan-2025-so-91-2025-QH15-625628.aspx>> accessed 17 April 2026.
 - 5 Law of Vietnam No 102/2016/QH13 'On Children' (adopted 05 April 2016) <<https://thuvienphapluat.vn/van-ban/Giao-duc/Luat-tre-em-2016-303313.aspx>> accessed 17 April 2026.
 - 6 Law of Vietnam No 24/2018/QH14 'On Cybersecurity' (adopted 12 June 2018) <<https://thuvienphapluat.vn/van-ban/Cong-nghe-thong-tin/Luat-an-ninh-mang-2018-351416.aspx>> accessed 17 April 2026.
 - 7 Law of Vietnam No 103/2016/QH13 'On the Press' (adopted 05 April 2016) <<https://thuvienphapluat.vn/van-ban/Van-hoa-Xa-hoi/Luat-Bao-chi-2016-280645.aspx>> accessed 17 April 2026.
 - 8 Law of Vietnam No 16/2012/QH13 'On Advertising' (adopted 21 June 2012) <<https://thuvienphapluat.vn/van-ban/Thuong-mai/Luat-Quang-cao-2012-142541.aspx>> accessed 17 April 2026.
 - 9 Decree of Vietnam No 72/2013/ND-CP 'On the Management, Provision and Use of Internet Services and Online Information' (adopted 15 July 2013) <<https://thuvienphapluat.vn/van-ban/Cong-nghe-thong-tin/Nghi-dinh-72-2013-ND-CP-quan-ly-cung-cap-su-dung-dich-vu-Internet-va-thong-tin-tren-mang-201110.aspx>> accessed 17 April 2026.
 - 10 Law of Vietnam No 15/2012/QH13 'On Handling of Administrative Violations' (adopted 20 June 2012) <<https://thuvienphapluat.vn/van-ban/Vi-pham-hanh-chinh/Luat-xu-ly-vi-pham-hanh-chinh-2012-142766.aspx>> accessed 17 April 2026.
 - 11 Milkaite and Lievens (n 1) 1.
 - 12 'Draft Decree on Administrative Sanctions in the Field of Cybersecurity and Personal Data Protection' (*Ministry of Public Security of Vietnam*, March 2026) <<https://bocongan.gov.vn/chinh-sach-phap-luat/lay-y-kien-du-thao/ho-so-du-thao-nghi-dinh-quy-dinh-xu-phat-vi-pham-hanh-chinh-trong-linh-vuc-an-ninh-mang-va-bao-ve-du-lieu-ca-nhan-1772531021?type=dang-lay-y-kien>> accessed 16 June 2026.

The central question this article pursues is not whether Vietnam should follow the GDPR, but how far it can. Vietnam's Law on Personal Data Protection 2025 already mirrors much of the European model, yet a borrowed rule does not always behave the same way once it enters a different legal and cultural setting. A child's right to consent, for instance, presupposes a child who can speak independently of their parents, an assumption that sits uneasily with the Confucian and communitarian fabric of Vietnamese family life. The analysis, therefore, proceeds along two lines of inquiry. The first asks where the Vietnamese framework falls short when compared with how the GDPR addresses the same problems. The second asks which of those European solutions Vietnam can realistically borrow, which it must reshape, and which it cannot adopt without a domestic alternative. Read together, these questions treat each part of the Vietnamese framework as an instance of conditioned transfer, in which some techniques can be taken as they stand, others require structural adaptation, and a few must be rebuilt to fit Vietnamese conditions. The age threshold, the consent architecture, the sanctioning regime, and the supervisory authority are examined not as separate problems but as four points at which this same tension between the imported rule and the receiving context must be resolved.

2 METHODOLOGY

The article employs a multi-method qualitative legal research design integrating doctrinal legal analysis, comparative law, and interdisciplinary contextual analysis. This combination is essential, as the research questions concern not only normative content but also the socio-cultural conditions that govern the law's interpretation and enforcement, an issue that neither a purely doctrinal nor a purely sociological approach can fully address.

First, the doctrinal legal analysis method is utilised to systematically identify, interpret, and evaluate the legal system governing the protection of children's personal data in Vietnam, clarifying its normative substance, internal consistency, and existing legal gaps.

Second, the functional comparative law method compares the Vietnamese framework with the GDPR. The GDPR is chosen not merely for its regulatory maturity but because it is the very model the LPDP 2025 emulates, so the comparison reflects a transfer rather than an arbitrary pairing of two systems. The comparison is conducted across the following aspects: (i) GDPR instruments and provisions, including Recital 38, Articles 6, 7, 8, 12, 25, 35, 51–59 and 83 of the GDPR, the European Data Protection Board's (EDPB) guidelines 03/2022 on dark patterns and guidelines 02/2023 on Article 8; (ii) evaluative criteria, including the conceptualisation of children as data subjects and the applicable age thresholds, the structure of parental consent and children's evolving capacities, child-oriented transparency obligations and privacy-by-design requirements, revenue-based sanctioning mechanisms, and the design of supervisory authorities; and (iii) the functional comparative element, which asks how each legal framework addresses the same regulatory problem, namely the protection of children's data in the digital environment. The secondary sources are confined

to peer-reviewed scholarship; instruments of standard-setting bodies such as the EDPB, the UN Committee on the Rights of the Child, and the Organisation for Economic Co-operation and Development (OECD); and official enforcement decisions, so that the normative claims rest on authoritative rather than incidental materials. On this basis, the reform proposals are reached through a four-step process. The article first identifies the regulatory problem common to both systems, then maps how each system addresses it, then tests each GDPR technique against Vietnam's constitutional, institutional, and socio-cultural conditions, and finally classifies the outcome as a technique that is portable as it stands, one that requires structural adaptation, or one that must be designed indigenously. The recommendations in Section 4 follow directly from this classification.

Third, interdisciplinary contextual analysis integrates insights from three fields: (i) developmental psychology, to evaluate children's decision-making capacity at various consent thresholds; (ii) cross-cultural psychology, to analyse authority structures within the Vietnamese family; and (iii) legal anthropology, to elucidate the influence of Confucian ethics and "Lang" culture on parent-child relationships. These insights supplement rather than replace the legal analysis, providing a basis for adapting Western legal references to the Vietnamese context.

3 RESULTS AND DISCUSSION

3.1. Children, Children's Personal Data, and Children's Personal Data Protection

Under Vietnamese law, a "child" is defined as a person under the age of 16.¹³ This definition, as provided in the Law on Children 2016, differs from that set out in the United Nations Convention on the Rights of the Child (UNCRC), to which Vietnam acceded in 1990 and which all Member States of the European Union have ratified. The Convention provides that "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."¹⁴ The GDPR does not adopt a uniform definition of "child" but anchors child-specific protection in Article 8, which sets the default age of digital consent at sixteen while permitting Member States to lower it to no less than thirteen. This margin has produced a heterogeneous European landscape (thresholds ranging from thirteen to sixteen), operating against the common backdrop of the UNCRC's 18-year benchmark. The definition of "child" thus varies across jurisdictions, reflecting differing cultural, legal, social, and historical contexts that shape how states conceptualise and protect children's rights.¹⁵ The Civil Code 2015 provides that

13 Law of Vietnam No 102/2016/QH13 (n 5) art 1.

14 Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25) [1999] UNTS 1577/3, art 1.

15 Sonia Livingstone and others, 'Children's Rights and Online Age Assurance Systems: The Way Forward' (2024) 32 International Journal of Children's Rights 721, doi:10.1163/15718182-32030001.

a person attains full legal capacity at eighteen.¹⁶ Individuals aged sixteen to under eighteen, therefore, occupy an ambiguous legal position. They fall outside the scope of the Law on Children 2016 and have not attained the full legal capacity of adults under the Civil Code 2015. This lacuna is problematic because individuals in this age bracket have not yet achieved full physical, mental, and cognitive maturity and thus remain particularly vulnerable in the digital environment.

Pursuant to the LPDP,¹⁷ personal data is defined as information in symbolic, alphabetic, numeric, image, sound or similar electronic form that is associated with or capable of identifying a specific individual, encompassing basic and sensitive personal data. Neither this law nor other instruments define “children’s personal data”. Accordingly, the concept must be derived from the definition of “child” in the Law on Children 2016, read in conjunction with the general definition of personal data, which differs only in terms of the subject’s age.¹⁸

Empirical evidence underscores the urgency of strengthening children’s data protection in Vietnam. A 2020 survey conducted by MSD and Save the Children International (SCI) across seven provinces and cities found 96.9% of surveyed children had access to internet-connected devices.¹⁹ Children are also exposed to wide-ranging online risks; MSD reports that 40% felt unsafe online and over 70% had experienced negative incidents, including disclosure of personal information, harassment, and cyberbullying²⁰. The National Centre for Missing and Exploited Children reported over 700,000 child sexual abuse images originating from Vietnam, among the highest in Southeast Asia, after the Philippines and Indonesia.²¹ Vietnam ranked 28th of thirty economies in the DQ Institute’s 2020 Child Online Safety Index (12.7/100 compared to a global average of forty-two), with particularly poor performance on cyber risk and social infrastructure (the legal and policy framework for online child protection). The United Nations Children’s Fund (UNICEF) reports that

16 Law of Vietnam No 91/2015/QH13 ‘Civil Code’ (adopted 24 November 2015) art 20 <<https://thuvienphapluat.vn/van-ban/EN/Quyen-dan-su/Law-No-91-2015-QH13-The-Civil-Code/303230/tieng-anh.aspx>> accessed 17 April 2026.

17 Law of Vietnam No 91/2025/QH15 (n 4) art 2(1).

18 Milda Macenaite and Eleni Kosta, ‘Consent for Processing Children’s Personal Data in the EU: Following in US Footsteps?’ (2017) 26(2) Information & Communications Technology Law 146, doi:10.1080/13600834.2017.1321096.

19 Management and Sustainable Development Institute, *Voice of Vietnamese Children: Report on Survey Results* (MSD Vietnam 2020) 31 [in Vietnamese].

20 ‘Children Face Risks in Cyberspace with 87% Accessing Internet Daily’ (*VietnamPlus*, 19 March 2023) <<https://en.vietnamplus.vn/children-face-risks-in-cyberspace-with-87-accessing-internet-daily-post250092.vnp>> accessed 29 January 2026.

21 NCMEC, ‘2021 CyberTipline Reports by Country’ (*National Center for Missing & Exploited Children*, 2022) <<https://www.missingkids.org/content/dam/missingkids/pdfs/2021-reports-by-country.pdf>> accessed 30 January 2026.

cyberbullying in Vietnam commonly occurs on Facebook, messaging applications (Zalo, Viber, etc.) and content-sharing platforms (YouTube and Instagram).²²

These data show that although Vietnam ranks among countries with high levels of internet and social media uptake among children, online safety, particularly regarding personal data, remains a significant concern. Comprehensive protection mechanisms are therefore needed for the following reasons:

First, children constitute a particularly vulnerable group. They are increasingly used for analytics, profiling, targeted advertising, and automated decision-making, while children often lack the capacity to comprehend the long-term consequences of such processing.²³ This renders them especially susceptible to identity theft, online harassment, and exploitation. UNICEF has emphasised that children's attitudes, preferences, and identities are continuously evolving and that their limited capacity for informed decision-making poses distinct privacy challenges. Even where children consent to data collection, they are generally unable to fully assess its long-term implications for their privacy.²⁴ In 2024, 1.1 million cases of child identity theft were recorded, with 50% of victims aged six or younger.²⁵ Children therefore require enhanced protection due to their incomplete physical and psychological development²⁶ and their classification as a vulnerable group with limited access to effective remedies.²⁷ Although these risks apply to all users, the harm is amplified when such technologies are deployed against children, who cannot give genuinely informed consent.²⁸

Second, children's personal data protection is intrinsically linked to their right to privacy in the digital environment. Article 16 of the UNCRC provides that no child shall be subjected to arbitrary or unlawful interference with privacy, family, home, or correspondence, or to unlawful attacks on honour and reputation, and the child has the right to legal protection against such interference or attacks. This right is reinforced by Article 8 of the European

22 Quy Nguyen, 'Vietnam Fares Poorly in Online Child Safety Ranking' *VnExpress International* (Hanoi, 15 February 2020) <<https://e.vnexpress.net/news/news/vietnam-fares-poorly-in-online-child-safety-ranking-4053720.html>> accessed 1 February 2026.

23 Sara M Grimes, 'Responsible AI and Children: Towards a Rights-Based Approach to AI Governance' (Sesame Workshop, Joan Ganz Cooney Center, 23 January 2025) <<https://joanganzcooneycenter.org/2025/01/23/responsible-ai-and-children/>> accessed 3 February 2026.

24 Sonia Livingstone, Mariya Stoilova and Rishita Nandagiri, *Children's Data and Privacy Online: Growing Up in a Digital Age* (LSE Media and Communications 2019) 15, 20, 25; Carly Nyst, Patrick Geary and Amaya Gorostiaga, *Privacy, Protection of Personal Information and Reputation Rights* (Discussion Paper Series: Children's Rights and Business in a Digital World, UNICEF 2017).

25 Julija A, 'Most Worrying Identity Theft Statistics for 2026' (*Fortunly*, 27 March 2026) <<https://fortunly.com/statistics/identity-theft-statistics/>> accessed 7 February 2026.

26 Mariya Stoilova, Rishita Nandagiri and Sonia Livingstone, 'Children's Understanding of Personal Data and Privacy Online: A Systematic Evidence Mapping' (2021) 24(4) *Information, Communication & Society* 557, doi:10.1080/1369118X.2019.1657164.

27 Darina Smyr and Ekaterina Ulianova, 'Legal Issues of Children's Personal Data Protection' (2022) 5(1) *Open Journal for Legal Studies* 1, doi:10.32591/coas.ojls.0501.01001s.

28 Milkaite and Lievens (n 1).

Convention on Human Rights (ECHR) and Article 12 of the UDHR.²⁹ In the digital environment, the right to privacy is inextricably linked to personal data protection. Any discussion of children's personal data necessarily engages their right to privacy.³⁰ Recital 38 GDPR acknowledges that children merit specific protection regarding their personal data, as they may be less aware of the risks, consequences, safeguards, and their rights. The GDPR's child-specific provisions reflect a broader commitment to aligning data protection with the best interests of the child.³¹ Although closely related, the two rights are not identical: privacy rights prohibit state interference in the personal sphere and in the formation of identity, whereas data protection establishes a control system over how personal information is processed by public and private entities.³² Children are particularly susceptible to privacy violations because of many situations in which adults exercise power over them. Any collection, processing, or sharing of their data constitutes a direct interference with privacy, which international and national law are obliged to protect.

Third, protecting children's data is essential to prevent misuse for unlawful purposes. Once disclosed within big data ecosystems, such data may be exploited for inappropriate advertising, behavioural manipulation, or criminal targeting. Children are no longer passive recipients of goods and services but increasingly act as consumers, contracting parties, and autonomous users.³³ However, limited awareness and digital literacy make them particularly susceptible to exploitation. Commercially, children are subject to large-scale profiling for behavioural advertising.³⁴ These practices feed children's data into algorithmic systems for

29 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).

30 Ahmad Sofian and others, 'Children's Privacy and Data Protection in Judicial Decisions in Indonesia' (2021) 18(4) *US-China Law Review* 153, doi:10.17265/1548-6605/2021.04.001.

31 Eva Lievens and Valerie Verdoodt, 'Looking for Needles in a Haystack: Key Issues Affecting Children's Rights in the General Data Protection Regulation' (2018) 34(2) *Computer Law & Security Review* 271-5, doi:10.1016/j.clsr.2017.09.007; Ingrida Milkaitė and Milda Mačėnaitė, 'Advancing Children's Privacy and Data Protection Rights: Emerging Data Protection Trends and Challenges in Selected CEE Countries' in Agnė Limantė and Rūta Vaičiūnienė (eds), *Children's Rights in Central and Eastern Europe: A Comparative Analysis with a Spotlight on Lithuania* (Springer 2025) 325, doi:10.1007/978-3-032-07092-0_16.

32 Sonia Livingstone and others, 'Children's Privacy in the Digital Age: US and UK Experiences and Policy Responses' in Dimitri A Christakis and Lauren Hale (eds), *Handbook of Children and Screens: Digital Media, Development, and Well-Being from Birth Through Adolescence* (Springer 2025) 491, doi:10.1007/978-3-031-69362-5_67.

33 Federica Persano, 'GDPR and Children Rights in EU Data Protection Law' (2020) (spec) *European Journal of Privacy Law & Technologies* 32.

34 Eline L Leijten and Simone van der Hof, 'Dissecting the Commercial Profiling of Children: A Proposed Taxonomy and Assessment of the GDPR, UCPD, DSA and AI Act in Light of the Precautionary Principle' (2025) 57 *Computer Law & Security Review* 106143, doi:10.2139/ssrn.5055046; Valerie Verdoodt and Eva Lievens, 'Targeting Children with Personalised Advertising: How to Reconcile the (Best) Interests of Children and Advertisers' in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy under Pressure: Transatlantic Tensions, EU Surveillance and Big Data* (Maklu 2017) 313.

profiling and personalised advertising; data are also traded across actors; for example, a website may sell a child's behavioural data through real-time bidding to the highest bidder, who then targets advertising at the children.³⁵ Children are more vulnerable to such advertising than adults, given their underdeveloped ability to recognise persuasive intent and limited awareness that social media data are being commercially exploited.³⁶ Additionally, digital platforms deploy dark patterns, deceptive interface designs that nudge users against their best interests, to which children are particularly susceptible.³⁷ The EDPB's 2023 Guidelines acknowledge dark patterns' especially harmful effects on children, who may be less aware of the risks and consequences associated with the processing of their personal data.³⁸ From a criminal perspective, according to Childlight (University of Edinburgh), more than 300 million children globally are victims of online sexual exploitation and abuse each year.³⁹ In 2024, the National Centre for Missing and Exploited Children (NCMEC) recorded 546,000 reports of online enticement, representing a 192% increase compared to 2023.⁴⁰ Children's data protection is therefore an urgent imperative against increasingly commercial exploitation and criminal abuse online.

Fourth, personal data protection is a fundamental condition for children's safe development online. The digital ecosystem presents both opportunities and risks. When appropriately safeguarded, children's online participation can help support their development. Privacy thus functions both as a protective right and an enabling right: shielding children from harm and providing the foundation for meaningful participation in digital life.⁴¹ Inadequate

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- 35 Simone van der Hof and others, 'The Child's Right to Protection Against Economic Exploitation in the Digital World' (2020) 28 *The International Journal of Children's Rights* 833, doi:10.1163/15718182-28040003.
 - 36 Jenny Radesky and others, 'Digital Advertising to Children' (2020) 146(1) *Pediatrics* e20201681, doi:10.1542/peds.2020-1681; Esther Rozendaal and Moniek Buijzen, 'Children's Vulnerability to Advertising: An Overview of Four Decades of Research (1980s–2020s)' (2023) 42(1) *International Journal of Advertising* 78, doi:10.1080/02650487.2022.2135349.
 - 37 Jenny Radesky and others, 'Prevalence and Characteristics of Manipulative Design in Mobile Applications Used by Children' (2022) 5(6) *JAMA Network Open* e2217641, doi:10.1001/jamanetworkopen.2022.17641; René Schäfer and others, 'Growing Up with Dark Patterns: How Children Perceive Malicious User Interface Designs' (NordCHI 24: 13th Nordic Conference on Human-Computer Interaction, Uppsala, Sweden, 13-16 October 2024) doi:10.1145/3679318.3685358.
 - 38 Arianna Rossi and others, 'Who Is Vulnerable to Deceptive Design Patterns? A Transdisciplinary Perspective on the Multi-Dimensional Nature of Digital Vulnerability' (2024) 55 *Computer Law & Security Review* 106031, doi:10.1016/j.clsr.2024.106031.
 - 39 Global Child Safety Institute, *Into the Light: Childlight Global Index of Child Sexual Exploitation and Abuse Prevalence* (Childlight 2024) <<https://www.ed.ac.uk/news/2024/scale-of-online-harm-to-children-revealed-in-globa>> accessed 14 March 2026.
 - 40 WeProtect Global Alliance and Columbia University, *Global Threat Assessment 2025* (WeProtect 2025) <<https://www.weprotect.org/global-threat-assessment-25/>> accessed 14 March 2026.
 - 41 UN CRC, *General Comment No 25 (2021) on Children's Rights in Relation to the Digital Environment* (UN Doc CRC/C/GC/25, 2 March 2021) paras 67–76 <<https://digitallibrary.un.org/record/3906061>> accessed 14 March 2026; Stoilova, Nandagiri and Livingstone (n 26).

data protection exposes children to continuous monitoring and commercialisation; predefined algorithmic profiling can confine them to matched recommendations, depriving them of exposure to other content and hindering exploration and development.⁴² The protection of personal data is therefore a prerequisite for ensuring that children can benefit from the digital environment safely and comprehensively.

In sum, children's data protection is a critical policy and legal priority for Vietnam, both for children's safe development and for the broader human rights and privacy framework.

3.2. The current state of the legal framework on children's personal data protection in Vietnam

3.2.1. Recognition of children's personal data protection

The Vietnamese legal system on children's personal data covers multiple regulatory relationships. At the highest level, the Constitution 2013 provides the foundation for protecting privacy: everyone has the right to the inviolability of private life, personal and family secrets, and the right to the protection of honour and reputation.⁴³ The collection, storage, use, and disclosure of such information require the person's consent except as provided by law. This provision thus grounds individual privacy and serves as a foundation for more detailed provisions in other laws.

In addition to the Constitution, a series of laws and implementing documents address children's personal data and privacy. Among these, the Law on Children 2016 is a key instrument for protecting, caring for, and educating children. It sets out children's rights and the responsibilities of agencies, organisations, families, and individuals. Accordingly, Article 21 provides that children have the right to the inviolability of private life, personal and family secrets, and to legal protection of their honour, dignity, reputation, and the confidentiality of correspondence; the processing of children's personal data requires the consent of the child or lawful guardian.⁴⁴ The Government then issued Decree 56/2017/ND-CP ("Decree 56"),⁴⁵ detailing this law, the first Vietnamese instrument to define "private personal information relating to children" and set out protective measures online. Such information includes identifying characteristics; health records; images; family and caregiver data; residential

42 Hof and others (n 35) 835.

43 Constitution of the Socialist Republic of Vietnam (adopted 28 November 2013) art 21 <<https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Constitution-dated-November-28-2013-of-the-socialist-republic-of-Vietnam-221949.aspx>> accessed 14 March 2026.

44 Law of Vietnam No 102/2016/QH13 (n 5).

45 Decree of Vietnam No 56/2017/ND-CP 'Detailing a Number of Articles of the Law on Children' (adopted 9 May 2017) <<https://thuvienphapluat.vn/van-ban/Van-hoa-Xa-hoi/Nghi-dinh-56-2017-ND-CP-huong-dan-Luat-tre-em-340397.aspx>> accessed 14 March 2026.

address; and contact information, and information on school, academic performance, friends, and services used. Online disclosure of such information requires the consent of both parents and, where the child is seven or older, of the child as well.

Additionally, Article 54 establishes responsibilities for protecting children's private lives: agencies, organisations, educational institutions, families, and individuals must protect children's privacy and promptly notify the competent authorities upon detecting any infringements.⁴⁶ This creates a multi-actor, multi-layered network in which not only state authorities but also families, schools, and society bear responsibility, with the notification duty providing a rapid response mechanism. However, implementation remains constrained by uneven community awareness, particularly among families and schools, of the importance of protecting children's privacy.

Beyond the Law on Children, Decree 56 and the LPDP contain detailed provisions on children's personal data in Vietnam. Other instruments also apply. The Law on Cybersecurity 2018 grants children the right to be protected, to access information, to participate in social activities, to play, to maintain personal secrecy and privacy, and to enjoy other rights in cyberspace. Information system administrators and telecom, Internet, and value-added service providers must control information content so as not to harm or infringe upon children, prevent the sharing of, and remove, harmful content, and promptly notify and coordinate with specialised cybersecurity forces under the Ministry of Public Security for handling.⁴⁷ The Law's scope extends beyond personal data to harmful acts such as inducing children into unlawful activities. The Law on the Press 2016 protects personal secrets, including those of children, while the Law on Advertising 2012 prohibits advertising that uses an individual's images, words, or writings without consent. Policy measures reinforce this framework. Decision 830/QD-TTg approving the Programme on Protecting and supporting children to interact in a healthy and creative manner in the online environment for the period 2021–2025 and Decision 1591/QD-TTg approving the Programme on Child Mental Health Care and Care for Orphaned Children for the period 2023–2030 require the promotion of legal frameworks and cooperation with Internet service providers and technology enterprises.⁴⁸

46 Law of Vietnam No 102/2016/QH13 (n 5) art 54.

47 Law of Vietnam No 24/2018/QH14 (n 6) art 29.

48 Decision of the Prime Minister No 830/QD-TTg 'Approving the Program "Protecting and supporting children's healthy and creative interaction in the online environment during the period 2021–2025"' (adopted 1 June 2021) <<https://vanban.chinhphu.vn/default.aspx?pageid=27160&doid=203332>> accessed 16 March 2026; Decision of the Prime Minister No 1591/QD-TTg 'Approving the Program on Mental Health Care for Children and Care for Orphaned Children for the period 2023–2030' (adopted 8 December 2023) <<https://vanban.chinhphu.vn/?pageid=27160&doid=209145>> accessed 16 March 2026.

3.2.2. Children's right to consent to personal data protection

The LPDP builds its consent rule on a sliding scale of age. Under Article 24(2),⁴⁹ a child under seven has no voice at all, consent resting solely with the representative, while a child aged seven to under sixteen must consent jointly with the representative for the publication or disclosure of private matters. The structure already signals the tension this section examines, since it grants the child a formal say at precisely the age range where, in the Vietnamese context, that say is least likely to be freely exercised. This difficulty becomes clearer when the dual consent model is read against the backdrop of Vietnamese culture, shaped by Confucian philosophy and “Lang” culture.

The design of a dual consent mechanism for processing personal data under the LPDP does not necessarily increase substantive protection; it may instead create practical difficulties.

First, in terms of its ideological foundation, Confucianism places the parent-child relationship at the centre of the moral order, structured by the principle of hierarchy and the duty of filial piety. Filial piety is not only an emotion but also a normative obligation that requires children to respect, obey, and place family interests above their own will.⁵⁰ In a vertically structured authority where the parental will plays a guiding role, and in light of cross-cultural analyses of vertical collectivism in East Asian societies, acting against parental wishes is regarded not merely as a personal choice but as a deviation from moral norms.⁵¹ This is reinforced in the context of Vietnam’s “Lang” culture, whose basic social unit is the interwoven structure of “family-lineage-village,” where collective values stand above individual ones, and the family’s honour remains subject to the observation of the village community.⁵² The conduct of each member is tied to the face of the entire family and lineage, so the tendency to follow one’s parents derives not only from family authority but also from social pressure.

49 Law of Vietnam No 91/2025/QH15 (n 4) art 24(2).

50 Donghyun Kim, ‘The Concept of Filial Piety in East Asian Confucian Culture from the Perspectives of Gadamer and Habermas’ (2019) 33-34 *Kritika Kultura* 36.

51 Olwen Bedford and Kuang-Hui Yeh, ‘The History and the Future of the Psychology of Filial Piety: Chinese Norms to Contextualized Personality Construct’ (2019) 10 *Frontiers in Psychology* 100, doi:10.3389/fpsyg.2019.00100; Bart Soenens and others, ‘The Moderating Role of Vertical Collectivism in South-Korean Adolescents’ Perceptions of and Responses to Autonomy-Supportive and Controlling Parenting’ (2018) 9 *Frontiers in Psychology* 1080, doi:10.3389/fpsyg.2018.01080; Eunice Pui-Yu Yim, ‘Effects of Asian Cultural Values on Parenting Style and Young Children’s Perceived Competence: A Cross-Sectional Study’ (2022) 13 *Frontiers in Psychology* 905093, doi:10.3389/fpsyg.2022.905093.

52 Luong Ha Chuc Quynh, ‘The Influences of Collectivism on Vietnamese Communication Style’ (2021) 4(7) *International Journal of Research in Engineering, Science and Management* 10; Thi Kim Dung Le, ‘Characteristics of Traditional Vietnamese Family and Its Influence on Communication Culture in the Family’ (2021) 1(11) *Anthropological Researches and Studies* 49, doi:10.26758/11.1.4.

The system of village conventions, customary rules, and traditional patriarchal order further reinforces hierarchical family structures, with the principle that “Custom rules the law” reflecting the strength of community norms governing father–child, siblings, and spousal relationships.⁵³ Norms such as “Three Obediences and Four Virtues” and the preference for sons in traditional society have contributed to maintaining a patriarchal family model, in which the will of the head of the family is decisive.⁵⁴ Children are thus influenced both by their parents and by community opinion; the fear that “the whole village will know” functions as an effective mechanism of social control. Filial piety in Vietnam extends beyond the family to the honour of ancestors, lineage, and homeland so that obeying parents is internalised as a responsibility toward the community.

From the perspective of developmental psychology, children aged seven to eleven are in the concrete operational stage (Piaget), with thinking that remains highly dependent on rules and authority; in terms of morality, they tend to evaluate behaviour based on adults' approval rather than on principles of independent autonomy.⁵⁵ In the Confucian cultural context, this natural developmental dependence is further reinforced by social and moral norms. Therefore, although children from age seven may understand consent, their independence in making legally significant decisions remains limited and is strongly influenced by their parents. On that basis, under the LPDP in Vietnam, the requirement to obtain the simultaneous consent of both parents and children aged seven and over is, in practice, neither appropriate nor culturally grounded, and thus lacks substantive effectiveness.

In the educational environment, where personal data processing for enrolment, academic records, health management, and teaching primarily serves the student's own interests, a scenario in which the child withholds consent while the legal representative grants it would, under a strict reading of dual consent, produce conflicts that are difficult to resolve in practice. Given that Vietnamese cultural and legal structures already vest parents with both moral authority and representative capacity, the child's consent is, in many cases, consultative rather than dispositive; insisting on co-equal legal weight thus complicates implementation without enhancing substantive protection. Accordingly, in cases of genuine conflict, the decision of the legal representative, charged with safeguarding the best interests of the child, should be regarded as final, while the views of the child are weighed in accordance with age and maturity, rather than formalistically absolutised.

53 Pham Diem, ‘Relationships between Parents and Children under Vietnam's Ancient Laws’ [2011] Vietnam Law and Legal Forum <<https://vietnamlawmagazine.vn/relationships-between-parents-and-children-under-vietnams-ancient-laws-4343.html>> accessed 27 March 2026.

54 Thi Bich Hang Nguyen, ‘The Concepts of Filial Piety and Factors Affecting Filial Piety of Vietnamese People’ (2025) 67(2) VMOST Journal of Social Sciences and Humanities 117, doi:10.31276/VMOSTJOSSH.2024.0064.

55 Martha Lally and Suzanne Valentine-French, ‘Kohlberg's Stages of Moral Development’ in Martha Lally and Suzanne Valentine-French, *Lifespan Development: Psychological Perspective* (College of Lake County Foundation 2022) 373; Roger JR Levesque, *Adolescence, Privacy, and the Law: A Developmental Science Perspective* (OUP 2016) <<https://doi.org/10.1093/acprof:oso/9780190460792.001.0001>>.

3.2.3. Suspension of children's personal data processing

Article 24(3) LPDP makes suspension turn on the withdrawal of consent or on intervention by a competent authority where the child's interests are at risk.⁵⁶ On its face, this embodies the revocability of consent, treating control over a child's data as something that can always be reclaimed rather than permanently surrendered. Yet the provision leaves unresolved the question that the dual structure makes unavoidable, namely, whose withdrawal triggers suspension.

In the context of dual consent, a notable question arises: whether suspension is triggered by the withdrawal of one party alone or requires the withdrawal of both parties. A maximum-protection reading, under which withdrawal by either party would convert the mechanism into a unilateral veto, disrupting essential sectors such as education and healthcare; the converse reading, requiring both to withdraw, contradicts the revocability of consent and weakens protection. The underlying problem is that the law does not clarify whether dual consent comprises two independent expressions of will of equal value or whether the children's consent is consultative alongside that of the legal representative. In the absence of detailed guidance, equating the legal weight of a child with that of a representative, without a priority rule, risks creating practical conflicts, particularly in educational settings where data processing is necessary to perform public functions.

Furthermore, the mechanism also empowers competent authorities to order the cessation of processing where there are sufficient grounds to fear harm to the child's interests. This confirms that valid consent does not legitimise every processing activity. The legislator thus adopts a preventive stance, permitting intervention before actual harm occurs, in recognition that children cannot protect themselves.⁵⁷ However, the effectiveness and reasonableness of this provision depend on clearly defining the standard of "sufficient grounds" to avoid abuse of administrative intervention powers, yet such criteria currently lack specific guidance. This poses the risk that suspending processing may harm the best interests of the subjects being protected.

56 The processing of children's personal data shall be suspended when the person who has given consent withdraws the consent permitting the processing of children's personal data, except where otherwise provided by law or at the request of a competent authority where there are sufficient grounds to demonstrate that the processing of personal data may infringe upon the lawful rights and interests of the child. See, Law of Vietnam No 91/2025/QH15 (n 4) art 24(3).

57 *ibid*, art 24(3)(b); European Commission, *Guidelines on Data Protection Impact Assessment (DPIA) and Determining Whether Processing Is "Likely to Result in a High Risk" for the Purposes of Regulation 2016/679* (Article 29 Data Protection Working Party, WP 248 rev.01, adopted 4 October 2017, last revised 4 October 2017) <<https://ec.europa.eu/newsroom/article29/items/611236/en>> accessed 17 April 2026.

3.2.4. Sanctions for Infringements of Children's Personal Data

With respect to sanctions imposed for infringing on children's personal data, these have been relatively clearly provided for in the Vietnamese legal system. Accordingly, violations involving the infringement of children's personal information in cyberspace may be subject to administrative sanctions or incur criminal liability, depending on the severity of the violation.

1) Administrative sanctions.

Administrative sanctions are applied in a tiered manner between organisations and individuals, and calibrated to the nature, severity, and economic impact of the violation. For organisations, Article 8(5) of the LPDP sets a general maximum monetary fine of VND 3 billion for violations of personal data protection.⁵⁸ However, for certain particularly serious violations, this Law applies a mechanism for calculating fines based on a percentage or on the unlawful gains. Accordingly, for unlawful cross-border transfer of personal data, the maximum fine may reach up to 5% of the total revenue of the preceding financial year;⁵⁹ in cases where the organisation has no revenue or where the fine calculated based on revenue is lower than VND 3 billion, the maximum of 3 billion shall apply. For buying and selling personal data, the maximum fine is set at ten times the amount of unlawful gains obtained from the violation;⁶⁰ if such gains cannot be determined or if the calculated amount is lower than VND 3 billion, the maximum of VND 3 billion shall also apply. This mechanism shows that the legislator not only sanctions the violation itself but also deprives unlawful economic beneficiaries,⁶¹ thereby preventing situations in which violations are profitable. Individuals committing the same violations face fines at half the organisation's rate, reflecting differentiated liability. Beyond administrative sanctions, criminal acts are subject to prosecution under the Criminal Code, and damages are compensable. The design thus combines strong deterrence of serious violations, such as illegal transfers or trading, with a transparent ceiling under Article 8(5).

Currently, the Ministry of Public Security is in the final stages of drafting a Decree on administrative penalties in the fields of cybersecurity and personal data protection.⁶² However, when assessing the consistency between the LPDP and the Draft Decree, there are significant technical discrepancies regarding the determination of fine levels.

58 Law of Vietnam No 91/2025/QH15 (n 4) art 8(5).

59 *ibid*, art 8(4).

60 *ibid*, art 8(3).

61 See, by analogy, Regulation (EU) 2016/679 (n 72) art 83, which establishes a two-tier fine structure reaching up to 4% of total worldwide annual turnover: Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (OUP 2020) doi:10.1093/oso/9780198826491.001.0001.

62 Thi Thuy Duong Phan, Thi Than Niem Tran and Duc Giang Pho, 'Draft Decree Dealing with Violations of Personal Data Protection Regulations' (*PwC Vietnam Legal NewsBrief*, 10 May 2024) <<https://www.pwc.com/vn/en/publications/2024/240510-draft-pdpd.pdf>> accessed 25 May 2026.

The most significant question concerns fines for serious violations. Article 8 LPDP sets the maximum fine, which may reach up to 5% of total revenue⁶³ of the preceding financial year for unlawful cross-border transfers, up to ten times the unlawful gains for the trading of personal data and VND 3 billion general ceiling otherwise, a design intended to eliminate economic incentives for infringement and to deter large enterprises. The Draft Decree, however, has progressed through two stages regarding this architecture. Earlier drafts diverged sharply from the parent law, confining the revenue-based fine to narrow conditions, omitting the multiplier mechanism for unlawful data trading, and retaining low fixed brackets for breach-notification failures, a configuration that risked diminishing deterrence and contravening the principle that subordinate legislation must not weaken the effect of the parent law. The most recent draft has substantially closed this gap, lowering the quantitative threshold for cross-border violations, restoring the multiplier mechanism for unlawful data trading, and replacing the low fixed brackets with a tiered scheme.⁶⁴ The trajectory of the drafting process is itself revealing. The initial divergence and its subsequent correction show that the deterrent architecture of Article 8 LPDP is not self-executing but depends on the political will sustained through the subordinate legislation that operationalises it.

2) Criminal sanctions.

In Vietnam, the protection of personal data, including children's data, is governed not only by administrative measures but may also result in criminal sanctions for serious violations.

Criminal liability attaches under two provisions of the Criminal Code 2015. Article 159 reaches unauthorised access to or disclosure of private correspondence, and Article 288 reaches the unlawful provision or use of information on computer networks.⁶⁵ Neither provision, however, was drafted with children in mind. Both treat the victim's age as irrelevant to the offence and at most as a discretionary aggravating factor, so the criminal regime offers no child-specific protection and reaches children's data only incidentally, through offences designed for the general population.

63 Law of Vietnam No 91/2025/QH15 (n 4) art 8.

64 Earlier drafts confined the revenue fine to cases involving more than 5,000,000 citizens and omitted the multiplier mechanism. The latest draft applies the 3%–5% revenue fine to cases involving 1,000,000 citizens or more (Article 70(3)), restores fines of two to ten times the unlawful gains up to VND 3 billion for unlawful data trading (Article 67), and establishes a tiered regime reaching VND 60 million for reporting delays beyond 72 hours and VND 80 million for failure to implement remedial measures (Article 68).

65 Article 159 carries fines of VND 20–50 million, non-custodial reform of up to three years, or imprisonment of six months to three years, rising to five years for serious consequences. Article 288 carries fines of VND 30–200 million or imprisonment of six months to three years, rising to seven years for organised offences, dangerous recidivism, or the loss of critical data, with further aggravation where national security, social order, or the victim's life is affected. See, Law of Vietnam No 100/2015/QH13 'Criminal Code' (adopted 27 November 2015) <<https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Bo-luat-hinh-su-2015-296661.aspx>> accessed 17 April 2026.

Criminal sanctions, with severe penalties such as imprisonment and fines, play an important role in deterring serious violations of the right to privacy and personal data, including children's data. Moreover, criminal sanctions ensure that grave violations of victims' rights, particularly children, are adjudicated with fairness and transparency. The application of imprisonment and supplementary measures serves to prevent recidivism and protect society from similar criminal conduct.

3.3. Children's Data Protection Framework under the GDPR

In this section, the GDPR is utilised as a comparative framework to identify regulatory gaps in Vietnamese law regarding the protection of children's personal data. Rather than treating the GDPR merely as an external legal model for benchmarking, this section focuses on regulatory techniques that offer instructive insights for Vietnam, particularly in three dimensions: (i) a progressive and revenue-linked sanctioning regime; (ii) an independent supervisory authority model; and (iii) a specialised set of rules for children regarding consent, transparency, and data protection by design. These three dimensions not only reflect the GDPR's advanced development in safeguarding children in the digital environment but also provide a basis for a systematic assessment of the gaps identified in subsections 3.2.1–3.2.4, thereby informing recommendations for Vietnam.

These three areas should not be assessed in isolation. The strength of the European model lies in the way its components reinforce one another. A strong sanctioning regime has limited value without an independent authority capable of enforcing it, just as an age threshold remains weak if it is not supported by meaningful consequences for non-compliance. Examining Vietnam's framework in separate fragments would therefore miss precisely what makes the original model function as a coherent regulatory system.

First, the sanctioning of the GDPR under Article 83 is built upon two principles directly relevant to the law reform discussion in Vietnam. The first principle is the graded severity of penalties. Article 83(4) prescribes a lower maximum fine of up to 10 million EUR or 2% of the total worldwide annual turnover, whichever is higher, for violations concerning procedural and technical security obligations, including data breach notification duties under Articles 33–34 and data protection impact assessment requirements under Article 35. Conversely, Article 83(5) establishes a higher maximum fine of up to 20 million EUR or 4% of the total worldwide annual turnover for infringements related to core data processing principles, the lawfulness of processing, data subjects' rights, and international data transfer regulations.

The second principle is revenue sensitivity. By tethering the upper limit of penalties to a percentage of global turnover rather than a fixed monetary amount, the GDPR ensures that sanctions retain their deterrent effect even when the infringing entity is a multinational company with revenue that far exceeds any fixed statutory ceiling.

Furthermore, Article 83(2) mandates supervisory authorities to determine the specific fine amount based on eleven distinct criteria (points a to k), including the nature and gravity of the infringement, the categories of personal data affected, the degree of cooperation exhibited by the infringer, and any previous infringements. Crucially, through the open-ended criterion of any other aggravating or mitigating factor under point k, infringements affecting vulnerable subjects, such as children's data, are treated as an aggravating circumstance. This mechanism successfully reconciles the requirement of deterrence with the principle of proportionality. The Vietnamese drafting process itself shows why this element of the GDPR model is transferable. Article 8 LPDP incorporates a revenue-based fine ceiling. While earlier versions of the Draft Decree risked undermining this mechanism by confining it too narrowly, the latest revisions have largely realigned it with the LPDP, thereby preserving the deterrent architecture of the sanctioning regime.

Second, the independent supervisory authority model under Articles 51–59 of the GDPR establishes a reference benchmark for the structural separation between personal data protection and general policing or security functions. Each Member State must designate one or more public authorities responsible for monitoring the application of the GDPR pursuant to Article 51. These authorities must operate with complete independence when performing their tasks in accordance with Article 52. The members of these authorities remain free from external influence, a status safeguarded through fixed tenures, professional qualification requirements, and budgetary autonomy.

The tasks of supervisory authorities under Article 57 are broadly designed to encompass issuing guidelines, handling complaints, conducting investigations, approving certification mechanisms, and advising on legislative measures. The corrective powers under Article 58 include issuing warnings and reprimands, imposing bans on data processing, and imposing administrative fines. Notably, this model is further reinforced at the constitutional level by Article 8(3) of the Charter of Fundamental Rights of the EU, which explicitly mandates that compliance with data protection rules shall be subject to control by an independent authority.

The cooperation and consistency mechanisms under Articles 60–67, together with the EDPB under Articles 68–76, extend this institutional logic to cross-border cases. This is particularly relevant for Vietnam, as the most significant violations involving children's data are often tied to foreign digital platforms. This is the dimension on which the gap is widest. Vietnam's supervisory function sits inside the Ministry of Public Security, the very type of security-oriented body from which the GDPR model deliberately separates oversight, so the problem for Vietnam is not the absence of an authority but the absence of independence within the one it already has.

Third, the GDPR contains a specialised set of regulations concerning children. These provisions constitute a relatively comprehensive regulatory technique for the processing of children's data. Recital 38 establishes the foundational principle that children merit specific protection because they may be less aware of the risks and safeguards associated with the

processing of their data. This Recital also highlights specific contexts of concern, such as marketing, profiling, and services offered directly to children.

This principle is operationalised through five closely interrelated groups of regulations. The conditions for lawfulness under Article 6 must be satisfied for all data processing activities. When consent serves as the legal basis, the qualitative requirements of Article 7 apply: consent must be freely given, specific, informed, and unambiguous; the data controller must demonstrate that such consent was given; and the withdrawal of consent must be equally as easy. Article 8 establishes a specialised consent for children regarding information society services offered directly to them. Accordingly, if the child is below the applicable age threshold, the processing of data requires authorisation from the holder of parental responsibility. Concurrently, the data controller is obligated to make reasonable efforts to verify such authorisation, taking into account available technology. The transparency obligations under Articles 12–14 are heightened by Article 12(1). This provision stipulates that any information addressed to children must be presented in a concise, transparent, intelligible, and easily accessible form, using clear and plain language. This standard is further developed in the EDPB's Guidelines 03/2022 on Deceptive Design Patterns.⁶⁶ Article 25 imposes binding obligations regarding data protection by design and by default. The data controller must implement appropriate technical and organisational measures to integrate data protection principles into the processing operations. Simultaneously, they must ensure that, by default, only personal data necessary for each specific purpose is processed. This provision is crucial for default privacy settings, the data minimisation principle, and the restriction of profiling targeting children. Article 35 requires a data protection impact assessment for processing activities that are likely to pose a high-risk to data subjects' rights. Under the EDPB's approach, this high risk threshold is generally met when children's data are processed on a large scale or for behavioural targeting.

The deterrent efficacy of these regulations is currently observable in practice. The decisions of the Irish Data Protection Commission against TikTok in 2023⁶⁷ and Meta/Instagram in 2022⁶⁸, both of which centred on the application of Articles 5, 12, 13, and 24–25 to children,

66 EDPB, *Guidelines 03/2022 on Deceptive Design Patterns in Social Media Platform Interfaces: How to Recognise and Avoid Them* (version 2.0, adopted 14 February 2023) <https://www.edpb.europa.eu/documents/guideline/guidelines-032022-on-deceptive-design-patterns-in-social-media-platform_en> accessed 17 April 2026.

67 EDPB, *Binding Decision 2/2023 on the Dispute Submitted by the Irish SA Regarding TikTok Technology Limited (Art 65 GDPR)* (adopted 2 August 2023) <https://www.edpb.europa.eu/documents/edpb-binding-decisions/binding-decision-22023-on-the-dispute-submitted-by-the-irish-sa_en> accessed 17 April 2026.

68 Data Protection Commission, *Decision in the Matter of Meta Platforms Ireland Limited, Formerly Facebook Ireland Limited, and the "Instagram" Social Media Network* (DPC Inquiry Reference: IN-20-7-4, adopted 2 September 2022) <<https://www.dataprotection.ie/en/dpc-guidance/decisions/inquiry-concerning-processing-personal-data-relating-child-users-instagram-social-networking-service>> accessed 17 April 2026.

demonstrate that the specialised obligations for children under the GDPR can compel major digital entities to alter their design choices. Vietnam possesses none of this layer. It has no child-specific transparency standard, no data protection by design obligation, and no DPIA requirement for children's data, so the protective burden falls entirely on a consent rule that, as Section 3.2.2 showed, the cultural context already weakens.

Across these dimensions, Vietnam has borrowed substantive form but still lacks key institutional and design conditions that make the European model effective. Although recent revisions to the Draft Decree have successfully restored the sanctioning ceiling, the supervisory authority exists but lacks independence, and the child-specific layer remains absent altogether. These three modes of incomplete transfer, the half-adopted, the misplaced, and the missing, define the reform agenda that Section 4 takes up in turn, in each case calibrated to the constitutional and socio-cultural conditions analysed above.

4 RECOMMENDATIONS FOR IMPROVING VIETNAMESE LAW

The gaps identified in the preceding sections do not call for a wholesale importation of the European model but for reforms calibrated to the conditions under which Vietnamese law operates. Each of the four proposals below addresses one of those gaps, and each is governed by the question that has run through this article: namely, how far a borrowed rule can be made to work once it enters a different legal and cultural setting.

First, determining age and the consent mechanism for children in the processing of personal data is a fundamental issue in children's data protection law, as it concerns the balance between two values: the protection of children and respect for children's autonomy as data subjects. Therefore, the design of the consent mechanism cannot be purely technical; it must be grounded in the theoretical foundations of children's developmental capacity, the best interests of the child, and Vietnam's socio-cultural characteristics.

European experience is instructive here. Article 8 GDPR sets the default age of digital consent at sixteen and permits Member States to derogate to a minimum age of thirteen, resulting in a fragmented European landscape. This heterogeneity has been criticised by the EDPB and the Fundamental Rights Agency as undermining the consistency of children's protection across the internal market. More importantly, treating children of thirteen and above as fully capable of giving consent on their own creates a protection gap for the thirteen to seventeen age group, who remain "children" under UNCRC and are the cohort most exposed to risks in the digital environment. Simultaneously, this model is inconsistent with the principle of evolving capacities, which posits that a child's maturity is not uniform and must be recognised in stages.⁶⁹ Conversely, if all decision-

69 Convention on the Rights of the Child (n 14) art 5; UN CRC, *General Comment No 25 (2021)* (n 41) para 19. See also, Lina Jasmontaite and Paul De Hert, 'The EU, Children Under 13 Years, and Parental Consent: A Human Rights Analysis of a New, Age-Based Bright-Line for the Protection of Children on the Internet' (2015) 5(1) *International Data Privacy Law* 20, doi:10.1093/idpl/ipu029.

making power is assigned to the legal representative until close to the age of majority without recognising the voice of the child, there is a risk of going against the modern approach that considers children as rights-holders who have the right to participate in decisions concerning them. Therefore, both extreme approaches, either premature autonomy or absolute paternalism, fail to achieve the necessary balance.

In Vietnam, this issue must be viewed through a cultural lens influenced by Confucianism and traditional village social structures. The philosophy of “filial piety” and hierarchical order in the family reinforces the guiding role of parents over children, and village culture, with the close linkage between family honour and community, resulting in children having a higher degree of dependence on parental will, which can be compared to many Western societies. However, Confucianism is not merely a system of authority; it also emphasises the principle of harmony, advocating for the avoidance of extremes and the pursuit of balance between values.⁷⁰

On this basis, it is proposed that provisions on age and consent mechanisms be amended toward a stratified approach as follows:

- 1 For children under seven years of age. All decisions relating to the processing of personal data shall be made by the legal representative. This is a stage at which children do not yet have the capacity to independently perceive digital risks; assigning full decision-making authority to the representative is consistent with the reality of psychological development.
- 2 For children aged from seven to under sixteen years. The position advanced here is not the wholesale adoption or rejection of a dual consent mechanism, but rather its risk stratification. The consent of the legal representative remains in every case a mandatory legal condition for processing. What varies is whether the child’s own consent is additionally required. For processing that poses heightened risks to the child’s legitimate rights and interests, the child is given not a co-equal role in authorising the processing, but a limited negative control through which an objection may halt it. For routine processing that directly serves the child’s educational, health, or welfare interests, enrolment, academic records, school health management, ordinary medical care, and comparable activities, the representative may decide independently, provided the child is informed with age-appropriate explanations and consulted in a manner commensurate with their cognitive level; the child’s view operates here as a consultative input rather than as a co-equal legal condition, reflecting the cultural and developmental realities analysed in Section 3.2.2. For high-risk processing, by contrast, the representative’s consent should be supplemented by a qualified right of the child to object, because the child’s independent voice acquires genuine protective value where processing engages risks of a different order.

70 Bedford and Yeh (n 51) 100.

The differential treatment of these two categories of processing follows from a feature of the cultural pressure analysed above. That pressure does not bear symmetrically on the two directions in which a child may express their will. Norms of filial piety, hierarchical order within the family, and community observation tend to place children in a position of deference to parental will rather than encouraging them to voice opposition. This is not to suggest that the family is the only source of such pressure. Children are also influenced by peers, schools, digital platforms, and online communities. In decisions concerning data processing, however, where the legal representative occupies the central legal role, the dominant direction of pressure remains one of deference.

In such a context, a child's consent and a child's refusal should not be assumed to carry the same epistemic value. When a child consents, genuine volition is difficult to distinguish from conformity to social norms. This signal is therefore less reliable and, for that reason, should not be granted coequal legal weight in routine processing. A child's active refusal does not always reflect an accurate perception of risk. A child may object out of fear, misunderstanding, or a failure to appreciate longer-term benefits. Yet because such a refusal must run against the prevailing tendency towards deference, it carries cautionary value. It therefore warrants more serious consideration than consent alone.

On this basis, the mechanism proposed for high-risk processing is not dual consent in the sense of treating the child's consent as a constitutive condition equal to that of the legal representative. The consent of the legal representative remains the principal legal condition for processing. What is added is a qualified right of the child to object, carrying suspensive effect and a duty of reassessment. This right is not conferred because the child has attained full autonomy, a proposition already rejected in Section 3.2.2. It is conferred because, where processing carries a serious risk of harm to a child's privacy, honour, psychological development, digital identity, or future opportunities, a signal of objection from the very person affected should be capable of suspending the processing and triggering an obligation to reassess it. The mechanism thus prevents processing from continuing, even when the legal representative's consent alone is sufficient, when it is the child who bears its direct consequences.

Understood in this way, a child's objection is neither a final and absolute legal decision nor an unconditional veto. It operates as a risk-control mechanism, functioning as a safety valve. It serves a preventive purpose while avoiding the risk that a child might permanently block processing that genuinely serves their own interests.

The weight accorded to this signal of objection should be calibrated to the child's age, maturity, and cognitive capacity, in line with the stratified framework proposed above. For younger children, an objection should be understood as an indication requiring the legal representative and the data controller to reassess. For older children, particularly those approaching sixteen, a refusal may carry greater legal weight. It then approaches the degree of self-determination that the framework proposed in this study recognises for children in the field of personal data processing. It does not amount to full civil-law capacity in the general sense.

Confining this mechanism to high-risk processing is proportionate to its institutional cost. In routine processing that directly serves a child's educational, health, or welfare interests, a right to object with suspensive effect, if applied indiscriminately, would disrupt essential services while generally offering no commensurate protective benefit. The boundary between the two categories is not fixed by the nominal label of an activity. Where processing described as routine, such as AI-based monitoring of academic performance, psychological profiling of students, location tracking, or the sharing of health data with third parties, in fact gives rise to a high-risk by reason of the nature of the data, the scale of processing, or its consequences for the child, it must be classified as high-risk processing and attract the child's right to object.

Drawing on Article 35(3) GDPR and EDPB Guidelines WP248 rev.01,⁷¹ processing should be classified as high-risk where it presents one or more of the following features: (a) public disclosure or dissemination of the child's data, including on social media platforms; (b) cross-border transfers to jurisdictions without an adequate level of protection; (c) processing of sensitive categories of data (health used beyond ordinary care, biometrics, religious belief, sexual orientation); (d) processing for commercial-profiling, behavioural advertising, or AI-training purposes; (e) systematic monitoring or large-scale processing; or (f) deployment of innovative technologies whose risks to the child are not yet well understood.

Second, children aged sixteen and above shall be entitled to decide independently whether to consent to or refuse the processing of personal data.⁷² At this age, children possess the capacity to understand and relatively fully evaluate the risks and consequences of data sharing in the digital environment. The selection of the age of sixteen is consistent with Article 8 of GDPR, according to which children's personal data processing in relation to information society services is lawful only where the child is at least 16 years old; below this age, processing is lawful only with the consent of the holder of parental responsibility.

This tiered approach not only addresses the limitations of the thirteen-year-old model but also mitigates the risk of absolutising the representative's role. It recognises children as evolving subjects of rights, while maintaining the necessary protective role of parents and providing the State with a clear legal basis for intervention when data-processing risks infringe upon children's rights.⁷³

In addition, it is necessary to supplement the mandatory data protection impact assessment (DPIA) for all processing activities that target children aged sixteen and

71 European Commission, *Guidelines* (n 57).

72 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 (General Data Protection Regulation, GDPR) [2016] OJ L 119/1, art 8; OECD, *How's Life for Children in the Digital Age?* (OECD Publishing 2025) doi:10.1787/0854b900-en.

73 Lievens and Verdoodt (n 31).

over, particularly in high-risk sectors such as social networks, online games, educational technology (EdTech), and AI systems for behavioural profiling. A DPIA must specifically assess the impact on children's rights, not merely conduct a general assessment applied to adult users.⁷⁴

Third, drawing on European two-tier sanctioning architecture and on the analysis of Article 8 LPDP,⁷⁵ it can be affirmed that the orientation of strengthening sanctions under a two-tier model, linked to revenue ratios and unlawful gains, is consistent with modern legislative trends, but needs to be technically refined to ensure consistency and feasibility in the Vietnamese context. Article 8 LPDP installs a total-revenue-based architecture comparable in design to Article 83 GDPR, and although earlier drafts narrowed its operation through high quantitative thresholds and low fixed fines, the latest draft has largely realigned with the parent law. The remaining task is therefore not to restore deterrence, which the latest revisions have substantially achieved, but to entrench it, so that future amendments cannot quietly reopen the gap that the drafting process has just closed.

Consequently, the sanctioning mechanism should be enhanced to achieve a clear stratification of violation groups, such as the European Union's two-tiered ceiling model, but adjusted to Vietnam's socio-economic conditions. The group involving procedural, administrative, or technical security obligations may be subject to a general ceiling; whereas the group involving violations of fundamental data processing, processing without a legal basis, data trading, illegal overseas transfers, or serious infringements of children's data should be categorised under the highest sanction tier, applying revenue-based penalties or multiples of illicit turnover as stipulated in Article 8 of the LPDP.⁷⁶ Simultaneously, to ensure feasibility and prevent discretionary application, a system of guiding criteria should be added to determine specific fines within the brackets, including the nature, duration, and scope of the violation, the degree of cooperation, recidivism, and the financial scale of the enterprise.

In parallel with administrative sanctions, the refinement of criminal penalties should be considered selectively, focusing on organised acts, those aimed at significant illicit profits, or those causing severe consequences, rather than arbitrarily expanding criminalisation. A sanctioning mechanism designed in a properly tiered manner, maintaining the economic deterrence spirit of the LPDP, with clear technical guidance and consistency between the LPDP and the Decree, will not only enhance enforcement effectiveness but also affirm the

74 Simone van der Hof and Eva Lievens, 'The Importance of Privacy by Design and Data Protection Impact Assessments in Strengthening Protection of Children's Personal Data Under the GDPR' (2018) 23(1) Communications Law 33; Regulation (EU) 2016/679 (n 72) art 35.

75 Law of Vietnam No 91/2025/QH15 (n 4) art 8; 'Draft Decree on Administrative Sanctions in the Field of Cybersecurity and Personal Data Protection' (n 12).

76 See, Regulation (EU) 2016/679 (n 72) art 83(4)–(5), which imposes ceilings of EUR 10 million or 2% of total worldwide annual turnover for procedural infringements, and EUR 20 million or 4% for substantive violations of data subjects' rights.

position of personal data protection, particularly children's data, as a legal value subject to strict protection within the Vietnamese legal system.

Fourth, building on the analysis of Articles 51–59 of the GDPR and Article 8(3) of the EU Charter, Vietnam should establish a specialised supervisory authority for personal data protection, modelled after the Data Protection Authorities (DPAs) found in many jurisdictions, particularly within the EU.⁷⁷ Beyond sanctioning, such an authority would issue guidance and interpretations, resolve complaints, conduct inspections, perform DPIAs, and formulate policy recommendations. In the Vietnamese context, where children's personal data is increasingly exploited online, a specialised authority would enhance the consistency of enforcement and enable early detection of infringements.

Currently, the competent authority for personal data protection is the Ministry of Public Security, a model that offers centralisation and rapid investigative capacity, but one in which placing management, inspection, and sanctioning within an authority whose primary mandate is security and public order carries two risks. First, the independence and objectivity of oversight may be subordinated to cybersecurity management priorities, preventing privacy protection from being fully realised as an independent value.⁷⁸ Second, a security-oriented approach risks overshadowing the human rights dimension, whereas personal data protection is, in essence, a fundamental personality right that requires a balance between state administration and individual liberty.

The relevant question for Vietnam is therefore not whether the authority can be made independent of the Government, which its constitutional structure does not readily allow, but whether it can be made independent of the security apparatus, since it is the latter, not the former, that compromises objective oversight. Vietnam should therefore consider establishing a specialised supervisory authority with relative independence, potentially placed under the Government, empowered to issue binding guidance, conduct independent inspections, apply administrative sanctions under the LPDP, and prioritise the protection of vulnerable groups such as children.

Implementation could proceed in two stages. In the first, a Personal Data Protection Commission would be established under the Government, drawing part of its initial staff from the Ministry of Public Security but governed by fixed-term appointments and a separate budget, with the Ministry retaining only the criminal-investigation function. This

77 Kuner and others (n 61) art 52, doi:10.1093/oso/9780198826491.003.0093; Thi Tuyet Dung Thai, Van Duong Nguyen and Van Lam Nguyen, 'A Comparative Study of Cross-Border Data Transfer Regulations in Vietnam and Singapore: Ensuring the Protection of Privacy' (2025) 26(2) *Asia-Pacific Journal on Human Rights and the Law* 81, doi:10.1163/15718158-26020001.

78 See, Regulation (EU) 2016/679 (n 72) art 52(1)–(2) requiring supervisory authorities to 'act with complete independence' and remain 'free from external influence'; Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, art 8(3); Thi Thu Huynh, 'Everyone Is Safe Now: Constructing the Meaning of Data Privacy Regulation in Vietnam' (2024) 11(4) *Asian Journal of Law and Society* 530, doi:10.1017/als.2024.36.

separates administrative supervision from criminal enforcement without dismantling existing capacity. In the second stage, once institutional competence is consolidated, the Commission would assume independent sanctioning power and cross-border enforcement competence. A domestic precedent exists in the National Competition Commission, which operates within the Ministry of Industry and Trade, yet follows a distinct adjudicative procedure, indicating that Vietnam has already accepted a semi-independent regulator within a ministry. This would overcome the current fragmentation of competences and affirm that personal data protection is not merely a matter of cybersecurity but a core element of human rights protection in a rule-of-law state.⁷⁹

Fifth, the Government of Vietnam should promote policies to develop and apply data protection technologies for children's personal data, imposing obligations on data collectors and controllers to provide clear, age-appropriate transparency before children aged sixteen and above make consent decisions. Studies show that children online are data subjects whose information is shared, collected, and processed without their understanding of the consequences.⁸⁰ Therefore, notices regarding processing purposes, the scope of third-party sharing, retention periods, and the right to withdraw consent must be presented in language tailored to the cognitive capacity of minors. Articles 12 and 25 GDPR, read with the EDPB's Guidelines 03/2022 on dark patterns, require that information directed to children be provided in clear and plain language and that privacy-protective settings apply by default, standards that materially improve children's capacity to understand and control what they are consenting to. Building on principles of data protection by design and privacy by default, Vietnam should adopt minimum technical security standards for systems processing children's data, including child-friendly interface design, encryption in transit and at rest, access control and audit logging, security monitoring, and periodic risk assessments, together with incentives and technical support for online education platforms, games, and digital services targeting children. Complementary measures should include child-specific privacy tools, content filters, alert applications, and educational programmes on information security risks to enhance children's capacity for self-protection in cyberspace.

Sixth, it is necessary to enhance publicity and transparency in the enforcement of children's personal data protection regulations. Selective disclosure of information regarding serious violations, accompanied by the resulting sanctions, will establish important legal precedents and raise societal awareness of the dangers of infringing upon children's data. However, such

79 Milkaite and Lievens (n 1) 1.

80 Cansu Caglar, 'Children's Right to Privacy and Data Protection: Does the Article on Conditions Applicable to Child's Consent under the GDPR Tackle the Challenges of the Digital Era or Create Further Confusion?' (2021) 12(2) European Journal of Law and Technology 1; Stoilova, Nandagiri and Livingstone (n 26) 557.

disclosure must adhere to the principle of victim protection, ensuring that no additional information is disclosed that could lead to the child's identification.⁸¹

Furthermore, given the cross-border nature of personal data and digital services, Vietnam must participate in and strengthen international cooperation regarding children's personal data. This includes learning from nations with advanced legal systems and oversight mechanisms, while participating in and internalising international treaties and standards on privacy and data protection. This approach will not only help Vietnam keep pace with global trends but also provide the legal and systemic basis to coordinate the handling of children's data violations involving foreign elements.⁸²

5 CONCLUSIONS

Children's personal data protection has emerged as an imperative in Vietnam's digital transformation, serving not only to safeguard privacy but also to uphold human rights and the holistic development of children. Although Vietnam's current legal framework, most notably the LPDP 2025, has established a relatively comprehensive foundation, significant limitations persist in consent mechanisms, age thresholds, and sanctions for protecting children's privacy and personal data. This paper's contribution to comparative legal scholarship is a framework of culturally conditioned legal transfer: rather than transplanting the GDPR wholesale or rejecting it as foreign, each borrowed element, age thresholds, consent architecture, sanctioning tiers, supervisory design, is calibrated against the receiving jurisdiction's socio-cultural structure (Confucian filial hierarchy and the "Lang" community order) and the child's evolving capacities. This reframes the transplant-versus-particularism debate into a graduated inquiry: which features of a foreign regime are culturally portable, which require structural adaptation, and which must be designed indigenously. The study is doctrinal and comparative; it does not examine enforcement practice or how the proposed model would operate in Vietnamese schools, clinics, or EdTech platforms.

81 Ingrida Milkaite and Eva Lievens, 'Child-Friendly Transparency of Data Processing in the EU: From Legal Requirements to Platform Policies' (2020) 14(1) *Journal of Children and Media* 5, doi:10.1080/17482798.2019.1701055.

82 OECD, *Recommendation of the Council on Children in the Digital Environment* (OECD Legal Instruments, OECD Publishing 2021). See also, UN CRC, *General Comment No 25 (2021)* (n 41) paras 122–124, on international cooperation.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАХИСТ КОНФІДЕНЦІЙНОСТІ ТА ПЕРСОНАЛЬНИХ ДАНИХ ДІТЕЙ: ПЕРСПЕКТИВА В'ЄТНАМСЬКОГО ЗАКОНОДАВСТВА

Тхі Туєт Дунг Тай, Ван Дуонг Нгуєн* та Ван Лам Нгуєн

АНОТАЦІЯ

Вступ. Захист персональних даних дітей стає нагальним питанням у В'єтнамі та в усьому світі. У цій статті аналізується правова основа захисту персональних даних дітей у В'єтнамі та розглядається конкретне правове питання про те, наскільки В'єтнам може впровадити правові елементи, що наразі викладені в Загальному регламенті про захист даних (GDPR). У статті визначено структурні обмеження щодо вікових порогів, механізмів згоди, санкцій та органу із захисту персональних даних. У статті також пропонуються рекомендації та пропозиції у сфері державної політики щодо вдосконалення в'єтнамського законодавства про захист даних, зокрема модель визначення віку надання згоди, диференційовану відповідно до рівня розвитку дитини, та спеціалізований наглядовий орган, з ширшою метою забезпечення безпечного цифрового середовища, орієнтованого на розвиток дітей.

Методи. У цій статті застосовуються різноманітні методи правового дослідження, що поєднують три підходи: 1) доктринальний правовий аналіз для визначення, інтерпретації та оцінки нормативної бази В'єтнаму; 2) функціональний порівняльний аналіз для порівняння в'єтнамського законодавства з GDPR, для оцінки ступеня їхньої сумісності та визначення регуляторних механізмів, які можуть бути імplementовані у в'єтнамське законодавство; та 3) міждисциплінарний контекстуальний аналіз, що спирається на психологію розвитку, міжкультурну психологію та правову антропологію, для оцінки здатності дітей ухвалювати рішення, структури сімейної ієрархії та впливу конфуціанської етики та культури «Ланг» на стосунки між батьками та дітьми, що дає змогу отримати висновки, необхідні для адаптації міжнародних моделей до В'єтнаму. Вторинні джерела, включно з рецензованими науковими роботами та звітами міжнародних організацій, дозволяють інтерпретувати отримані результати у ширшому контексті.

Результати та висновки. Хоча В'єтнам розробив основоположну систему правового регулювання, суттєві недоліки стосуються: 1) визначення «дитини» та вікові порогові згоди є непослідовними та недостатньо узгодженими з розвитком здібностей дітей; 2) механізми подвійної згоди та призупинення не мають чіткості та погано узгоджуються з культурними чинниками, що асиметрично послаблюють згоду дитини порівняно з її правом заперечити; 3) режим санкцій не забезпечує належного превентивного ефекту, незважаючи на нещодавні законодавчі зміни; та 4) В'єтнаму не стільки бракує наглядового органу, скільки незалежного: його наглядова функція наразі

знаходиться в апараті безпеки, водночас він не має зобов'язань щодо прозорості, адаптованої до потреб дитини, захист даних за замовчуванням і на етапі проектування або оцінки впливу на захист даних (DPIA). На цій основі у статті пропонується концепція культурно зумовленого правового трансферу, яка класифікує кожен механізм GDPR як такий, що може бути застосований у незмінному вигляді, потребує структурної адаптації або вимагає розробки власного (національного) механізму, та пропонує: (а) багаторівневу модель згоди з кваліфікованим правом дитини заперечувати проти обробки даних з високим рівнем ризику; (б) прозорість, орієнтовану на дітей, захист даних на етапі проектування (data protection by design) та обов'язкову оцінку впливу на захист даних (DPIA); (в) диференційовану систему санкцій, що залежить від рівня доходів; (г) спеціалізований орган із захисту даних із відносною незалежністю та компетенцією у сфері транскордонного правозастосування; (д) прозорість процедури надання згоди, адаптовану до вікових особливостей; (е) поглиблене міжнародне співробітництво. Ці пропозиції реформ враховують конституційний лад та соціокультурний контекст В'єтнаму.

Ключові слова. Захист персональних даних дітей; інформована згода; GDPR; в'єтнамське законодавство про захист даних; конфуціанська правова культура.

TÓM TẮT BẰNG TIẾNG VIỆT*

Bài báo nghiên cứu

BẢO VỆ QUYỀN RIÊNG TƯ VÀ DỮ LIỆU CÁ NHÂN CỦA TRẺ EM: GÓC NHÌN TỪ PHÁP LUẬT VIỆT NAM

Thái Thị Tuyết Dung, Nguyễn Văn Dương, Nguyễn Văn Lâm

TÓM TẮT

Bối cảnh: Bảo vệ dữ liệu cá nhân của trẻ em đang trở thành một vấn đề cấp thiết tại Việt Nam cũng như trên phạm vi toàn cầu. Bài viết này phân tích khung pháp lý của Việt Nam về bảo vệ dữ liệu cá nhân của trẻ em và giải quyết câu hỏi pháp lý cụ thể là Việt Nam có thể tiếp nhận đến đâu những khía cạnh pháp lý đang được quy định trong GDPR. Bài viết chỉ ra những hạn chế mang tính cấu trúc bao gồm: ngưỡng độ tuổi, cơ chế đồng ý, chế tài và cơ quan bảo vệ dữ liệu cá nhân. Sau cùng, bài nghiên cứu đề xuất các kiến nghị, gợi mở nhằm hoàn thiện pháp luật Việt Nam, bao gồm mô hình độ tuổi đồng ý phân tầng theo mức độ phát triển và một cơ quan giám sát chuyên trách, với mục tiêu chung là bảo đảm một môi trường số an toàn và định hướng phát triển cho trẻ em.

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Phương pháp: Bài viết được thực hiện trên cơ sở nghiên cứu pháp lý định tính với cách tiếp cận đa phương pháp. (i) phương pháp phân tích pháp luật thực định được sử dụng nhằm nhận diện, giải thích và đánh giá hệ thống pháp luật hiện hành của Việt Nam; (ii) phương pháp so sánh chức năng được vận dụng để đối chiếu pháp luật Việt Nam với GDPR, để đánh giá mức độ tương thích và xác định các kỹ thuật điều chỉnh có thể tiếp nhận. (iii) bài viết sử dụng cách tiếp cận liên ngành, kết hợp các luận điểm của tâm lý học phát triển, tâm lý học xuyên văn hóa và nhân học pháp luật để lý giải năng lực ra quyết định của trẻ em, cấu trúc quyền uy trong gia đình, cũng như ảnh hưởng của đạo đức Nho giáo và văn hóa làng xã đối với quan hệ cha mẹ - con cái. Những yếu tố này có ý nghĩa quan trọng trong việc đánh giá khả năng tiếp nhận và cấy ghép các mô hình pháp lý quốc tế nhằm phù hợp với bối cảnh Việt Nam. Nghiên cứu cũng sử dụng các nguồn tài liệu thứ cấp, bao gồm các công trình khoa học đã qua phản biện và báo cáo của các tổ chức quốc tế, nhằm hỗ trợ cho quá trình phân tích.

Kết quả và Kết luận: Mặc dù Việt Nam đã thiết lập một khung pháp lý nền tảng, vẫn tồn tại những hạn chế đáng kể: (i) định nghĩa "trẻ em" và các ngưỡng độ tuổi đồng ý còn thiếu nhất quán và chưa được quy định phù hợp với năng lực phát triển của trẻ em; (ii) cơ chế đồng ý kép và đình chỉ xử lý chưa rõ ràng và chưa tương thích với áp lực văn hóa vốn làm suy yếu một cách bất đối xứng giá trị của sự đồng ý so với sự phản đối của trẻ; (iii) tính răn đe của chế tài còn chưa thực sự hiệu quả mặc dù đã được điều chỉnh gần đây; và (iv) Việt Nam không thiếu một cơ quan giám sát mà thiếu một cơ quan độc lập do chức năng giám sát hiện đặt trong bộ máy an ninh, đồng thời chưa có các nghĩa vụ về minh bạch dành riêng cho trẻ em, bảo vệ dữ liệu ngay từ khâu thiết kế, hay đánh giá tác động xử lý dữ liệu.

Trên cơ sở đó, bài viết đề xuất một khung lý thuyết về chuyển giao pháp luật có điều kiện về văn hóa, phân loại mỗi kỹ thuật của GDPR thành: có thể tiếp nhận nguyên trạng, cần điều chỉnh về cấu trúc, hoặc phải thiết kế nội sinh; và kiến nghị: (a) mô hình đồng ý phân tầng kèm theo quyền phản đối có điều kiện của trẻ đối với hoạt động xử lý có rủi ro cao; (b) minh bạch dành riêng cho trẻ em, bảo vệ dữ liệu ngay từ khâu thiết kế, và đánh giá tác động dữ liệu bắt buộc; (c) cơ chế chế tài phân tầng, gắn với doanh thu; (d) cơ quan bảo vệ dữ liệu chuyên trách có tính độc lập tương đối và thẩm quyền thực thi xuyên biên giới; (e) minh bạch phù hợp với độ tuổi trong quá trình đồng ý; và (f) tăng cường hợp tác quốc tế. Những cải cách này cần được đặt trong giới hạn của nguyên tắc hiến định và điều kiện văn hóa - xã hội của Việt Nam, thay vì chỉ tiếp nhận cơ học các mô hình pháp lý từ bên ngoài.

Từ khóa: Bảo vệ dữ liệu cá nhân của trẻ em; sự đồng ý trên cơ sở được cung cấp thông tin; GDPR; pháp luật Việt Nam; văn hóa pháp lý Nho giáo.

Research Article

MANAGING RELIGION IN A SECULAR STATE: KAZAKHSTAN'S INTERFACE RULES AND EVIDENCE-BASED REFORMS

**Zhanna Khamzina*, Amangeldy Khamzin
and Yermek Buribayev**

ABSTRACT

Background: Kazakhstan constitutionally protects freedom of conscience and freedom of religion or belief and defines itself as a secular state. The article examines how that guarantee is administered at five state-religion interfaces: registration of religious associations, registration and re-registration of persons carrying out missionary activity, religious literature expert assessment and designated-place rules, notification of religious events outside cult buildings and other listed venues, and regulation of spiritual or religious educational organisations only insofar as they conduct educational activity subject to education legislation.

Method: The article combines doctrinal analysis with selected administrative and judicial indicators from the post-2011 regulatory period. It uses 2011, 2012, 2017 and 2023 as benchmark years, with later official materials for 2024, 2025 and the first quarter of 2026 treated as current-status snapshots. The legal analysis covers the Constitution, the 2011 Religion Law, administrative and criminal legislation, implementing bylaws, Article 18 of the International

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and Yermek Buribayev

Covenant on Civil and Political Rights, selected domestic case law, a Constitutional Court resolution, and persuasive comparative materials.

Results and Conclusions: In 2023, Kazakhstan recorded 3,977 registered religious associations. Form No. 1-AD records 206 rulings imposing administrative penalties under Articles 489 and 490 of the Code of Administrative Offences: 49 under Article 489 and 157 under Article 490. Article 490, therefore, accounts for 76.2% of the relevant penalty rulings. The sanction profile is fine-dominant, with one warning and 205 fines. The article concludes that peaceful, first-time, or remediable breaches in the religious sphere require a more graduated compliance sequence before fines, bans, seizures, refusals, suspensions, or liquidations are imposed.

1 INTRODUCTION

Kazakhstan constitutionally protects freedom of conscience and religion while defining the state as secular. The practical content of that constitutional settlement is shaped less by the abstract declaration of secularity than by the administrative points at which religious activity becomes visible to public authorities. At those points, decisions on legal personality, missionary registration, religious literature, events, education-law requirements, sanctions, and review determine how the guarantee operates in ordinary legal practice.

Those points are analysed here as five legally distinct state-religion interfaces: registration of religious associations; registration and annual re-registration of persons carrying out missionary activity; expert assessment, import and designated-place rules for religious literature; notification of religious events outside cult buildings and other statutorily listed venues; and regulation of spiritual or religious educational organisations only insofar as they conduct educational activity subject to education legislation. Treating them separately is important because each interface uses a different legal technique: registration or re-registration for missionary activity; notification for events; expert assessment and designated-place rules for literature; and education licensing only where a spiritual or religious organisation conducts educational activity regulated by education legislation.

The existing literature supplies the policy and institutional background. It has explained Kazakhstan's post-Soviet secular model, the architecture of the 2011 Religion Law and broader Central Asian patterns of state management of religion.¹ What remains insufficiently developed is the connection between those accounts and the evidence generated by the interfaces themselves. The unresolved legal question is how each interface performs when tested for legal certainty, neutrality, reason-giving, available sanctions, and proportionality, and when doctrinal analysis is read alongside official administrative-offence indicators and case-based reasoning.

1 Inna Nam Brady, 'Religious Freedom in Kazakhstan: Facing the Kazakhstani Law on Religious Activities and Religious Associations' (2015) 1 Regent Journal of Global Justice and Public Policy 227.

The research questions, therefore, follow from the structure of the problem. The article asks how the interfaces are legally structured, where administrative-offence outcomes are concentrated, and which safeguards would improve predictability without weakening the lawful protection of public order, public health, morals, or others' rights and freedoms.

The argument and results are correspondingly linked. The article shows that the central difficulty is not the absence of a regulatory framework, but the uneven institutionalisation of legal certainty and proportionality at the administrative interface. By connecting the post-2011 legal architecture with corrected 2023 enforcement indicators and selected case-law clusters, it identifies the specific interfaces where compliance-first amendments are most justified for peaceful, first-time, or remediable breaches.

2 MATERIALS AND METHODS

2.1. Design, Sources and Research Questions

The empirical design uses benchmark years within the post-2011 observation window rather than a continuous time series. The selected years serve different legal functions: 2011 is the final pre-re-registration baseline; 2012 is the immediate post-re-registration year; 2017 is an intermediate benchmark after the immediate 2011-2012 re-registration shock and before the complete 2023 Form No. 1-AD outcome structure; and 2023 is the principal complete annual benchmark with verified outcome cells. The non-benchmark years 2013-2016 and 2018-2022 are not treated as irrelevant; they are excluded from the article's principal tables because the purpose is a doctrinally selected benchmark comparison, not continuous econometric trend analysis. Materials for 2024, 2025 and the first quarter of 2026 are used only as current-status snapshots and are not merged into the 2023 annual denominator.

The coding connects each data point to the legal test. Registration and religious education count as the regulated field. Form No. 1-AD is read by outcome category: reviewed proceedings are treated as workload, while penalty rulings, warnings and fines are treated as administrative-offence outcome indicators. Criminal-law materials are separated by procedural stage.

The research questions are supported by three groups of sources: legal texts, official administrative and judicial indicators, and selected domestic case materials. The legal-text group includes the Constitution,² the 2011 Religion Law,³ the Code of Administrative

2 Constitution of the Republic of Kazakhstan (adopted 30 August 1995) <https://adilet.zan.kz/eng/docs/K950001000_> accessed 19 June 2026.

3 Law of the Republic of Kazakhstan No 483-IV 'On Religious Activities and Religious Associations' (adopted 11 October 2011) <<https://adilet.zan.kz/eng/docs/Z1100000483>> accessed 19 June 2026.

Offences,⁴ the Criminal Code,⁵ implementing regulations and public-service materials. The indicator group includes registration data, religious education data, administrative proceedings, and penalties under Articles 489 and 490, warning and fine outcomes, and criminal-law indicators where their procedural meaning is clear.

To avoid ambiguity, the article does not rely on unidentified policy documents. The phrase "implementing regulations and public-service materials" refers principally to Order No. 97 of 31 March 2020⁶ and the related e-government/public-service materials that operationalise missionary registration, religious expertise, and designated-place services; official registration and statistical materials are used only for the specific data points cited.

The domestic case-law sample is purposive and doctrinal. It consists of eight ordinary-court judgments grouped into five clusters, together with one Constitutional Court resolution concerning missionary registration. Cases were included when they concerned one of the analysed interfaces, arose under the relevant religious, administrative, criminal, or education-law rules, contained sufficient reasoning to assess legality, safeguards, and proportionality, and were available through public sources or certified copies.

The analysis separates *de lege lata* from *de lege ferenda*. The *de lege lata* step identifies the applicable domestic rule, the competent authority, the current sanction or remedy, and the available discretion. The *de lege ferenda* step evaluates whether statutes should add cure periods, corrected notification, assessment-on-return, registration facilitation, or staged compliance orders for peaceful, first-time, or remediable non-compliance.

The domestic materials include the Constitutional Court's Normative Resolution No. 67-NP of 26 February 2025⁷ and decisions of the Shu District Court of Zhambyl Region, the Zhambyl Regional Court, the Shymkent Inter-District Specialized Administrative Court, the Shymkent City Specialized Inter-District Administrative Court and the Almaty Specialized Inter-District Economic Court.⁸ Comparative case-law, including decisions of the European Court of Human Rights, is used as persuasive doctrinal guidance.

4 Code of Administrative Offences of the Republic of Kazakhstan No 235-V (adopted 5 July 2014) <<https://adilet.zan.kz/eng/docs/K1400000235>> accessed 19 June 2026.

5 Criminal Code of the Republic of Kazakhstan No 226-V (adopted 3 July 2014) <<https://adilet.zan.kz/eng/docs/K1400000226>> accessed 19 June 2026.

6 Order of the Minister of Information and Social Development of the Republic of Kazakhstan No 97 'On approval of the Rules for the Provision of Public Services in the Field of Religious Activity' (adopted 31 March 2020) <<https://adilet.zan.kz/eng/docs/V2000020256>> accessed 19 June 2026.

7 Normative Resolution No 67-NP 'On Consideration for Conformity with the Constitution of Subparagraph 5) of Article 1 and Paragraph 1 of Article 8 of the Law on Religious Activities and Religious Associations and Part Three of Article 490 of the Code of Administrative Offences Concerning Administrative Liability for Missionary Activity Without Registration' (Constitutional Court of the Republic of Kazakhstan, 26 February 2025) <<https://adilet.zan.kz/kaz/docs/S2500000067>> accessed 19 June 2026.

8 Shu District Court (Zhambyl Region), administrative proceedings concerning Administrative Code arts 489(9), 489(10) and 490(3), judgments of 27 March 2024 and 5 April 2024; Zhambyl Regional

The selection of sources follows the structure required by the subject matter. Statutes and regulations establish legality; international standards and persuasive comparative materials structure the forum internum/forum externum distinction and the proportionality test; administrative data describe the distribution of recorded proceedings and sanction outcomes; and case-law clusters expose the reasoning practices that aggregate numbers cannot show.⁹

Kazakhstan law terminology is used throughout. Missionary activity is governed by registration and annual re-registration; religious events outside cult buildings and listed venues by notification; religious literature by expert assessment, import and designated-place rules; religious associations by state registration as legal entities; and spiritual or religious educational organisations by licensing only where they conduct educational activity regulated by education legislation.

Court, appellate judgments of 30 April 2024 and 2 May 2024; Shymkent Inter-District Specialized Administrative Court, administrative proceedings concerning Administrative Code art 490(1)(3), judgments of 2 August 2022 and 10 November 2022; Shymkent City Specialized Inter-District Administrative Court, administrative proceedings concerning Administrative Code art 490(1)(1), judgment of 22 May 2023; Almaty Specialized Inter-District Economic Court, civil proceedings on liquidation of a Baptist theological seminary under the 2011 Religion Law, judgment of 9 January 2013. Certified copies on file with the authors.

- 9 Official register of religious associations maintained by the competent central authority for religious affairs; Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, Forms 1AD and 1M; Supplementary File 1: Statistical Extraction Log (XLSX), submitted with the manuscript for editorial and reviewer verification. See, Committee on Religious Affairs of the Ministry of Culture and Information of the Republic of Kazakhstan, 'Official Documents, 2011–2026' (*Gov.KZ: The Single Platform of Government Agencies*, 2026) <<https://www.gov.kz/memleket/entities/din/documents/1?lang=ru>> accessed 20 June 2026; Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, 'Statistical Reports, 2011–2026' (*Qamqor: Legal Statistics Portal*, 2026) <<https://qamqor.gov.kz/crimestat/statistics>> accessed 20 June 2026; and Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, 'Form No 1-AD "On the Results of Consideration of Administrative-Offence Cases by Authorised Bodies"' (*Open Data eGov.KZ*, 19 February 2021) <https://data.egov.kz/datasets/view?index=gp_od_service_1ad> accessed 20 June 2026; Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, 'Form No 1-M "On Registered Criminal Offences"' (*Open Data eGov.KZ*, 25 August 2020) <https://data.egov.kz/datasets/view?index=gp_od_service_1m> accessed 20 June 2026; Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, 'Form No 1 "Report on the Work of First-Instance Courts in Criminal Cases"' (*Open Data eGov.KZ*, 26 August 2020) <https://data.egov.kz/datasets/view?index=gp_od_service_1> accessed 20 June 2026; Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, 'Form No 10 "On the Number of Persons in Respect of Whom Judicial Acts Were Issued"' (*Open Data eGov.KZ*, 26 August 2020) <https://data.egov.kz/datasets/view?index=gp_od_service_10> accessed 20 June 2026.

2.2. Current Kazakhstan Legislation and Regulatory Interfaces

Kazakhstan's regulation of religion is structured by several layers of legal authority. The constitutional baseline consists of the principles of secularity, equality before the law, freedom of conscience and the general limitations framework. These provisions do not themselves establish a registration, notification, or licensing procedure, but they define the baseline of legality and proportionality against which statutory and administrative measures must be assessed.

The 2011 Law on Religious Activities and Religious Associations supplies the special statutory framework. It regulates the legal personality of religious associations, missionary activity, religious literature, religious events outside religious buildings and other listed venues, and religious educational organisations. These procedures are kept legally distinct: missionary activity is a registration and annual re-registration regime; public religious events are governed by notification rules; religious literature is regulated through expert assessment, import requirements and designated-place rules; and spiritual or religious educational organisations are subject to licensing only in respect of educational activity regulated by education legislation.¹⁰

Order No. 97 is treated as part of the current law, not as an omitted or absent procedural safeguard. It approves public-service rules for, inter alia, registration and re-registration of persons carrying out missionary activity,¹¹ coordination of the activity of foreign religious associations and appointments by foreign religious centres, approval of locations of special stationary premises for distribution of religious literature and religious items, construction of religious buildings and repurposing buildings into religious buildings.

For missionary registration, the rules identify submission channels through the local executive body, the State Corporation and the e-government portal;¹² provides documentary completeness checks, receipts or refusal to accept incomplete or expired documents, electronic status notifications, suspension where religious-studies expert assessment is required, preliminary refusal notice, the applicant's opportunity to submit objections, and a final certificate or reasoned refusal. They also provide administrative complaint routes, including review by a superior competent body or the body responsible for public-service quality control.

10 'Issuance of a License to Engage in Educational Activities in the Field of Primary, Basic Secondary, General Secondary, Technical and Professional, Post-Secondary Education, Religious Education' (*Electronic Government of the Republic of Kazakhstan: Public services and online information*, 2026) <https://egov.kz/cms/en/services/pre_school/204pass_mon> accessed 19 June 2026.

11 'Missionary Activities' (*Electronic Government of the Republic of Kazakhstan: Public services and online information*, 19 November 2025) <<https://egov.kz/cms/en/articles/religion/missio>> accessed 19 June 2026.

12 'Registration and Reregistration of Missioners' (*Electronic Government of the Republic of Kazakhstan: Public services and online information*, 2026) <https://egov.kz/cms/en/services/pass051_adr> accessed 19 June 2026.

For special stationary premises for religious literature and religious items, Order No. 97 similarly requires an application and supporting justification, internal coordination of the draft decision, a decision or reasoned refusal, electronic delivery through the applicant's personal account and a complaint procedure. The regulatory-gap claim in this article is therefore narrowed: existing public-service rules provide procedural scaffolding; the remaining question is whether the Religion Law and Articles 489 and 490 provide sufficient graduated compliance options before penalties, bans, seizure, or liquidation in low-risk and remediable cases.

Administrative enforcement is primarily governed by Articles 489 and 490 of the Code of Administrative Offences. These provisions are analytically important because they translate breach of specific statutory duties concerning registration, notification, venue, literature or religious-association requirements into warnings, fines, activity bans, or other administrative consequences. The article, therefore, treats Articles 489 and 490 not as a single generic restriction on religion, but as enforcement gateways attached to legally distinct interfaces.

Article 43 of the Code of Administrative Offences is treated as a current-law control on sanction selection. Where the relevant Special-Part provision provides a warning, Article 43 requires application of that warning in the absence of Article 57 aggravating circumstances and the statutory exclusion connected with Article 366. Conversely, where the applicable part provides only a fine, deportation, suspension, prohibition, confiscation, or liquidation is sought in civil proceedings, courts and administrative bodies cannot substitute cure periods, venue adjustment, assessment-on-return or conditional compliance mechanisms unless the legislature creates such powers.

Criminal-law provisions, especially Articles 174 and 405 of the Criminal Code, are treated separately because they concern higher-severity state responses. Registered-offence or prosecution statistics are not equated with convictions.

The resulting problem is one of sanction design and compliance sequencing, not a claim that Kazakhstan lacks any public-service procedure in the field of religion. Articles 3, 7, 8, 9 and 12-15 of the 2011 Religion Law define the interfaces; Order No. 97 and related e-government materials establish public-service rules; Articles 43, 57, 489 and 490 structure administrative sanction selection and enforcement; and criminal-law provisions should remain confined to conduct meeting thresholds of intent, harm and public danger.

2.3. Variables, Coding and Doctrinal Test

The units of analysis are the organisation-year and the code-article-outcome-year aggregate. The organisation-year captures religious associations or religious education institutions at the end of a calendar year. The code-article-outcome-year aggregate captures annual counts of administrative or criminal-law indicators under a specific statutory article and, where available, the outcome of that indicator. The manuscript

distinguishes reviewed administrative proceedings from rulings imposing administrative penalties and from specific sanction types; warnings and fines are reported separately where the outcome structure permits.

The empirical variables are limited to indicators necessary for the legal test: year; denomination; registered religious associations; religious education institutions and enrolment where officially supported; proceedings and penalty rulings under Articles 489 and 490; warnings and fines; descriptive rates per 100 registered associations; criminal-law indicators under Articles 174 and 405; and court statistics where the relevant verdict cells are verified.

For each selected norm or instrument, the study records the legal basis, relevant forum, legitimate aim under Article 18(3) International Covenant on Civil and Political Rights (ICCPR),¹³ foreseeability, procedural safeguards, current-law sanction discretion, and proportionality of legislative design.

Table 1. De lege lata / de lege ferenda limitation matrix¹⁴

Dimension	De lege lata question	De lege ferenda question	Interpretive consequence
Foreseeability	Is the statutory duty sufficiently identifiable for the addressee and the reviewing body?	Should the statutory language or public guidance be clarified to reduce uncertainty?	Low foreseeability supports a legal certainty concern.
Procedural safeguards	Are notice, reasoned refusal, administrative complaint, and judicial review available under current law and implementing rules?	Should publication, templates or disclosure duties be strengthened to improve auditability?	Existing public-service safeguards may answer the de lege lata question; limited statutory remedies may still indicate a reform issue.

13 International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966) [1983] UNTS 999/171.

14 Source: Authors' doctrinal matrix compiled on the basis of the Constitution of the Republic of Kazakhstan (n 2) arts 1(1), 14, 22 and 39; Law of the Republic of Kazakhstan No 483-IV (n 3) arts 3, 7-9, 12-15 and 24; Code of Administrative Offences (n 4) arts 43, 57, 489 and 490; Order of the Minister of Information and Social Development of the Republic of Kazakhstan No 97 (n 6); ICCPR (n 13) art 18(3); UN Human Rights Committee, *General Comment No 22 (48) (art 18) under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights* (CCPR/C/21/Rev.1/Add.4, 20 July 1993) paras 3 and 8 <<https://docs.un.org/ccpr/C/21/Rev.1/Add.4>> accessed 19 June 2026; OSCE/ODIHR and Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (OSCE 2004); OSCE/ODIHR and Venice Commission, *Guidelines on the Legal Personality of Religious or Belief Communities* (OSCE 2014).

Dimension	De lege lata question	De lege ferenda question	Interpretive consequence
Sanction discretion under current law	What sanction or remedy does the applicable provision allow: warning, fine, deportation, suspension, ban, confiscation, liquidation, or another measure? If a warning is legally available, does Article 43 of the Code of Administrative Offences require or exclude it in light of Article 57 and other statutory conditions?	Should the legislature add a cure period, corrected notification, registration facilitation, assessment-on-return, partial suspension, or another graduated compliance mechanism for peaceful, first-time, or remediable non-compliance?	Current-law sanction choices are assessed de lege lata; absent compliance mechanisms are assessed as legislative reform gaps, not as failures to apply unavailable remedies.
Proportionality of legislative design	Does the current sanction range distinguish minor or remediable breaches from conduct involving coercion, incitement, repeated non-compliance, or concrete public-order risk?	Should the sanction range be recalibrated to include graduated responses before fines, bans, or liquidation?	The analysis concerns statutory proportionality unless case materials show misuse of existing discretion.
Note: The matrix preserves current-law boundaries. Authorities and courts may select only sanctions provided by the applicable provision. Cure periods, assessment-on-return and partial suspension are treated as legislative proposals where current law lacks them. Aggregate warning/fine data do not prove that a fine was unlawfully selected in any individual case; they identify a sanction profile that requires article-specific monitoring and, where justified, legislative recalibration.			

2.4. Comparative and European Methodology

The comparative component is functional. It uses selected European materials as issue-specific comparators for legal personality, missionary registration and proselytism, religious literature, notification and venue rules, worship, and spiritual or religious education within the education-law framework.

European comparators were selected when they concerned an equivalent interface and articulated a standard relevant to legality, foreseeability, neutrality, safeguards, or proportionality. Priority was given to post-socialist, transition, cooperative-secular and religious security contexts.

The European Court of Human Rights is used as a regional doctrinal system, not as a binding law for Kazakhstan. Its role is analytical: it supplies a structured vocabulary for assessing whether restrictions on the forum externum are prescribed by law, pursue a legitimate aim, rest on relevant and sufficient reasons, and remain proportionate.

The selected case-law clusters map onto the Kazakhstani interfaces. Legal personality materials inform the registration analysis;¹⁵ Kokkinakis and Larissis inform missionary registration and proselytism; Manoussakis, Kuznetsov and Barankevich inform worship, venue, and notification questions; Hasan and Chaush, Izzettin Dogan and Sindicatul Pastorul cel Bun inform neutrality; and Ibragim Ibragimov and Taganrog LRO inform religious literature controls.

3 LITERATURE REVIEW

Scholarship on freedom of religion or belief provides the doctrinal starting point for the inquiry. It treats the right both as a rule-of-law guarantee and as a field of institutional tension when courts, administrative bodies and security authorities translate constitutional commitments into enforceable rules. This scholarship supports the premise used below: freedom of religion or belief is the broader category; worship is only a modality of the forum externum; and restrictions on manifestation must satisfy legality, a legitimate aim, and necessity or proportionality.¹⁶

Secularism scholarship then explains the state-structure side of the same problem. Comparative accounts show that secular constitutional orders range from separation to cooperative arrangements and that positive secularity is best understood not as religious privilege, but as neutrality organised through transparent, non-delegating cooperation.

15 W Cole Durham Jr, 'Facilitating Freedom of Religion or Belief through Religious Association Laws' in Tore Lindholm, W Cole Durham Jr and Bahia G Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Brill Nijhoff 2004) 321, doi:10.1007/978-94-017-5616-7_15.

16 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) doi:10.1093/acprof:oso/9780199606474.001.0001; Faizan Raza, 'Limitations to the Right to Religious Freedom: Rethinking Key Approaches' (2020) 9(3) Oxford Journal of Law and Religion 435, doi:10.1093/ojlr/rwaa025; Benjamin Schonthal and others, 'Is the Rule of Law an Antidote for Religious Tension? The Promise and Peril of Judicializing Religious Freedom' (2016) 60(8) American Behavioral Scientist 966, doi:10.1177/0002764215613380; Winnifred Fallers Sullivan, 'Religious Freedom and the Rule of Law: Exporting Modernity in a Postmodern World' (2002) 22(2) Mississippi College Law Review 173.

This literature is the reason the article examines administrable interfaces rather than abstract declarations of secularity.¹⁷

Comparative public-law and international-guidance materials translate that conceptual framework into operational criteria. Cooperation remains compatible with neutrality only when access criteria are general, reasons are written, public powers are not delegated to religious associations, and remedies are available. These criteria later become coding variables for the Kazakhstani interfaces: non-delegation, openness of consultation, viewpoint-neutral access, reason-giving, and reviewability.¹⁸

The literature also clarifies why model classification alone does not answer the Kazakhstani question. Neither separationist, cooperative, nor security-administered arrangements are inherently required by the ICCPR. The decisive issue is whether the chosen model regulates external manifestation through content-neutral, foreseeable, non-delegating and proportionate rules. The article, therefore, does not ask whether Kazakhstan should abandon cooperative secularism; it asks whether that cooperation is administered in a way that prevents denominational preference and makes sanction choices legally auditable.

Comparative practice identifies the principal risk that makes an inquiry into the interface necessary. In cooperative systems, consultation, access to closed institutions, public benefits, or expert participation may gradually become informal privileging if criteria, agendas, records, and reasons are unpublished. The risk is heightened where prior-control mechanisms for worship, literature or proselytism are justified by status defects rather than concrete risk. The comparative authorities are therefore used as analytical controls for arbitrariness, not as a blueprint for importing a European model.¹⁹

- 17 Christian Joppke, *The Secular State under Siege: Religion and Politics in Europe and America* (Polity 2015); Javier Martinez-Torron and W Cole Durham Jr, 'Religion and the Secular State' in Karen B Brown and David V Snyder (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (Springer 2012) 1, doi:10.1007/978-94-007-2354-2_1; Andras Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6(3-4) *International Journal of Constitutional Law* 605, doi:10.1093/icon/mon018; Monika Wohlrab-Sahr and Christoph Kleine, 'Historicizing Secularity: A Proposal for Comparative Research from a Global Perspective' (2021) 20(3) *Comparative Sociology* 287, doi:10.1163/15691330-bja10035.
- 18 *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) <<https://hudoc.echr.coe.int/eng?i=001-57827>> accessed 19 June 2026; *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) <<https://hudoc.echr.coe.int/eng?i=001-58921>> accessed 19 June 2026; *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) <<https://hudoc.echr.coe.int/eng?i=001-59985>> accessed 19 June 2026; *Izzettin Dogan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016) <<https://hudoc.echr.coe.int/eng?i=001-162697>> accessed 19 June 2026; OSCE/ODIHR and Venice Commission(n 14).
- 19 *Manoussakis and Others v Greece* App no 18748/91 (ECtHR, 26 September 1996) <<https://hudoc.echr.coe.int/eng?i=001-58071>> accessed 19 June 2026; *Kuznetsov and Others v Russia* App no 184/02 (ECtHR, 11 January 2007) <<https://hudoc.echr.coe.int/eng?i=001-78982>> accessed 19 June 2026; *Sindicatul 'Pastorul cel Bun' v Romania* App no 2330/09 (ECtHR, 9 July 2013) <<https://hudoc.echr.coe.int/eng?i=001-122763>> accessed 19 June 2026; *Izzettin Dogan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016) <<https://hudoc.echr.coe.int/eng?i=001-162697>> accessed 19 June 2026.

Post-Soviet and Central Asian scholarship provides the regional setting for that interface analysis. It describes the shift from atheist legalism to pragmatic cooperative regulation, the post-2011 legal architecture, and Kazakhstan's use of dialogue mechanisms in a multiconfessional environment.²⁰ Much of the literature remains at the level of model, policy, or institutional description. The remaining gap is the one addressed in the results section: the five interfaces are not yet sufficiently connected to the ICCPR limitation structure, official administrative-offence outcomes, and case-based analysis of legally available sanction choices.²¹

4 RESULTS

The results are organised to answer the questions posed in the Introduction. Section 4.1 establishes the regulated field and the corrected administrative-offence denominator. Sections 4.2 and 4.3 then show where enforcement outcomes and case-law clusters reveal the limits of the current sanction architecture. Section 4.4 explains why benchmark years and current-status snapshots are kept methodologically distinct, and Section 4.5 connects the empirical and doctrinal findings to the reform analysis in the Discussion.

4.1. Registration Landscape and Religious Education

At the end of 2023, Kazakhstan recorded 3,977 registered religious associations across 18 denominations. Islamic associations formed the largest group, alongside Orthodox, Catholic, Protestant/Evangelical, Jehovah's Witness, New Apostolic and other communities. The label "Protestant/Evangelical" is used as the authors' descriptive aggregation of separately reported official denominations; the denomination-level cells are recorded in Supplementary File 1. The registered field is concentrated but not mono-confessional, and the counts provide denominators for the descriptive administrative rates below.

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- 20 Alicja Curanovic, 'The Post-Soviet Religious Model: Reflections on Relations between the State and Religious Institutions in the CIS Area' (2013) 41(3) *Religion, State & Society* 330, doi:10.1080/09637494.2013.843122; S Frederick Starr, Svante E Cornell and Julian Tucker, *Religion and the Secular State in Kazakhstan* (Central Asia-Caucasus Institute & Silk Road Studies Program 2018); Yuliya V Shapoval, 'The Model of the Secular State and the Politics of Secularism in Kazakhstan: Modern Challenges' (2020) 24 *Relihiina svoboda* 65, doi:10.32420/rs.2020.24.2111.
- 21 Yermek Buribayev and others, 'Strategic Development and Comprehensive Guidelines for State Policy in Kazakhstan's Religious Sphere' (2024) 5(3) *International Journal of Religion* 40, doi:10.61707/77nmvb36; Ilyas E Iskakova and others, 'The Legal Framework of the Operation of Religious Associations in the Republic of Kazakhstan' (2016) 7(7) *Journal of Advanced Research in Law and Economics* 1700; Rashid A Podoprighora and Nargis Kassenova, 'State and Religious Associations in Kazakhstan: Legal Regulation and Political Context' (2017) 18(4) *Central Asia and the Caucasus* 75; Ernar Toilybekova and others, 'Legal Regulation of Confessional Relations in Kazakhstan' (2024) 105(3) *Pharos Journal of Theology* 1, doi:10.46222/pharosjot.105.37.

Table 2. Corrected empirical baseline and enforcement indicators, 2023²²

Indicator	Corrected value	Analytical use in this article
Registered religious associations	3,977 registered religious associations. The label “Protestant/Evangelical” is an authors’ descriptive aggregation of separately reported denominations; the denomination-level cells appear in Supplementary File 1.	Denominator for descriptive administrative-penalty rates.
Religious education institutions ²³	14 religious educational institutions. Student enrolment is reported where the official annual source identifies it. ²⁴	Describes the regulated religious education field without treating religious activity itself as licensed activity.
Administrative proceedings reviewed under Articles 489 and 490	279 reviewed proceedings: 60 under Article 489 and 219 under Article 490.	Procedural workload indicator: penalty rulings are reported separately.
Rulings imposing administrative penalties under Articles 489 and 490	206 penalty rulings: 49 under Article 489 and 157 under Article 490. Article 490 accounts for 76.2% of penalty rulings. The combined rate is approximately 5.2 penalty rulings per 100 registered religious associations; the Article 490 rate is approximately 3.9 per 100 registered religious associations.	Principal descriptive administrative penalty-ruling indicator.

22 Source: Committee on Religious Affairs of the Ministry of Culture and Information of the Republic of Kazakhstan; Committee on Legal Statistics and Special Records of the General Prosecutor’s Office of the Republic of Kazakhstan, ‘Form No 1-AD, 2023’ annual return, columns 9-11; ‘Form No 1-M, 2023’ annual return; and Supplementary File 1 submitted with the manuscript (n 9).

23 ‘Registered Spiritual (Religious) Educational Organisations’ (*Open Data eGov.KZ*, 24 January 2018) <https://data.egov.kz/datasets/view?index=tirkelgen_dini_birlestikterdin> accessed 19 June 2026.

24 Committee on Religious Affairs of the Ministry of Culture and Information of the Republic of Kazakhstan, ‘Religious and Religious Studies Education’ (*Gov.KZ: The Single Platform of Government Agencies*, 2026) <<https://www.gov.kz/memleket/entities/akk/activities/1800>> accessed 19 June 2026.

Indicator	Corrected value	Analytical use in this article
Warnings and fines under Articles 489 and 490	Article 489: 1 warning and 48 fines. Article 490: 157 fines and no warnings. Total: 1 warning and 205 fines. Warnings account for approximately 0.5% of penalties and fines for approximately 99.5%.	Shows a fine-dominant sanctioning profile and supports monitoring of warning/fine choices and compliance-first reform options.
Criminal-law indicators under Articles 174 and 405	Form No. 1-M entries are reported, if at all, as registered-offence or prosecution stage indicators. Article-specific judicial verdict cells were not verified for this revision.	Keeps criminal-law analysis aligned with the verified source structure.

Table 2 separates reviewed proceedings from penalty rulings. Form No. 1-AD, column 9, is the principal administrative outcome indicator; columns 10 and 11 distinguish warnings and fines.

The corrected 2023 cross-section shows 206 rulings imposing administrative penalties under Articles 489 and 490, rather than 279 penalties. Article 490 accounts for 157 of 206 penalty rulings, or 76.2%. The outcome structure is fine-dominant, with one warning and 205 fines.

Article 490 covers heterogeneous statutory duties, so the aggregate count is read through the separate interfaces supplied by the 2011 Religion Law, education legislation, and implementing rules.

Later official materials update the current institutional context. They show continued operation of the same interfaces, including registration, missionary activity, religious expertise, and religious education, and remain separate from the 2023 annual outcome denominator.

4.2. Current-Law Outcome and de Lege Ferenda Interface Assessment

Table 3. Domestic case-law clusters: current-law outcome and de lege ferenda reform issue²⁵

Case-law cluster	Current-law classification	Domestic-law outcome	Current-law boundary	De lege ferenda issue
V1 Missionary registration	Administrative liability for missionary activity without registration under Article 490. The Constitutional Court has confirmed the constitutional validity of the missionary registration model as such.	Fine imposed and upheld on appeal.	Article 490 was applied under current law; warning analysis depends on Article 43/57 conditions in the individual file, and registration facilitation would require express statutory basis.	Whether Article 490 should provide a warning or registration facilitation mechanism for first-time, peaceful, and remediable non-registration, absent coercion, incitement, or concrete public-order risk.
V2 Religious literature	Administrative liability for breach of expert assessment, import or designated-place rules.	Fine and ancillary measures as provided by the relevant provision.	Expert assessment remains part of current law; assessment-on-return requires legislative authorisation, and the article does not treat absence of that mechanism as judicial error.	Whether legislation should allow information notice, temporary storage, assessment-on-return, or warning for non-extremist materials before fine, seizure, or activity ban in minor or remediable cases.

²⁵ Source: Authors' synthesis of the domestic case-law sample cited in notes 19-23 and analysed against the current-law framework established by the Law of the Republic of Kazakhstan No 483-IV (n 3) arts 7, 8, 9 and 24; the Code of Administrative Offences (n 4) arts 489 and 490; Order of the Minister of Information and Social Development of the Republic of Kazakhstan No 97 (n 6); and Normative Resolution No 67-NP (n 7). Certified copies of the ordinary-court judgments are on file with the authors; case numbers and proceedings numbers are supplied in the corresponding case notes.

Case-law cluster	Current-law classification	Domestic-law outcome	Current-law boundary	De lege ferenda issue
V3 Unregistered religious association	Administrative liability for leadership or participation in an unregistered religious community under Article 489.	Fines imposed and upheld.	The analysed Article 489 parts are treated as fine-only; warning or rectification would require amendment, so the issue is statutory design rather than non-use of an unavailable remedy.	Whether the sanction design should distinguish peaceful first-time collective worship from repeated, organised, or harmful evasion of registration duties.
V4 Event/venue rules	Administrative liability connected with venue/status or notification rules.	Fine and temporary ban imposed.	The final domestic judgment is treated as the current-law outcome; relocation or corrected notification mechanisms require statutory basis if not already available under the relevant public-service rule.	Whether legislation should require prior written correction or relocation opportunities where the defect is remediable and no concrete disturbance is shown.
V5 Re-registration/liquidation	Civil liquidation for failure to comply with post-2011 re-registration or constituent-document requirements under Article 24 of the Religion Law.	Liquidation ordered.	Article 24 and applicable civil procedure define the remedies available to the court; staged cure requires legislative amendment unless already permitted by procedural law.	Whether Article 24 should include a cure period or staged compliance mechanism before liquidation for remediable defects, unless immediate public-order or extremism-related risks are present.

Table 3 links each case-law cluster to its current-law classification, domestic-law outcome and de lege ferenda reform issue. The table does not assert that final domestic judgments were unlawful. It asks whether the statutory architecture gives decision-makers sufficiently graduated options for peaceful, first-time, or remediable breaches.

Across the selected clusters, legal bases, public-service routes, and review channels were generally in place. The recurring issue is therefore not the absence of any procedure but the limited statutory room for compliance-first responses in peaceful, first-time, or remediable cases.

4.3. Domestic Case-Law Sample and Access-to-Justice Implications

The case-law clusters are used to analyse current-law reasoning, not to relitigate final domestic decisions. The article does not contend that the judgments were unlawful, unfounded, or procedurally invalid; it treats them as evidence of how the current sanction and remedy architecture operates. They follow Kazakhstan's legal categories: missionary registration and annual re-registration; notification of religious events outside listed venues; expert assessment, import, and designated-place rules for literature; and licensing of educational activity when spiritual or religious educational organisations conduct such activity.

Case C0: constitutional review of missionary registration. In Normative Resolution No. 67-NP of 26 February 2025, the Constitutional Court examined the statutory definition of missionary activity, the requirement of prior registration for missionary activity, and administrative liability under Article 490(3).²⁶ The Court recognised the challenged provisions as constitutional. C0 confirms the current-law validity of missionary registration and frames the remaining issue as one of reasoned individual application.

Case V1: missionary registration. The courts imposed and upheld a fine of 100 monthly calculation indices for missionary activity without registration in connection with an unregistered home congregation. The reform issue is whether Article 490 should permit warning and registration facilitation for first-time, peaceful, and remediable non-registration where no coercion, incitement, abuse of vulnerability or concrete public-order risk is shown.²⁷

Case V2: distribution of religious literature. Two Shymkent cases concerned Arabic-language religious books transported without prior expert assessment and outside the statutory import or designated-place framework.²⁸ The courts imposed fines and three-

26 'Missionary activities' (n 11).

27 Shu District Court (Zhambyl Region), administrative proceedings concerning Administrative Code art 490(3), judgment of 27 March 2024; Zhambyl Regional Court, appellate judgment of 30 April 2024 (case numbers not published; certified copies on file with the authors).

28 Committee on Religious Affairs of the Ministry of Culture and Information of the Republic of Kazakhstan, 'Religious Expertise' (Gov.KZ: *The Single Platform of Government Agencies*, 2026) <<https://www.gov.kz/memleket/entities/din/activities/879>> accessed 19 June 2026.

month activity bans, while the judgments described no extremist finding. The reform issue is whether non-extremist and remediable materials should first trigger temporary storage, information notice, or an assessment on return.²⁹

Case V3: registration and leadership of an unregistered association. The courts upheld fines for leadership of and participation in an unregistered religious community. The reform issue is whether Article 489 should distinguish peaceful first-time collective worship from repeated, organised, or harmful evasion of registration duties and allow warning-or-cure where the defect is remediable.³⁰

Case V4: public religious event in a deregistered mosque.

The specialised administrative court imposed a fine and a three-month ban on the use of a deregistered mosque for religious activities. The reform issue is whether remediable venue or notification defects should be addressed through corrected notification, renewed registration, relocation, or limited-use mechanisms before sanctions are imposed, where no concrete disturbance is established.³¹

Case V5: re-registration and liquidation of a religious legal entity. A Baptist seminary was liquidated after non-compliance with post-2011 re-registration and constituent-document requirements. The reform issue is whether Article 24 should provide a cure period or a staged compliance order before liquidation for remediable defects, unless the violation involves extremism, incitement, repeated refusal to comply or another immediate legal threat.³²

No case cluster is used to infer that a court or authority should have applied a measure absent from the applicable provision. Where the proposed warning, cure period, assessment-on-return, relocation, registration facilitation, or staged compliance mechanism is unavailable under current law, it is classified as a legislative reform issue rather than a current-law adjudicative error.

29 Shymkent Inter-District Specialized Administrative Court, administrative proceedings concerning Administrative Code art 490(1)(3), judgments of 2 August 2022 and 10 November 2022 (case numbers not published; certified copies on file with the authors).

30 Shu District Court (Zhambyl Region), administrative proceedings concerning Administrative Code arts 489(9) and 489(10), judgment of 5 April 2024; Zhambyl Regional Court, appellate judgment of 2 May 2024 (case numbers not published; certified copies on file with the authors).

31 Shymkent City Specialized Inter-District Administrative Court, administrative proceedings concerning Administrative Code art 490(1)(1), judgment of 22 May 2023, concerning use of a deregistered mosque for religious activity; private-party name, case number and unnecessary identifying details omitted; certified copy on file with the authors.

32 Almaty Specialized Inter-District Economic Court, civil proceedings on liquidation of a Baptist theological seminary under the 2011 Religion Law, judgment of 9 January 2013 (case number not published; certified copy on file with the authors).

4.4. Selected benchmark years and current official snapshots

The benchmark year panel shows a sharp reduction between 2011 and 2012 following the re-registration process introduced by the 2011 Religion Law, followed by a gradual recovery, as evidenced by the 2017 intermediate count of 3,658 and the 2023 count of 3,977. The year 2017 is included only as an interim check between the immediate post-2011 transition and the complete 2023 outcome structure; it is not presented as a replacement for a full annual series. The 2024, 2025 and first-quarter 2026 materials are presented separately as current-status snapshots.³³

Table 4. Selected benchmark years and later official snapshots³⁴

Benchmark year	Selection rationale	Verified data	Methodological status
2011	Pre-re-registration baseline.	Registered religious associations: 4,551.	Historical benchmark.
2012	Immediate post-re-registration benchmark.	Registered religious associations: 3,088.	Historical benchmark.
2017	Intermediate post-re-registration benchmark after the immediate 2011-2012 shock and before the verified 2023 outcome structure.	Registered religious associations: 3,658. Article/outcome cells checked; not used as a continuous annual trend.	Intermediate benchmark.
2023	Complete annual year with verified Form No. 1-AD outcome structure.	206 penalty rulings: 49 under Article 489 and 157 under Article 490; one warning and 205 fines.	Principal annual benchmark.
2024-2026	Current-status snapshots.	2024 Q4, 2025 Q4 and Q1 2026 snapshots.	Snapshot only.

33 Committee on Religious Affairs of the Ministry of Culture and Information of the Republic of Kazakhstan, 'Religious Sphere' (*Gov.KZ: The Single Platform of Government Agencies*, 2026) <<https://www.gov.kz/memleket/entities/din/activities/141?lang=en>> accessed 19 June 2026.

34 Source: Committee on Religious Affairs of the Ministry of Culture and Information of the Republic of Kazakhstan; Committee on Legal Statistics and Special Records of the General Prosecutor's Office, Qamqor Legal Statistics Portal and Open Data datasets; and Supplementary File 1 submitted with the manuscript (n 9).

The benchmark pattern clarifies the normative claim. The corrected 2023 data identify Article 490 as the main source of penalty rulings and show a fine-dominant profile. These aggregate data do not indicate whether Article 43/57 exclusions existed in any individual file; they support targeted monitoring of warning/fine choices and statutory-compliance-first mechanisms for low-risk cases.

4.5. Synthesis of Results

Empirically, the results show a stable and diverse field of registered religious actors and a corrected 2023 administrative-penalty profile concentrated in Article 490. Doctrinally, they show that procedural predictability and graduated-sanctions design are the most actionable reform points.

These findings support a narrow reform conclusion. The practical insufficiency lies in the gap between formal legality and the administrability of the proportionality of the sanction architecture, rather than in the invalidity of the selected domestic judgments. Current legislation should more clearly distinguish peaceful, first-time, and remediable non-compliance from repeated or harmful conduct and make compliance-first mechanisms available where appropriate.

5 DISCUSSION

5.1. Secular principles and state-religion interfaces

The corrected empirical and benchmark tables carry the results into the normative analysis. They identify a stable denominator after the post-2011 re-registration breakpoint, concentration of administrative penalty rulings under Article 490 in 2023 and a fine-dominant sanctioning profile. Read with the case-law sample, these findings justify procedural and legislative reform rather than general deregulation or a finding that final domestic judgments were unlawful.³⁵

The implication is procedural rather than ideological. The findings support codifying open and transparent dialogue, uniform access criteria, non-delegation of public powers to religious associations, written reasons, and review. These measures preserve secular neutrality while improving foreseeability and equal treatment.

35 MT Abdikakimov and MS Karibayev, 'Correlation of Religious and Secular Values in Kazakhstan Society' (2024) 88(1) *The Journal of Psychology & Sociology* 110, doi:10.26577/JPsS.2024.v88.i1.09.

5.2. Comparative synthesis: what the European materials add

The comparative analysis identifies a methodological lesson rather than a model for transplantation. European practice is plural, but the selected Article 9 materials consistently emphasise the quality of law, neutrality of the decision-maker, clear access criteria, specific reasons, effective review, and proportionality.

State neutrality is used here in a procedural rather than anti-religious sense. It prohibits the state from determining religious truth, ranking confessions, or using religious status as a proxy for legal entitlement. Comparable actors should be assessed under the same access conditions, evidentiary thresholds, and remedial sequence.

Because Article 490 is the principal source of the 2023 penalty rulings, comparators concerning prior administrative control, worship venues, notification systems, and religious literature are particularly significant. They support published criteria, written reasons, non-delegation, effective review, and reasoned selection among legally available sanctions.

5.3. Administrative enforcement and the forum externum

Administrative penalty practice, measured by rulings imposing administrative penalties, is the principal observable enforcement channel in the corrected 2023 data. Because Article 490 is dominant, the analysis focuses on missionary registration, notification and venue requirements, expert assessment, import and designated-place rules for religious literature.

For missionary registration, literature and notification rules, the most effective reforms are publication and updating of criteria and venue lists, explicit venue or time reasoning where the applicable law permits it, careful recording of the statutory basis for any fine or warning, and legislative consideration of cure periods or corrected notification mechanisms for low-risk cases.

The fine-dominant outcome structure is not used here as proof that courts or authorised bodies unlawfully preferred fines to warnings. Article 43 requires a warning only where the relevant Special-Part provision provides one, and Article 57 or Article 366 exclusions are absent. Because aggregate Form No. 1-AD data do not disclose those circumstances for each file, the article confines its statistical inference to monitoring and legislative design review.

Order No. 97 also narrows the reform claim. The public-service rules already contain procedural elements, documents, submission channels, deadlines, preliminary refusal, objections, reasoned refusal, and complaint routes for several religious-sphere services. The recommended changes, therefore, concern the auditability of reasons and the addition of substantive compliance-first mechanisms, where current statutory sanctions move directly from breach to fine, ban, seizure, or liquidation.

5.4. Religious security and the criminal law

Form No. 1-M is used to indicate the registered offence or prosecution stage. Conviction-level claims require article-specific judicial verdict cells, so the criminal-law discussion remains doctrinal and focused on precise thresholds, concrete harm analysis, and strict proportionality.

A clearer doctrinal distinction between internal belief and regulable manifestation would reduce the risk that administrative uncertainty migrates into criminal-law reasoning and would strengthen state neutrality in a multiconfessional setting.³⁶

5.5. Normative analysis and proposals: de lege lata and de lege ferenda

The normative analysis separates the applicable de lege lata framework from de lege ferenda proposals tailored to Kazakhstan's constitutional and statutory order.

The proposals derive from the corrected 2023 outcome profile and the case-law clusters: a fine-dominant sanction pattern, limited room for compliance-first responses and recurring uncertainty at the boundary between formal breach and proportionate statutory design. The fine-dominant outcome profile is used as a signal for legal-design review, not as proof that courts or bodies misapplied Article 43 in any individual case.

De lege lata, Kazakhstan's constitutional and statutory framework establishes a secular, rule-of-law state, guarantees freedom of conscience and prohibits discrimination on grounds including attitude to religion.³⁷ The 2011 Religion Law supplies the special framework for religious-association registration, missionary registration and re-registration, religious literature, religious events outside listed venues and spiritual or religious educational organisations. Articles 489 and 490 of the Code of Administrative Offences and Articles 174 and 405 of the Criminal Code provide the principal enforcement provisions.³⁸ Regulation of external manifestation should be read consistently with Article 18(3) ICCPR: the measure must be prescribed by law, pursue an enumerated legitimate aim and be necessary and proportionate.³⁹

36 Gilimbek Mazhiyev, Rakhymzhan Rashimbetov, and Nurlan Kairbekov, 'Religious Orientations on Attitude toward a Secular State: Case of Evangelical Lutheran Churches in North Regions of Kazakhstan' (2024) 105(3) *Pharos Journal of Theology* 1, doi:10.46222/pharosjot.105.311.

37 Constitution of the Republic of Kazakhstan (n 2) arts 1(1), 14, 22 and 39. Article 1(1) proclaims Kazakhstan a democratic, secular, legal and social state; Article 14 guarantees equality before the law and prohibits discrimination, including on grounds of attitude to religion; Article 22 guarantees freedom of conscience; Article 39 sets the general constitutional framework for limitations on rights and freedoms.

38 Law of the Republic of Kazakhstan No 483-IV (n 3) preamble and arts 3, 7-9 and 12-15; Code of Administrative Offences (n 4) arts 489-490; Criminal Code (n 4) arts 174 and 405.

39 ICCPR (n 13); UN Human Rights Committee, *General Comment No 22 (48) (art 18)* (n 14) paras 3 and 8.

In Normative Resolution No. 67-NP of 26 February 2025, the Constitutional Court reviewed subparagraph 5) of Article 1 and paragraph 1 of Article 8 of the 2011 Religion Law, together with part three of Article 490 of the Code of Administrative Offences and recognised the challenged provisions on missionary activity without registration as consistent with the Constitution. The resolution confirms the constitutional permissibility of missionary registration and leaves individual applications under Article 490 to be assessed on the basis of statutory basis, foreseeability, concrete risk, necessity, and current-law sanction choice.

De lege lata also includes Order No. 97. Its annexed public-service rules set the relevant documents, service providers, submission channels, service time limits, preliminary refusal notices, objection opportunities, reasoned refusals, and administrative complaint routes for religious-sphere public services. This existing procedural layer means that the article's reform proposals are not premised on the absence of service regulation; rather, they are premised on the limited availability of substantive cure mechanisms and the need for more auditable reasons for sanction selection.

5.5.1. Proposed legislative amendments

The de lege ferenda proposals are formulated as five targeted amendments to the sanction and compliance architecture.

Article 490 of the Code of Administrative Offences should be supplemented by a note or additional part providing that, for a first-time violation of missionary registration requirements by a citizen or resident where the conduct is peaceful, non-coercive and free from incitement, abuse of vulnerability or concrete public-order risk, the competent body or court may, where the amended sanction permits and Article 43 conditions are met, impose a warning and set a short period for registration or cessation of the relevant missionary activity. A fine should remain available for repeated non-compliance, refusal to regularise, foreign-citizen cases where the statute so provides, or conduct involving concrete risk.

Article 489, parts 9 and 10, should allow a warning-or-cure period for peaceful first-time leadership of, or participation in, an unregistered religious community where the defect is remediable and no coercion, incitement, violence, or public-order disturbance is established. The amendment would preserve the registration requirement while creating a compliance-first sequence before monetary liability in low-risk cases.

Articles 7 and 7-1 of the Religion Law should be supplemented by an express corrected notification mechanism. Where a notice for a religious event outside listed venues is deficient, the authority should issue a written explanation of the defect and allow a corrected notification unless the event poses an immediate and substantiated risk to public order, safety, health, or others' rights.

Article 9 of the Religion Law and the related administrative provisions on religious literature should be supplemented by a temporary storage and assessment-on-return mechanism for

non-extremist materials imported or transported without prior expert assessment. Fine, seizure, destruction, or activity bans should be reserved for prohibited content, repeated non-compliance, refusal to submit materials for assessment or cases involving concrete risk.

Article 24 of the Religion Law should be amended to introduce a staged response before liquidation of a religious legal entity for remediable constituent-document or re-registration defects. The court should be empowered to grant a cure period, require submission of corrected documents, or suspend only the legally defective activity before ordering liquidation, unless the violation involves extremism, incitement, repeated refusal to comply or another immediate threat recognised by law.

These amendments would preserve mandatory registration, missionary registration, expert assessment, notification, and licensing of educational activity while adding a statutory bridge between breach and sanction in peaceful, first-time, and remediable cases.

The amendments are addressed to the legislature. They do not ask courts or administrative bodies to apply rectification, conditional compliance, assessment-on-return, or partial suspension under current law when those measures are not provided for in the applicable article.

In addition to article-specific amendments, the 2011 Religion Law and Order No. 97 implementation templates should include a concise neutrality-and-dialogue clause requiring published access criteria, non-delegation of public powers, written reasons, and administrative and judicial review. A decision-making template should require the precise domestic rule, the Article 18(3) aim pursued, the facts establishing necessity and the reason for selecting the legally available sanction.

The proposals also have a future-oriented function. Digital public administration, online religious communication, and cross-border dissemination of religious materials will make missionary communication, literature circulation, and public manifestation increasingly difficult to manage through older venue-based concepts. Published criteria and reasoned decisions would help distinguish genuine security risks from ordinary religious communication.

6 CONCLUSION

This article examined how Kazakhstan's secular constitutional framework mediates freedom of religion or belief across legally distinct administrative interfaces. The 2023 Form No. 1-AD data, read by penalty rulings rather than total reviewed proceedings, show 206 rulings imposing administrative penalties under Articles 489 and 490: 49 under Article 489 and 157 under Article 490. The sanctioning structure is fine-dominant, with one warning and 205 fines. These figures do not establish that fines were unlawfully preferred in any individual case; they identify the interfaces where legality, foreseeability, reasons, review, and proportionality of statutory design should be strengthened.

The normative conclusion is that the existing sanction and compliance architecture should be more graduated for peaceful, first-time, or remediable breaches in the religious sphere. The appropriate reform is legislative and procedural: clearer statutory criteria, precise public-service references, article-specific statistical sourcing, reasoned sanction selection within current-law limits and compliance-first mechanisms before fines, bans or liquidation in low-risk cases.

The comparative and European analyses support the same interface-level safeguards for legal personality, missionary registration, notification and venue requirements, religious-material controls, religious education within the education-law framework, and state-religion dialogue. These safeguards remain grounded in Kazakhstan's constitutional order, current statutory limits, and the binding ICCPR framework.

Targeted amendments to Articles 489 and 490 of the Code of Administrative Offences and Articles 7, 8, 9 and 24 of the Religion Law would consolidate secular neutrality by making the transition from breach to sanction more foreseeable, reviewable, and proportionate.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДЕРЖАВНЕ РЕГУЛЮВАННЯ СФЕРИ РЕЛІГІЇ У СВІТСЬКІЙ ДЕРЖАВІ: ПРАВИЛА ВЗАЄМОДІЇ ДЕРЖАВИ ТА РЕЛІГІЇ В КАЗАХСТАНІ ТА РЕФОРМИ, ЗАСНОВАНІ НА ДОКАЗОВИХ ДАНИХ

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АНОТАЦІЯ

Вступ. Конституція Республіки Казахстан гарантує свободу совісті та свободу релігії або переконань, а також закріплює світський характер держави. У статті досліджується адміністративно-правове забезпечення реалізації цієї конституційної гарантії у п'яти сферах державно-релігійних відносин: реєстрація релігійних об'єднань; реєстрація та перереєстрація осіб, які провадять місіонерську діяльність; проведення релігієзнавчої експертизи релігійної літератури та дотримання вимог щодо її поширення у спеціально визначених для цього місцях; повідомлення про проведення релігійних заходів поза культовими будівлями та іншими визначеними законом місцями; регулювання діяльності духовних або релігійних закладів освіти лише в тій частині, у якій вони здійснюють освітню діяльність, що підпадає під дію законодавства про освіту.

Методи. У статті поєднано доктринальний аналіз із дослідженням окремих адміністративних і судових показників у межах періоду нормативно-правового регулювання, що бере початок у 2011 році. Базовими для аналізу визначено 2011, 2012, 2017

і 2023 роки, тоді як пізніші офіційні матеріали за 2024, 2025 роки та перший квартал 2026 року розглядаються як актуальні дані, що відображають сучасний стан правового регулювання. Джерельну базу правового аналізу становлять Конституція Республіки Казахстан, Закон Республіки Казахстан «Про релігійну діяльність та релігійні об'єднання» 2011 року, адміністративне та кримінальне законодавство, підзаконні нормативно-правові акти, прийняті на виконання цього Закону, стаття 18 Міжнародного пакту про громадянські і політичні права, окремі рішення національних судів, нормативна постанова Конституційного Суду Республіки Казахстан, а також релевантні порівняльно-правові матеріали.

Результати та висновки. У 2023 році в Республіці Казахстан налічувалося 3 977 зареєстрованих релігійних об'єднань. Згідно з даними форми № 1-АД, за статтями 489 та 490 Кодексу Республіки Казахстан про адміністративні правопорушення винесено 206 постанов про накладення адміністративних стягнень: 49 постанов за статтею 489 та 157 — за статтею 490. Таким чином, на статтю 490 припадає 76,2 % таких постанов. У структурі застосованих адміністративних стягнень переважають штрафи: винесено одне попередження та накладено 205 штрафів. У статті зроблено висновок, що мирні, уперше вчинені або такі, що можуть бути усунені, порушення у релігійній сфері потребують запровадження більш диференційованої та поетапної системи заходів для забезпечення дотримання законодавства, яка має передувати накладенню штрафів, встановленню заборон, вилученню майна, відмові в реєстрації чи погодженні, зупиненню діяльності або ліквідації.

Ключові слова. Свобода релігії або переконань; стаття 18 Міжнародного пакту про громадянські і політичні права (ICCPR); адміністративне правозастосування; правова визначеність; взаємодія держави та релігійної сфери; реєстрація місіонерів.

Review Article

ARTIFICIAL INTELLIGENCE
AND DIGITALIZATION IN INVESTIGATIVE
AND LAW ENFORCEMENT ACTIVITY
OF THE REPUBLIC OF KAZAKHSTAN

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ABSTRACT

Background: Digital transformation of law enforcement systems is an integral part of the modern development of state organizations. The implementation of Artificial Intelligence (AI) technologies in the sphere of legal proceedings and criminal process demonstrates significant potential to optimize investigative processes, accelerate information processing, and improve the quality of investigations. In addition, global expertise reveals a set of substantive challenges associated with the application of AI systems in law enforcement. Among them are critical issues concerning the correspondence between the use of AI during investigations and the principles of criminal proceedings, personal data protection, compliance with international human rights standards, fair proceedings, and the risk of discrimination.

Issues of legal regulations of high-risk artificial intelligence systems, as required by EU Regulation EU 2024/1689 of the European Parliament and of the Council of 13 June 2024 (hereinafter referred to as the "European AI Act") and other overseas tools, are becoming relevant for all states, including countries of the post-Soviet space.

Method: *The current research is based on the application of a complex approach, which includes analysis of active Kazakhstani legislation, international documents, and the study of existing AI development concepts and modern Kazakhstani innovations based on AI. As for the basic method, comparative law is used to clarify positive experience and differences in approaches to AI regulation between Kazakhstan and leading global jurisdictions. The research included a systematic analysis of official strategic documents, current regulations, scientific publications, and international standards in the field of digitalization. Particular attention is paid to the study of classification mechanisms of high-risk AI technologies and existing approaches to their use in law enforcement.*

Results and Conclusions: *In conclusion, this study has identified key directions for the application of AI tools in Kazakhstan. Furthermore, the analysis highlights an urgent need to develop a comprehensive legislative framework to create the necessary conditions for the domestic use of AI in the law enforcement activities of the Republic of Kazakhstan. It was revealed that successful digital transformation requires harmonization of national regulations with international standards, creating transparent assessment criteria for the risks of AI systems, and setting effective control and supervision mechanisms. The research demonstrated the importance of ensuring algorithmic transparency and fairness in the application of AI in criminal proceedings to guarantee human rights. Based on the authors' analysis, an integrated management model for digital transformation is proposed, including legislative initiatives, the development of professional standards, and the creation of control mechanisms. Thus, the implementation of this proposed model allows Kazakhstan to maximize the advantages of AI technologies to improve the quality of law enforcement activities, while simultaneously ensuring the firm protection of citizens' constitutional rights and fundamental freedoms.*

1 INTRODUCTION

Modern threats to public security necessitate a complex digital transformation of the law enforcement field, oriented not only to advancing the efficiency and effectiveness of police work but also to increasing public trust. As researchers note, developments in digital tools, as well as Artificial Intelligence systems (hereinafter referred to as "AI"), are shaping new standards of interaction between the state and citizens, facilitating crime

prevention and the optimization of investigations.¹ Digital solutions have become an integral part of law-making practice and ensure the adaptation of the application of law to the challenges of the digital era.² Furthermore, scientists emphasize the importance of interagency cooperation and the continuous development of employees' competencies for the successful implementation of innovations in practice.³ The implementation of AI in law enforcement activities is recognized as an important vector for the development of modern jurisprudence and security, as evidenced by extensive publications in both international and domestic scientific journals.⁴

However, despite the significance of technological progress and its potential to optimize pre-trial investigation and court proceedings, the implementation of algorithmic systems in criminal procedure requires an extremely careful, gradual, and human rights-based approach centered on the priority of protecting the rights and freedoms of the suspect and defendant. Any attribution of AI results to the factual status of evidence, in accordance with the principles of admissibility, reliability, and, when taken together, sufficiency, which is beyond doubt, is capable of exposing any pressure on the internal beliefs of law enforcement officers during the trial of a criminal case.

Algorithmic solutions based on probability assessment potentially concern the content of the presumption of innocence and the rules on interpreting ineliminable doubts in favor of the defendant, if in practice such assessments play a significant role when solving issues about bringing a subject to liability, or, for example, issues regarding the imposition of a pretrial restraint in relation to the subject of an offense.

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- 1 Kiel Brennan-Marquez and Stephen E Henderson, 'Artificial Intelligence and Role-Reversible Judgment' (2019) 109(2) *The Journal of Criminal Law and Criminology* 137, doi:10.2139/ssrn.3224549; Paolo Bory, Simone Natale and Christian Katzenbach, 'Strong and Weak AI Narratives: An Analytical Framework' (2024) 40(4) *AI & Society* 2107, doi:10.1007/s00146-024-02087-8; Francesco Borgesano and others, 'Artificial intelligence and Justice: A Systematic Literature Review and Future Research Perspectives on Justice 5.0' (2025) 28(11) *European Journal of Innovation Management* 349, doi:10.1108/EJIM-01-2025-0117.
 - 2 Patricia Haley and Darrell Norman Burrell, 'Integrating Artificial Intelligence into Law Enforcement' (2025) 9(2) *SocioEconomic Challenges* 60, doi:10.61093/sec.9(2).60-77.2025; Patricia Haley and Darrell Norman Burrell, 'Leveraging Geo-Profiling to Address Rape as a Public Health and Criminal Epidemic in the United States' (2024) 29(3) *Land Forces Academy Review* 358, doi:10.2478/raft-2024-0038; Seyedeh Monira Hejazi and others, 'Application of Artificial Intelligence in Security-Oriented Criminal Policy: Opportunities and Challenges' (2025) 4(4) *Legal Studies in Digital Age* 1, doi:10.61838/kman.lsd.223.
 - 3 Mohammadsadeh Sheykhvand and others, 'A Comparative Study of the Facilitator Application of Artificial Intelligence in Criminal Prosecution: Capacities and Challenges' (2023) 27(1) *Comparative Law Research* 81.
 - 4 Viktor Nalutsyshyn, Volodymyr Nalutsyshyn and Rostyslav Golovchak, 'Foreign Experience in the Application of Artificial Intelligence in Law Enforcement' (2025) 3(57) *Socio-Economic Relations in the Digital Society* 94, doi:10.55643/ser.3.57.2025.617.

There is a serious risk that the burden of evidence will increase for the defense: in addition to other evidence obtained as a result of the investigation, additional information may arise that requires a response and, consequently, refutation by the lawyers. The scope of principles of criminal procedure turns out to be no less vulnerable. The development of principles of competitiveness, equality of prosecution and defense, division of criminal procedural functions, disposition, and publicity constitutes a set of principles whose ratio and interaction define the type of modern criminal procedure. For example, consider the principle of competitiveness and equality of the parties: if the prosecution has specialized devices using AI and the defense is not equipped with comparable access either to the information obtained as a result of using such devices, or their parameters, work specificity, limitations, potential errors, and erroneousness, and so on.

Simultaneously, scientists have expressed concerns about the potential risks of rapid change, which may negatively affect law enforcement. The history of criminal procedure has seen anti-humanistic methods of investigation, data collection, and evidence evaluation.

Thus, an additional threat represents the potential impact of algorithmic recommendations on the realization of the principles of court independence, the free assessment of evidence, and the immediacy of court proceedings.

If such recommendations are not strictly delineated by the legislator, and if the status and nature of such information are not defined in analogy with results obtained from polygraph testing or by hiring specialists from the field, then there is a growing risk that the court's independent analysis of the evidence will be undermined.

Finally, processing large amounts of personal data within AI systems raises concerns about the fundamental rights to the inviolability of private life, the privacy of correspondence and communication, the protection of personal information, and the effective means of defending these rights against unwarranted interference. When there are no strict procedural frameworks and transparent admissibility criteria for such interferences, this erodes the principle of legality and the inviolability of private life.

In this regard, the subsequent paragraphs of the article will emphasize, in particular, how the designed regulatory approaches and the practical testing of artificial intelligence technologies align with the key principles of Kazakhstan's criminal procedural law and international human rights standards.

2 METHODOLOGY OF RESEARCH

The foundation of the research methodology of the given article lies in a complex legal-analytical approach. Within the scope of work, a combination of formal-legal, comparative-legal, and empirical methods is employed, enabling a comprehensive analysis of both the regulatory foundations of the digitalization of law enforcement activity and the applied aspects of integrating Artificial Intelligence into the legal environment.

The first stage was the analysis of international standards governing the use of digital technologies in public security. The selected countries for the analysis were chosen for their rapid adaptation of legislation to diverse technologies and the application of these technologies in criminal proceedings. Particular attention is paid to the comparison of Kazakhstani legislation with provisions of European directives. To identify legal risks associated with the application of high-risk AI systems, formal-logical and systematic-structural methods were used, enabling the uncovering of specifics of regulatory standards and the identification of challenging areas in their application.

Within the scope of comparative legal analysis, scientific publications and empirical reports on the implementation of AI research in the fields of fighting cybercrime, prevention organizations, and investigations into violations of the law were examined.

Content analysis of cases of digital services' functioning played an important role in justifying the applied conclusions ("Law and order", "ForensicLIMS", anti-fraud center), as well as in summarizing statistical data. During the work, goal-oriented research on digital control institutions, the storage of substantial evidence, and legal mechanisms of digital control concerning the integration of blockchain technology and cryptocurrency exchanges into the prevention structure and crime investigation was conducted.

Methods of foreign expertise interpretation harmoniously matched up with empirical modeling and juridical forecasting.

The article also explored the possibilities of leveraging modern developments by Kazakhstani information technology specialists, specifically the search for AI-based solutions within the framework of pre-trial investigations. Deductive and inductive approaches, the collection and processing of qualitative and quantitative data, and the systematic assessment of organizational-legal consequences, including the scaling of digital solutions, were used as auxiliary tools.

Such a structured and interdisciplinary methodological foundation ensures that the research has sufficient levels of trust and relevance of its conclusions, making it possible to integrate national juridical practice with advanced international developments in the field of digitalization of law enforcement agencies.

3 DISCUSSION

The significance of AI implementation in the law enforcement system is that AI can radically enhance the effectiveness of big data analysis, identify crime patterns, and predict criminal risk, allowing it to outpace traditional methods in speed and the scope of information.⁵

5 Europol, *AI and Policing: The Benefits and Challenges of Artificial Intelligence for Law Enforcement* (Publications Office of the European Union 2024) doi:10.2813/0321023.

Scientists note that AI is being implemented according to the following main directions:

- face recognition and biometrics for searching and identification of individuals sought by the authorities;
- predictive modeling and communication massive analysis for forecasting of potentials and prevention of offenses;
- automation of processes regarding digital forensics, including processing of evidence in case studies, study of video recordings, and creating analytical reports;
- enhancement of effectiveness regarding the investigation of transnational crimes (according to articles by foreign researchers).⁶

AI also enables the release of human resources and the redirection of law enforcement agencies' employees' efforts towards challenging tasks that require legal assessment and ethical judgment. In the EU, the USA, and China, big data analysis algorithms and machine learning are being implemented to fight cybercrime and terrorism.⁷

Global tendencies, risks, and challenges. European researchers underscore AI's potential for digital transformation in law enforcement, ranging from criminal analysis to the automation of routine operations.⁸

Among key challenges:

- protection of personal data and compliance with basic human rights when using AI;
- transparency and accountability of decisions of algorithmic systems for the prevention of failures in criminal proceedings;
- necessity of international coordination, and also legislative regulation of AI application in police and criminalistics.⁹

Particular attention is paid to the classification of high-risk AI systems in accordance with the new European legislation, which strictly regulates automated methods of impact on individuals.

6 Adnan Siraj and others, 'Redefining Accountability: AI's Role in Prosecuting Transnational Crimes under International Law' (2025) 6(2) *Audit of Comparative Law Journal* 124, doi:10.22219/aclj.v6i2.40434.

7 *ibid*

8 Lena Klasén, Niclas Fock and Robert Forchheimer, 'The Invisible Evidence: Digital Forensics as Key to Solving Crimes in the Digital Age' (2024) 362 *Forensic Science International* 112133, doi:10.1016/j.forsciint.2024.112133.

9 Athina Sachoulidou, 'Harnessing AI for Law Enforcement: Solutions and Boundaries from the Forthcoming AI Act' (2024) 15(2) *New Journal of European Criminal Law* 117, doi:10.1177/20322844241260114.

Along with that, one of the main issues occupying Kazakhstan scientists and the authors of this article is the potential for using modern technologies from the perspective of complying with the principles of criminal procedure, which mankind has come to through a long way and through the evolution of rights of defense and the liberty of subjects of an offense.

In criminal procedure, the constitutional and procedural criteria of the presumption of innocence hold particular significance.

4 RESULTS

The modern development of digital technologies in the Republic of Kazakhstan and in criminal proceedings is happening very quickly. Along with this, the Criminal Procedural Code of the Republic of Kazakhstan [10] (hereinafter referred to as “CPC-RK”) does not contain systematic regulation of the use of IT solutions that employ AI as an independent type of evidentiary information. This poses risks to participants’ constitutional rights in the procedure.

For the purpose of ensuring legal certainty, it is necessary to complement the CPC-RK by defining results obtained through the use of AI systems with a strict indication of their auxiliary, orienting feature. Such a definition may be codified in Article 111 of the CPC-RK as an independent source of factual data, subject to obligatory verification and comparison with other evidence (testimonies, expert findings, substantial evidence, and others) but not substituting for them.

Taking into account the realization of pilot programs in Kazakhstan regarding the use of intellectual systems in the activity of pre-trial investigation authorities, such as digital assistants for investigators, analytical models for investigation planning, and the automated preparation of procedural documents, it would be advisable to establish a special test mode for using these technologies in regulations. Such a mode must assume the following: a) mandatory marking of the results of AI as recommendations; b) direct prohibitions on the adoption of key procedural solutions (being named as a suspect, the imposition of a pretrial restraint, and generating defendant acts) exclusively on the basis of AI inferences without an independent assessment of their justification by an official; c) procedural fixation of the algorithm parameters (data, model version, volume, and features of the used data), necessary for subsequent verification and objections; d) certification and periodicity of checking the used data.

From the perspective of the basic principles of Kazakhstan criminal procedure (legality, competitiveness, ensuring the right to a defense, the presumption of innocence, and the independence of the court), a stricter articulation of human rights guarantees is required when using AI technologies under the CPC-RK.

It is important to consider the potential to complement the CPC-RK with the principles of technological neutrality and procedural equality in the age of digitalization. This principle has to ensure:

- the obligations of criminal prosecution authorities to uncover the defendant's information about using AI systems and the obtained results;
- right of the defendant to order an expert examination.

a) Digitalization of preventive activity.

The Ministry of Internal Affairs of the Republic of Kazakhstan implements a comprehensive set of measures to integrate digital technologies and other innovative solutions into the public security assurance system.¹⁰ In the matter of the indicated transformations, the concept of forming the ideology of “Law and order” in society is being implemented.

At the same time, attention is paid to the target directions of prevention: prevention of juvenile crime, minimization of child injuries, assurance of traffic safety, counteractions against cybercrime, reintegration of ex-convicts, and intensification of prevention.

In parallel, the legislative framework is being updated: a bill on crime prevention is being considered in the Mazhilis of Parliament. Active engagement with civil society is underway, and the activities of over 4,000 organizations uniting approximately 20,000 citizens are being coordinated.

A new service called “Law and order” was implemented on behalf of the Head of State on the 23rd of June 2025 in the “EgovMobile” mobile application and by second-tier banks. The service gives the citizens an opportunity to efficiently inform police officers about crimes (traffic accidents, traffic violations, domestic violence, other accidents, incidents involving children, illegal actions of police officers). From the moment of the service launch, the police received more than 30,000 reports from citizens (EgovMobile – 10,831, Kaspi.kz – 9,444, Halyk Bank – 181, application “102” – 10,518).¹¹

As a result, 9799 individuals were subjected to administrative liability for traffic violations; criminal offenses were registered; 407 traffic accidents and 8729 accidents were processed; incidents involving children were reviewed; 419 individuals were subjected to criminal liability for domestic violence; and 767 complaints about employee actions were reviewed.¹²

10 Resolution of the Government of the Republic of Kazakhstan no 200 of 1 April 2025 ‘Concept for the Promotion of the Ideology of Law and Order in Society for 2025–2030’ [in Kazakh] <<https://adilet.zan.kz/kaz/docs/P2500000200>> accessed 7 January 2026.

11 Sanzhar A Adilov, ‘Statement at the meeting of the Coordinating Council on Ensuring Legality, Public Order and Combating Crime under the Office of the Prosecutor General, the Main Military and Transport Prosecutor’s Offices, regional and equivalent prosecutor’s offices (cities of republican significance and the capital)’ (2025) [in Kazakh].

12 *ibid*

Simultaneously, large-scale efforts to promote Law and Order are underway: across mass media and social networks, more than 18,000 materials have been published to shape legal culture and raise public awareness of prevention.

The considered informational strategy not only allows for the systematic dissemination of knowledge about the structure and principles of action of the national legislature but also facilitates the integration of the values of law and order into various fields of daily interactions between society and the state. This activity fosters social accountability, helps prevent crimes at an early stage, and reinforces societal discipline and trust in authorities.

Increasing legal awareness through modern communication channels initially transforms citizens' individual attitudes, reinforces the law's superiority in public consciousness, and lays the foundation for the long-term development of legal culture amid the digital transformation of state management.

b) Fight against cybercrime and internet fraud.

To combat financial crimes, the Antifraud Center was created in June 2024 to track and block suspicious transactions. Since then, 841 million tenge has been blocked, of which 457 million was returned to the victims.¹³ Except for that, a great amount of blockages of cash is explained by the fact that at the initial stage of Antifraud Center's work in conditions when practice lacked, the measures had been undertaken widely, without the regard to detailed analysis of operations.

In addition, in accordance with Article 25-1 of the Law of the Republic of Kazakhstan "On payments and payment systems", a new refund procedure is implemented via the Antifraud Center's platform functionality.¹⁴ The necessity of ensuring around-the-clock incident processing and the effectiveness of interagency interaction was highlighted.

In this context, Great Britain's expertise in combating financial crime is of particular interest and warrants specific attention to the organization of information exchange and the automation of financial intelligence processes.¹⁵

At the current moment, the central element of financial intelligence's activity (UKFIU) and law enforcement organs is a system of processing suspicious activity reports (SAR), received from the National Financial Sector, and from foreign partners and law enforcement structures.

13 *ibid*

14 Law of the Republic of Kazakhstan no 11-VI ZRK of 26 July 2016 'Payments and Payment Systems' (amended 3 January 2026) <<https://adilet.zan.kz/eng/docs/Z1600000011>> accessed 7 January 2026.

15 Diana Bociga, Nicholas Lord and Elisa Bellotti, 'Dare to Share: Information and Intelligence Sharing within the UK's Anti-Money Laundering Regime' (2025) 35(6) *Policing and Society* 812, doi:10.1080/10439463.2024.2428735.

A secure, free online platform is being used to transfer SAR reports, allowing messages to be sent around the clock. The system ensures efficient confirmation of report receipt and the assignment of a unique identifier, which distinguishes it favorably from manual information collection methods. All the reports are stored in a secure central database, ensuring their preservation and availability for analysis by large agencies.

UKFIU takes responsibility for the receipt, preliminary analysis, and organization of investigations on provided proceedings. Annually, the department receives around 460,000 SAR, the majority of which, after detailed analysis, are redirected to specialized agencies for further investigation, such as the National Terrorist Financial Investigation Unit (NTFIU), the police professional standards unit, and so on.

The rest of the reports are available for law enforcement agencies via protected communication channels.

The use of keywords and specialized codes enhances the effectiveness of information processing. The same SAR may be used simultaneously by different agencies: the tax and customs control service, local police, governmental organizations, etc., depending on the identified crimes and risk signals. Such an information-exchange model ensures high efficiency, integration of analytical capabilities, and a multisectoral response to financial crimes.

Returning to Kazakhstani expertise, let us note the following: Accounting and registration discipline and the efficient blocking of cash were intensified in August 2025 by the Republic of Kazakhstan's Ministry of Internal Affairs to improving the Antifraud Center's activities, its integration with the Web-Interface of the Unified Register of Pre-trial Investigations (Web-URPI), and to further advance joint activity in coordination with the General Prosecutor's Office of the Republic of Kazakhstan. Incidents are automatically received by police units on duty after official registration, and decisions must be made within twenty-four hours. At the same time, the system flaws are identified. One of the current problems is the absence of a mechanism to refund blocked cash. Therefore, it is advisable for the National Bank, in conjunction with the Ministry of Justice and other relevant governmental bodies, to undertake the necessary amendments to the Criminal Procedure Code of the Republic of Kazakhstan. Another issue is the lack of response to incidents created by the Ministry of Internal Affairs on weekends and holidays. Pursuant to the National Bank's internal acts, this work must be conducted around the clock. Additionally, not all incidents reported by Internal Affairs Agencies on non-working days are processed, violating the established three-day response time and reducing the likelihood of blocking cash. In connection with this, the National Bank was offered the opportunity to undertake corresponding measures to ensure twenty-four-hour incident processing during these periods.

There is also a need to integrate the Antifraud Center with cryptocurrency exchanges, as a significant portion of stolen funds is converted into cryptocurrency. However, the police

only learn about this after questioning suspects or witnesses. Of course, by this time, all the cash has been withdrawn. Digitalization of the banking system enables real-time interception of such actions and the blocking of cash and virtual assets. In this regard, it is advisable to work on integrating the Antifraud Center with cryptocurrency exchanges registered in the “Astana” International Financial Center (Binance, Bybit, Atax Eurasia, CaspianEx, Delta DA, Biteu Eurasia, and others).

c) Artificial Intelligence in investigative activity.

The implementation of the investigator’s interactive assistant, incorporating elements of Artificial Intelligence, marks a new stage in the digitalization of criminal proceedings. The system automates investigation planning, reading processing, and the formation of procedural documents, enhancing the quality and speed of investigative activities.

In pilot mode, the system is approved in regions such as Astana and Kosshy, where AI helps analyze contradictions in indications, generate clarifying questions, and create expert conclusions. Development of new modules is ongoing for large-scale implementation nationwide.

To implement orders issued by the Head of State to accelerate the development of Artificial Intelligence in the Ministry of Internal Affairs, the Committee on Legal Statistics, and the special accounts of the General Prosecutor’s Office of the Republic of Kazakhstan, an investigator’s interactive assistant is being developed.

It implies digital technologies that:

- automate investigation activity;
- reduce labor costs;
- assist in creating an investigation plan;
- processes indications of participants in criminal proceedings;
- offers question variants necessary for clarifying and appointing forensic examinations from leading investigation practices.

Moreover, AI reduces investigation time by taking on all technical work. If there are indications that AI performs comparative analysis, identifies contradictions, and generates specific questions for further inquiry, it can also be used to facilitate subsequent face-to-face confrontations between participants in the proceedings.

As of today, three functioning modules have been approved for pilot mode, starting in June 2025, in two capital districts and the town of Kosshy in the Akmola region. These include:

- investigation planning;
- indications processing;
- creating procedural documents.

There is another module in development, drafting a ruling on the classification of the act. This is a desire among the investigators themselves who participate in the pilot project.

Considering this, a complete replacement of employees' activities is out of the question; AI only assists in investigating criminal proceedings more effectively, identifying failures and directing the work. This is in line with criminal procedure law for swift and complete disclosure, criminal investigations, exposure, and the criminal prosecution of individuals charged with crimes.

Based on the results of the pilot project, the system will be advanced for nationwide implementation.

In the context of conducting scientific research on the project named "Innovative approaches to conduct verbal investigative actions with application of Artificial Intelligence tools," the following priorities are put forward:

1) Development of intellectual equipment for automated recording of investigative actions is an interdisciplinary task at the intersection between jurisprudence, computational linguistics, machine learning, and cryptography security. The current state of documenting verbal investigative actions is characterized by high labor intensity and substantial reliance on the investigator's subjective perception, which poses risks to compliance with participants' procedural rights and to the completeness and reliability of the recorded information.

A fundamental issue is the lack of technological solutions that can integrate automated speech recognition with simultaneous analysis of compliance with procedural requirements, while ensuring the unchangeability and juridical significance of the created documents. Traditional systems of recognition do not consider the specifics of juridical discourse, the dialogical nature of questioning with inherent interventions and emotional nuances, and do not implement semantic analysis of content to identify potentially coercive interrogation techniques. The research conducted is directed towards the creation of a scientifically grounded methodology for system development, integrating multimodal data processing, intellectual analysis, the conduct, and cryptographically secure documentation into a Unified technological complex.

2) Development of a methodology for annotating multimodal data. Creating a high-quality annotated dataset requires developing a detailed methodology for annotating linguistic features of interrogation, as well as juridically significant aspects of compliance with procedural rules.

The procedure begins with creating interdisciplinary work groups, including specialists in criminal proceedings, interrogation psychology, and computer linguistics, that develop a hierarchical taxonomy of marking categories. The process of annotating is organized iteratively, with periodic calibration sessions in which a team discusses difficult cases and clarifies the interpretation of the marking category, ensuring dynamic advancement of the methodology based on accumulated experience.

3) *Creation of specialized models of speech recognition.* The development of the system of automatic speech recognition for tasks on recording interrogations requires adaptation of modern architectures to specific conditions of use, including necessity of two language support, processing of speech with emotional expressions, and also functioning in a complex acoustic situation with overlapping replicas of participants. The crucial stage is a procedure of further training of the basic model on query data, which allows model to adapt to juridical terminology, peculiarities in question construction by investigators, and response patterns of interrogated persons.

A training program is organized as a multi-stage process, starting with data preparation, including the creation of precise transcripts for training audio recordings, proceeding through iterative training with a gradual reduction in training speed, and completing validation on the deferred test set. Model quality assessment is implemented by calculating an indicator called Word Error Rate, with target values of at least 95 percent for Russian and at least 92 percent for Kazakh, which aligns with a level considered admissible for further application under production conditions.

4) *Development of a system of semantic analysis and query techniques classification.*

Automatic identification of potentially unacceptable interrogation techniques requires a system of deep semantic analysis capable of interpreting a witness's intentions beyond the literal meaning of words. The architecture of such a system is based on the application of large language models, pre-trained on extensive textual corpora and then retrained on specific query data, with the types of investigative actions marked.

The creation process for a classifier of query techniques begins with developing a hierarchical taxonomy of categories based on an analysis of the provisions of the Criminal Proceedings Code of the Republic of Kazakhstan and international recommendations on the ethical conduct of interrogations. A taxonomy is structured around levels of criticality, distinguishing categories of critical crimes that render evidence unacceptable; a category of substantial procedural crimes; and a category of non-optimal practices without legal consequences but indicating insufficient professionalism.

5) *Creating a subsystem for acoustic analysis of psychophysiological state.* Identification of stress signs and psychological pressure requires analysis of paralinguistic characteristics of speech, which are not reflected in textual transcripts. Acoustic parameters, such as fundamental frequency, pitch variation, speech rate, pause duration, and energy correlation across different frequency ranges, contain information about a speaker's emotional state. The development of a stress detection system is based on the architecture of ECAPA-TDNN, specialized for extracting signs from speech signals through temporal-channel convolution, an attention mechanism, and statistical aggregation across multiple time scales. The given architecture demonstrates resilience to variation in acoustic conditions and capacity to distinguish long-term patterns from short speech fragments.

Training the stress detection model is performed on marked speech segments from interrogated persons, in which annotators assessed stress level on a six-point scale based on a combination of acoustic signs and situational context. Such an approach allows models to normalize stress assessment relative to the individual's baseline, enhancing the precision of detecting significant changes in state.

Integration of stress detection with the investigator's content analysis of questions enables identification of causal connections between the use of specific interrogation techniques and changes in the psychophysiological state of the interrogated person. The system tracks the temporal dynamics of stress levels, identifying sharp fluctuations that follow specific statements made by investigators, which serve as indicators of potentially coercive impact.

6) Architecture design of integrated module for crime detection.

Creating a functional procedural rights compliance monitoring system requires integrating multiple specialized models into a unified processing process with a high-level reasoning mechanism. The system's architecture is structured as a sequence of processing levels, beginning with the sensor level involving multimodal data capture, continuing with the level of recognition with conversion audio to text and video into structured metadata, proceeding to the level of semantic analysis with intention and emotion classification, and ending with level of context reasoning, uniting outputs of underlying level for final conclusions about the existence of violations.

7) Creating a cryptographically protected documentation system.

Maintaining the juridical significance of automatically generated protocols requires the immutability of fixed information and the ability to cryptographically verify document authenticity. The decision is based on the use of distributed register technology, in which each element of the protocol is cryptographically linked to previous fragments via a hash chain. Each completed protocol is signed with the device's private key, enabling any verifying party to cryptographically verify that the protocol was created by a specific registered device and has not been modified since creation. The system also implements timestamp mechanisms by integrating with trusted timestamp services, ensuring independent confirmation of the protocol's creation time with split-second precision.

8) Development of the device's hardware platform. Creating physical devices requires integrating high-performance computational components with specialized sensors for audio and video data into a compact, autonomously functioning form factor. The choice of computational platform is determined by requirements for performance, necessary for implementing multiple machine learning models in real-time, while maintaining low energy consumption to enable many hours of autonomous operation. Platforms based on NVIDIA's graphics processors, such as the Jetson series, demonstrate an optimal balance of computational power and energy efficiency thanks to an architecture designed for deep learning operations and support for mixed-precision calculations.

9) *Integration with existing information systems of law-enforcement agencies.* Maintaining the device's practical application requires developing mechanisms for seamless integration with the existing information infrastructure of pre-trial investigation authorities. The key element of integration is the connection to the URRI (Unified Register of Pre-trial Investigations), the Centralized System that accumulates all procedural information on criminal proceedings in the Republic of Kazakhstan. The architecture of integration implements two-directional data exchange, where the device extracts contextual information about a case, including the procedural status of the interrogated person and the history of previous investigative actions to inform analysis, and sends the created protocols to the centralized system for inclusion in the case file.

The technical implementation of the integration is based on protected web services with authentication through the electronic digital signature infrastructure operating in Kazakhstan. The device is equipped with an interface to connect investigators' digital signature tokens, ensuring a cryptographic link between the created protocols and the specific authority responsible for interrogation. The data exchange protocol implements reliance-support mechanisms, including automatic reconnection when a temporary connection is lost, local data buffering, transmission expectation, and secure delivery through receipt confirmation at the application level. The system is adapted to operate under limited or unstable network conditions, typical of some investigative units, maintaining full autonomy of basic functions and synchronizing only when the connection is restored.

10) *System validation and organization of pilot implementation.* Ensuring the system's reliability and practical application requires implementing a multi-level testing program that encompasses both the components' technical characteristics and comfort of use and effectiveness under real conditions. The laboratory testing phase is organized as a systematic progression through a set of synthetic test scenarios, developed to cover the full range of procedural situations and potential violations. Testing methodology includes the creation of controlled reconstructions of interrogations with professional actors, conducted within detailed scenarios that encompass various combinations of procedural statuses, communication languages, interrogation techniques, and interrogated persons' stress levels. Each reconstruction is concurrently assessed by legal experts, creating reference marking of violations for further comparison with automatic system detections.

The user's training program is structured as a multilevel process, beginning with theoretical preparation on the system's operating principles and possibilities for interpreting outputs, proceeding with practical lessons in educational scenarios, and concluding with supervised real interrogations, followed by further analysis of the system's work. A critical aspect of learning is forming accurate expectations about the system's capabilities and limitations. Automatic detection serves as an assistive tool, requiring jurists' professional judgment for final interpretation, but does not substitute for human expertise. Additionally, written methodological recommendations and video instructions that cover typical application scenarios and action algorithms for emergency situations.

d) Electronic systems for storage of substantial evidence.

The E-AYGAQ ZAT project ensures the automated recording of substantial evidence. The given novation allows for the exclusion of labor-intensive paper recording of substantial evidence.

Thanks to the “online viewing” function, a head can control the entire process, from submission to storage of substantial evidence to a further decision on their fate.

The Ministry of Internal Affairs is sequentially developing the police's digital infrastructure to enhance the level of the legal order, transparency, and the effectiveness of law enforcement agencies' functioning in the modern conditions of an information society. The security alarm system, connected to the duty station, is set up. Entry to the hardware program complex is controlled by employees' biometric data. Substantial evidence is placed in a package with a "QR code" containing all information about the substantial evidence in criminal proceedings. For the nationwide implementation of the project, it is necessary to integrate the information systems “Unified Register of Pre-trial Investigations” and “Torelik”.

One of the fundamental tasks of law enforcement agencies in fighting crime is to identify property obtained through crime for use in compensating for damages. Along with this, criminals no longer store cash in accounts but instead prefer to legalize their criminal income by purchasing securities. In this regard, the Ministry of Internal Affairs of the Republic of Kazakhstan, during the year, together with the Committee on Legal Statistics and Special Accounts (CLSSA), is conducting work on integrating the Central Depository of securities with the System of information exchange of law enforcement, special state, and other bodies.

e) Automating forensic work.

The “ForensicLIMS” system is designed to drive the digital transformation of forensic expertise. It maintains control of overflow of substantial evidence, automatic reporting, and exclusion of manual document flow. Thanks to analytical functions, the system allows us to identify crime patterns and reduce the workload for regional departments.

Also, a pilot project called “Video HD”, aims to optimize registration of civil applications at events that do not involve signs of a crime. The project addresses the shift away from paper media by introducing video-recording systems for calls, which facilitate the automation of document flow and data processing.

Implementation of this decision makes it possible to significantly reduce the time spent processing applications and to enhance the quality of application accounting and registration, while minimizing the risk of concealment or fragmentation of the facts of a crime. Since August 2025, the “Video HD” system has been approved in five regional territorial police departments and is being implemented in cities and regions with different criminogenic specificities.

The platform implementation is receiving particular attention to optimize prosecutors' work when checking and processing order materials: during the first nine months of 2025, 1.2 million such materials were processed across the Republic,¹⁶ which places high demands on technical and office maintenance resources. The “Video HD” system frees up office space, reduces paper storage volume, and streamlines tasks related to effective space management.

The Ministry of Internal Affairs is sequentially developing the police's digital infrastructure to enhance the level of the legal order, transparency, and the effectiveness of law enforcement agencies' functioning in the modern conditions of an information society.

5 CONCLUSIONS

Research on the complex digitalization of law enforcement activities in Kazakhstan has demonstrated significant progress in integrating innovative technologies, including Artificial Intelligence, automated analytical platforms, and systems for digital document accounting. The use of AI has enhanced the efficiency and quality of big data analysis, enabling the forecasting of criminogenic risks and the identification of crime patterns, which aligns with the expertise of advanced jurisdictions in Europe and the USA. The creation of specialized services for civilians, active promotion of legal culture, and the launch of pilot projects facilitated the growth of social responsibility and reinforced the population's trust in law enforcement agencies.

Together with this, the development of digital technologies in the law enforcement field was accompanied by a range of fundamental challenges, such as maintaining cybersecurity, protecting personal data, ensuring transparency of algorithmic solutions, and ensuring compliance with basic human rights. Analysis of foreign expertise confirmed the expediency of creating and automating integrated antifraud centers, implementing interagency exchange mechanisms, and a dynamic monitoring system for banking and cryptocurrency operations. During the operational process, particular attention is paid to legislative regulation, professional training of personnel, and the development of future jurists' competencies.

The scientific significance and prospects of AI-driven automation of investigative protocols. The developed methodology makes an interdisciplinary contribution at the intersection of computer linguistics, machine learning, and jurisprudence, demonstrating the feasibility of applying advanced AI technologies to address socially significant tasks related to the protection of personal rights in criminal proceedings. The scientific novelty of the work lies in the development of a comprehensive approach to multimodal analysis of verbal investigative actions, integrating linguistic, acoustic, and contextual levels of analysis into a unified system for reasoning about compliance with procedural rules.

16 Adilov (n 11).

Methodology for data annotation, developed in the context of the project, contributes to the development of corpus linguistics of juridical discourse, creating a detailed taxonomy of communicative strategies in the context of interrogation and assurance of infrastructure for further research.

Technological innovations include the adaptation of deep learning architectures for specific analysis tasks in legally significant communication, the development of diarization methods for identifying speakers in complex acoustic conditions with overlapping replicas, and the creation of effective model quantization algorithms for operation on devices with limited computational resources. The application of blockchain technology in the context of law enforcement document flow demonstrates a novel approach to maintaining the constancy of juridically significant information while preserving functional autonomy without a constant connection to centralized infrastructure. These findings have potential applications in a wide range of other juridical procedures that require reliable fixation of oral interactions, including court hearings, notarial acts, and administrative hearings.

Prospects for further system development include expanding multimodal analysis by integrating computer vision to automate the detection of non-verbal stress indicators, such as facial microexpressions, gesture dynamics, and changes in body posture. The application of transformer-based architectures to video sequence processing opens opportunities to identify subtle behavioral patterns that are not available when speech analysis is performed in isolation. Development of adaptive learning mechanisms enables the system to continually improve based on accumulated application experience, automatically updating trigger-word dictionaries and adjusting classification thresholds in response to expert feedback. Expanding the linguistic scope to include additional languages and adapting violation-detection rules to the procedural requirements of other jurisdictions creates opportunities for the international application of the developed technology.

Integration with analytical systems for big data processing enables meta-analysis of interrogation-conducting patterns across the entire law enforcement system, identifying systemic issues and informing the development of programs to improve investigators' qualifications. Aggregated, anonymized statistics on violation types and frequencies across various departments may serve as a tool for assessing the effectiveness of management interventions and dynamic quality. Creation of centralized storage for anonymized interrogation reports with detailed stamp shapes a unique research infrastructure for further fundamental research in the fields of interrogation psychology, power communication linguistics, and the effectiveness of different investigative techniques.

Recommendations developed by the authors in the context of the current research:

1. To advance the national legislature, consider international standards, implement regulatory mechanisms for work with high-risk AI systems, and support legal adaptation to the rapidly changing technologies in the digital space.

The development of a complex model for the use of artificial intelligence in the criminal procedure of the Republic of Kazakhstan requires institutionalized interaction among the legislator, the law-applier, the scientific community, and civil society institutions. Scientifically grounded proposals for the modernization of the CPC-RK in this area must draw not only on comparative legal analysis of foreign expertise but also on the results of Kazakhstan's pilot programs, official strategies for digital development, and the doctrinal interpretation of the impact of algorithmic technologies on citizens' constitutional rights¹⁷

Such a distinction between the regulatory and empirical bases of inferences will yield a more sustainable conception of legal regulation of AI in criminal procedure. This approach minimizes risks to individuals' rights and liberties while enhancing the efficiency of investigations and the administration of justice.

In this context, a framework approach is the best option for generating jurisprudential constructions of regulations. However, it is also important to develop instructions on the use of AI at the level of subordinate regulatory legal acts. Unfortunately, researchers have not yet found foreign articles or regulations that could be directly incorporated into domestic legislation. Therefore, it is proposed that we develop such regulatory acts by involving not only scientists and practitioners in jurisprudence but also specialists in information technology. These experts can provide substantive support in understanding the nature and specifics of AI applications.

The use of AI must be accompanied by a range of requirements that should be addressed on a regulatory basis:

- consent of the subject of the offense and clarification to him of the legal consequences regarding the use of their data;
 - the opportunity for the defense party to review the data and their associated obligations;
 - maintaining data confidentiality and protecting data from hacking and unauthorized dissemination (for example, a video of an interrogation);
 - uninterruptedness of actions (if a video interrogation is used, it must be recorded from the very beginning until the very end in the presence of the defendant);
 - there must be a mechanism through which data obtained via different devices or solutions can be appealed or questioned and not taken into account when rendering a decision in the case.
2. It is proposed to work out the integration of the Antifraud Center with cryptocurrency exchanges registered in IFCA (International Financial Center "Astana") (Binance, Bybit, Ataix Eurasia, CaspianEx, Delta DA, Biteeu Eurasia, etc.).

17 A Akhpanov, S Sabitov and R Shaykhadenov, 'Criminal Pre-Trial Proceedings in the Republic of Kazakhstan: Trend of the Institutional Transformations' (2018) 34(85) *Opcion* 107.

3. To intensify educational programs on digital competencies for employees of law enforcement agencies and the overall civil service sector.

The authors of the given article believe that the use of AI must not simply substitute for or compensate for the incompetence of law enforcement officials. Instead, it must enhance their potential and save human resources, reducing the time between the commission of a crime and the rendering of a decision on the case, thereby minimizing procedural errors, defining the behavioral model of the authority, tactics for conducting interrogations, and situation modeling.

4. To introduce pilot projects on digitalization of procedural actions, conduct persistent monitoring of their results, and define the readiness of officials and the efficiency of IT solutions when conducting investigation actions. The authors believe that it is reasonable to implement such solutions using AI for certain categories of cases and to limit its use to very high-risk crimes.
5. Support informational campaigns, directed toward the development of legal culture and preventive awareness among citizens, applying modern communication technologies for the enhancement of legal literacy and engagement level.

Thus, the implementation of these recommendations will facilitate the shaping of an effective, open, and modern law enforcement system, capable of responding appropriately to the challenges of the digital era and reinforcing the competitiveness of the national legal order.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ШТУЧНИЙ ІНТЕЛЕКТ ТА ЦИФРОВІЗАЦІЯ В РОЗСЛІДУВАЛЬНІЙ ТА ПРАВООХОРОННІЙ ДІЯЛЬНОСТІ В РЕСПУБЛІЦІ КАЗАХСТАН

Арстан Ахпанов, Санжар Аділов, Єргалі Мабієв та Ляззат Нурлумбаєва *

АНОТАЦІЯ

Вступ. Цифрова трансформація правоохоронних органів є невід'ємною частиною сучасного розвитку державних організацій. Впровадження технологій штучного інтелекту (ШІ) у сферу судочинства та кримінального судочинства демонструє значний потенціал для оптимізації слідчих процесів, прискорення обробки інформації та підвищення якості розслідувань. Водночас, в світі виявляються суттєві виклики, пов'язані з застосуванням систем штучного інтелекту в правоохоронних органах. Серед них критичні питання щодо відповідності використання ШІ принципам кримінального процесу під час розслідувань, захисту персональних даних, дотримання міжнародних стандартів у сфері прав людини, дотримання права та справедливий суд та ризику дискримінації.

Питання правового регулювання систем штучного інтелекту високого ризику, як того вимагає Регламент ЄС № 2024/1689 Європейського Парламенту та Ради від 13 червня 2024 року (далі – «Акт ЄС про ШІ»), а також інші зарубіжні інструменти, стають актуальними для всіх держав, зокрема для країн пострадянського простору.

Методи. Це дослідження ґрунтується на застосуванні комплексного підходу, в межах якого здійснено аналіз чинного законодавства Республіки Казахстан, міжнародних актів, узагальнено наявні концепції розвитку ШІ та охарактеризовано сучасні казахстанські інновації на основі ШІ. Як базовий метод, для з'ясування позитивного досвіду та відмінностей у підходах до регулювання ШІ між Казахстаном та провідними світовими юрисдикціями використовується порівняльно-правовий підхід. У статті було здійснено системний аналіз офіційних стратегічних документів, чинних нормативних актів,

наукових публікацій та міжнародних стандартів у сфері цифровізації. Особлива увага приділяється вивченню механізмів класифікації високоризикованих технологій ШІ та підходів до їх використання в правоохоронній діяльності.

Результати та висновки. У висновках виділено напрямки застосування інструментів штучного інтелекту в Казахстані та вказано на необхідність розробки комплексної законодавчої бази, яка створює умови для внутрішнього використання ШІ в правоохоронній діяльності в Республіці Казахстан. Було виявлено, що успішна цифрова трансформація вимагає гармонізації національного законодавства з міжнародними стандартами, створення прозорих критеріїв оцінки ризиків систем ШІ та встановлення ефективних механізмів контролю та нагляду. Дослідження продемонструвало важливість забезпечення алгоритмічної прозорості та справедливості у застосуванні ШІ в кримінальному судочинстві для гарантування прав людини. На основі аналізу авторами запропоновано інтегровану модель управління цифровою трансформацією, що містить законодавчі ініціативи, розробку професійних стандартів та створення механізмів контролю. Впровадження запропонованої моделі дозволить Казахстану максимізувати переваги технологій ШІ для підвищення якості правоохоронної діяльності, одночасно забезпечуючи надійний захист конституційних прав та основоположних свобод громадян.

Ключові слова. Штучний інтелект, системи ШІ з високим рівнем ризику, правове регулювання ШІ, пілотні проєкти впровадження ШІ.

Reform Forum's Note

ENFORCING MEDIATION IN LABOUR DISPUTES: A DOCTRINAL CRITIQUE OF ARTICLE 239 OF THE DRAFT LABOUR CODE OF UKRAINE

Nataliia Cherevko

ABSTRACT

Background: This Reform Forum article examines the enforceability of settlement agreements resulting from mediation in individual labour disputes under Article 239 of the 2026 Draft Labour Code of Ukraine (No 14386). While the draft introduces mediation as a progressive and EU-oriented mechanism for dispute resolution, it fails to establish a clear procedural model for granting executive force to settlement agreements resulting from mediation.

Methods: Relying on doctrinal and comparative legal analysis, the article evaluates the compatibility of the proposed enforcement framework with Article 6 of Directive 2008/52/EC and the EU principles of effectiveness (*effet utile*) and legal certainty.

Results and Conclusions: It argues that the current wording of Article 239 creates a dual and internally inconsistent protection model: settlement agreements resulting from mediation may either be treated as ordinary contracts subject to separate enforcement proceedings or give rise to renewed judicial proceedings concerning the original labour dispute. Such structural ambiguity undermines procedural economy, weakens finality of dispute resolution, and risks strategic abuse of mediation.

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Drawing on comparative models from selected EU Member States, the article proposes a legislative amendment to introduce a direct mechanism for approving settlement agreements arising from court-mediated mediation, without reopening the merits of the dispute. The proposed reform would align Ukrainian labour legislation with European standards and strengthen mediation as a credible and effective access-to-justice mechanism in the context of EU integration and post-war legal transformation.

1 INTRODUCTION

Ukrainian labour legislation, which is based on the Labour Code, requires substantial modernisation, as it largely remains influenced by Soviet methods, centralised, formalised, and predominantly oriented towards administrative control mechanisms.¹ The urgency of reform has intensified significantly in light of Ukraine's status as a candidate country for accession to the European Union, as well as systemic disruptions in the functioning of the labour market caused by the war. The military aggression of the Russian Federation has led to profound changes in employment models, guarantees of stability of employment relationships, and working conditions.² These processes underscore the necessity of forming a modern, adaptive, and human rights-based system of labour law aligned with EU standards and ILO conventions.

The Cabinet of Ministers of Ukraine's adoption of the draft new Labour Code of Ukraine (Draft No. 14386) in 2026 marked a logical stage in the long-standing attempts to reform the outdated system.³ One of the most progressive novelties of the draft is the systematic introduction of mediation as a priority mechanism for resolving labour disputes.

In this context, mediation appears not merely as an alternative procedure for dispute resolution, but as a component of a broader transformation of legal culture, from a confrontational and formally procedural model to a dialogue-based and interest-oriented approach.⁴ In the Member States of the European Union, mediation has long been integrated into the system of labour dispute resolution as an effective, cost-efficient, and flexible instrument for ensuring social peace.⁵

1 Labor Code of Ukraine No 322-VIII of 10 December 1971 (amended 1 January 2026) <<https://zakon.rada.gov.ua/go/322-08>> accessed 20 February 2026.

2 Victor Shcherbyna and others, 'From Soviet Legacy to European Integration: Decent Work in Ukrainian Labor Reforms' [2026] Stanovnistvo, doi:10.59954/stnv.726.

3 Draft Labor Code of Ukraine No 14386 of 15 January 2026 <<https://itd.rada.gov.ua/billinfo/Bills/Card/69516>> accessed 20 February 2026.

4 Naser Sherman and Bashar Talal Momani, 'Alternative Dispute Resolution: Mediation as a Model' (2025) 13 F1000Research 778, doi:10.12688/f1000research.152362.2.

5 Tatiana Koliesnik and Mykola Klemparsky, 'Mechanisms for Out-of-Court Settlement of Labor Conflicts: Experience of EU Countries and Ways for Ukraine' (2025) 2 Law journal of Donbass 37, doi:10.32782/2523-4269-2025-91-37-42.

The dissemination of mediation in Europe was largely stimulated by the adoption of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, which established general procedural standards and the principles of voluntariness, confidentiality, and enforceability of settlement agreements resulting from mediation.⁶ In the sphere of labour relations, mediation is actively used both at the individual level (disputes between an employee and an employer) and at the collective level (negotiations with trade unions, settlement of strike-related conflicts). In many European countries, it serves as a mandatory or quasi-mandatory preliminary stage prior to recourse to a court, thereby reducing the burden on the judicial system and preserving employment relationships.⁷

Mediation becomes relevant in the context of crisis transformations when traditional employment guarantees are being revised and labour-related conflict increases. The flexibility of the procedure allows for the specific features of non-standard forms of employment, remote work, business relocation, and other phenomena characteristic of the wartime and post-war period to be taken into account.

For Ukraine, the introduction of mediation in labour legal relations is not only a step towards European integration but also an instrument for the formation of a new model of social dialogue. In view of the adoption of the Law of Ukraine "On Mediation" and the gradual development of a professional community of mediators, institutional preconditions are being created for the effective application of mediation in the sphere of labour. At the same time, the level of legal culture, trust between the parties to employment relationships, and the readiness of employers and employees for out-of-court dispute resolution remain challenges.⁸

An analysis of official statistics published by the Judicial Authority of Ukraine indicates an extremely low level of use of alternative dispute resolution mechanisms in labour disputes. In particular, according to judicial statistics for 2025, local general courts considered 7,961 labour-related claims, of which only 54 were resolved through amicable settlement, while no cases of mediation were recorded.⁹ A similar trend is observed at the appellate level: out of 3,212 cases reviewed, only 4 were concluded through settlement

6 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.

7 Ahmad A Al Dalaïen and Mohammed A Aladaseen, 'Judicial Mediation and the Governance of Administrative Contract Disputes: The Legal Possibilities under Jordanian and UAE Legislation' (2025) 7(1) *Corporate Law and Governance Review* 111, doi:10.22495/clgrv7i1p10; Olga Tymoshenko and Iryna Petrova, 'Features of Mediation as an Alternative Method of Settlement of Family Disputes: Legal Provision and Practice in Ukraine and EU Countries' (2025) 26(2) *Revista Eletrônica de Direito Processual*, doi:10.12957/redp.2025.90138.

8 Law of Ukraine No 1875-IX 'On Mediation' of 16 November 2021 [2021] *Official Gazette of Ukraine* 98/6340.

9 'Judicial Statistics' (*Judicial Authority of Ukraine*, 2026) <https://court.gov.ua/inshe/sudova_statystyka/> accessed 20 April 2026.

between the parties, and mediation was not applied at all. Statistical data for 2024 further confirm this tendency: local general courts examined 7,671 labour-related claims; however, publicly available statistics do not provide information on the number of cases resolved through settlement agreements.¹⁰ Overall, these data demonstrate a significant gap between the formal availability of mediation as a legal mechanism and its actual application in practice within the labour dispute resolution system. In the broader post-Soviet context, the prospects for mediation are also linked to overcoming the dominance of judicial models of dispute resolution, which have historically been characterised by formalism and insufficient orientation toward the parties' interests. The gradual introduction of mediation may contribute to the modernisation of labour law in these countries, enhance the predictability of law enforcement, and strengthen the principle of the participants' autonomy of will in employment relationships.

Thus, the institutionalisation of mediation in the draft new Labour Code of Ukraine reflects not only a technical update of dispute-resolution mechanisms but also a broader shift in the paradigm of labour regulation, from a punitive-control model to a partnership-based, consensual one. In this respect, mediation emerges as one of the most promising directions for the development of Ukrainian labour law in the context of European integration and post-war reconstruction.

In the context of European integration and the need to relieve the burden on the judicial system, mediation is proposed not merely as an alternative to court proceedings but as an instrument for restoring social dialogue between the employee and the employer. This commentary analyses the legal nature of mediation clauses in the draft Code, their compliance with EU standards, and their potential impact on the actual accessibility of justice in wartime and the post-war recovery.

A central element of the EU legal framework on mediation is not merely the possibility of reaching an agreement, but the guarantee of its enforceability.¹¹ The effectiveness of mediation depends on the parties' confidence that the procedure will produce legally binding and practically enforceable outcomes. Without such guarantees, mediation risks being perceived as a preliminary or symbolic stage rather than a comprehensive and effective mechanism for the protection of rights.¹²

Article 6 of Directive 2008/52/EC establishes a clear obligation for Member States to ensure that parties may request the content of a written settlement agreement resulting from mediation to be made enforceable by a court or other competent authority. This

¹⁰ *ibid*

¹¹ Iyllyana Che Rosli and others, 'Mediated Settlement Agreements: Enhancing Enforcement through the Singapore Convention in Malaysia' (2024) 14 *International Journal of Academic Research in Business and Social Sciences* Pages 3225, doi:10.6007/IJARBS/v14-i12/24295.

¹² Serhii Otovchyts, 'Current Issues of Labour Dispute Resolution through Mediation' (2024) 2 *Analytical and Comparative Jurisprudence* 318, doi:10.24144/2788-6018.2024.02.55.

provision reflects a broader principle of EU law, the principle of effectiveness, according to which procedural mechanisms introduced by national legislation must ensure the practical and effective realisation of rights. Enforceability, therefore, is not a secondary technical element but a structural condition for the legitimacy and functionality of mediation within the justice system.

In labour disputes, the issue of enforceability acquires particular importance. Employment relations are inherently asymmetrical, often involving disparities in economic power and access to legal resources. If a mediation agreement cannot be directly enforced, the weaker party, typically the employee, may be compelled to initiate new judicial proceedings to secure compliance. Such duplication of procedures undermines procedural economy, delays the restoration of rights, and contradicts the objective of reducing judicial workload.

Furthermore, the absence of a clear enforcement mechanism creates legal uncertainty regarding the legal nature of the settlement agreement resulting from mediation. It remains unclear whether such an agreement should be treated as an ordinary contract, enforceable only through separate proceedings, or as a specific labour-law instrument endowed with autonomous procedural status and capable of direct enforcement.¹³ The coexistence of these models without explicit legislative coordination risks forum shopping, procedural manipulation, and strategic abuse of mediation to delay dispute resolution.

Thus, in the context of Ukraine's European integration commitments, the enforceability of settlement agreements resulting from mediation must be regarded as a decisive criterion for assessing the Draft Labour Code's compliance with Directive 2008/52/EC. Ensuring a coherent enforcement mechanism is not merely a matter of technical drafting but a prerequisite for safeguarding legal certainty, procedural fairness, and genuine access to justice.

Despite the growing academic discussion on mediation reform in Ukraine, insufficient attention has been paid to the enforceability of settlement agreements resulting from mediation in individual labour disputes, particularly in light of Article 6 of Directive 2008/52/EC.¹⁴ The draft Labour Code introduces mediation as a progressive mechanism, yet the legal consequences of non-performance of settlement agreements resulting from mediation remain doctrinally unclear. This gap necessitates a focused legislative commentary.¹⁵ Although the present article focuses on labour law, the issue of enforceability of settlement agreements resulting from mediation has been the subject of detailed doctrinal analysis. Tetiana Tsvina and Sabrina Fertz examine comparative models of recognition and enforcement of mediated settlement agreements, demonstrating significant differences between national legal systems, including judicial approval, notarial

13 Llewelyn Gray Curlew and Ettian Raubenheimer, 'International Commercial Mediation: International Recognition and Enforcement of Mediation Agreements' (2024) 45(1) *Obiter* 209.

14 Directive 2008/52/EC (n 6).

15 Olha Melnychuk, 'Labor Mediation: Concept, Features and Directions of Development' (2025) 10 *Successes and Achievements in Science* 174, doi:10.52058/3041-1254-2025-10(20)-174-183.

certification, and contractual enforcement mechanisms. Their research highlights the absence of a uniform European approach and emphasises the importance of clear procedural frameworks for ensuring legal certainty and effectiveness.¹⁶

Further, Tetiana Tsvina identifies a plurality of enforcement models across EU Member States and argues that the effectiveness of mediation depends on the availability of accessible and predictable mechanisms for granting enforceability, while excessive procedural fragmentation undermines its practical utility.¹⁷

Similarly, Nataliia Mazaraki analyses the legal nature of settlement agreements resulting from mediation within Ukrainian law, emphasising their contractual character and the limitations of relying solely on general civil-law remedies in the absence of a specialised enforcement mechanism.¹⁸

Taken together, these contributions demonstrate that the key challenge lies not in recognising mediated agreements as such, but in establishing coherent and effective procedural pathways for their enforcement, thereby directly supporting the argument advanced in this article.

The central research question addressed in this article is whether Article 239 of the Draft Labour Code establishes an effective and EU-compliant model for the enforcement of settlement agreements resulting from mediation in individual labour disputes.

The article argues that the current wording of Article 239 creates a dual and internally inconsistent protection model, which risks undermining legal certainty, procedural efficiency, and the effectiveness of mediation as a dispute resolution mechanism, as it allows a party to resort to mediation, deliberately refrain from complying with the resulting settlement agreement, and subsequently initiate judicial proceedings on the same dispute. Such a structure risks undermining legal certainty, procedural efficiency, and the effectiveness of mediation as a dispute resolution mechanism.

This article is grounded in doctrinal legal research as the primary methodological framework. The doctrinal method is employed to analyse the normative structure and internal coherence of Articles 237–239 of the 2026 Draft Labour Code of Ukraine.¹⁹ The study focuses on the interpretation of statutory provisions governing mediation in individual labour disputes, examining their legal nature, systemic positioning within labour

16 Tetiana Tsvina and Sascha Ferz, 'The Recognition and Enforcement of Agreements Resulting from Mediation: Austrian and Ukrainian Perspectives' (2022) 5(4) *Access to Justice in Eastern Europe* 32, doi:10.33327/AJEE-18-5.4-a000436.

17 Tetiana Tsvina, 'National Mechanisms of the Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives' (2022) 158 *Problems of legality* 110, doi:10.21564/2414-990X.158.264998.

18 Nataliia Mazaraki, 'Enforceability of Mediation Settlement Agreement' (2018) 1 *Current Problems of Domestic Jurisprudence* 15.

19 Draft Labor Code of Ukraine No 14386 (n 3).

law, and potential procedural consequences. Attention is paid to enforceability as a core condition for the effectiveness of alternative dispute resolution mechanisms.

The research further applies a comparative legal method to assess whether the enforcement model proposed in the Draft Labour Code aligns with European regulatory trends. The comparative analysis is selective and functional rather than descriptive: it examines enforcement mechanisms in selected EU Member States (including Poland, Lithuania, Germany, and Belgium) insofar as they illustrate different procedural models of granting mediation agreements executive force (judicial approval model, notarial model, hybrid model).²⁰ The purpose of this comparison is not to provide an exhaustive survey, but to identify structural elements that ensure compliance with Article 6 of Directive 2008/52/EC.

In addition, the study relies on EU law interpretative principles, particularly the doctrines of effectiveness and legal certainty. These principles serve as analytical reference points for assessing whether the Ukrainian draft legislation facilitates practical and effective access to justice through mediation. The article therefore adopts a normative-evaluative approach: it not only describes the legislative proposal but also assesses its compliance with EU obligations and proposes a legislative amendment to eliminate structural inconsistencies.

The methodology is limited to normative and doctrinal analysis and includes empirical or socio-legal research. This choice reflects the Reform Forum format of the article, which focuses on legislative critique and normative recommendations rather than quantitative evaluation.

2 MEDIATION IN LABOUR DISPUTES: EUROPEAN LEGAL FRAMEWORK

In the context of enforceability, the Singapore Mediation Convention, which entered into force in 2020, establishes a uniform framework for the recognition and enforcement of mediated settlement agreements in cross-border disputes.²¹ While the European Union has not signed this instrument, reflecting a cautious and, to some extent, sceptical approach towards its implications, its existence nevertheless illustrates the growing international emphasis on enforceability mechanisms. In this sense, the Convention highlights broader global trends rather than a model adopted within the EU legal order. It enhances legal certainty by providing predictable enforcement pathways, in functional terms, comparable to those established under the New York Convention for arbitral awards.

The EU legal framework on mediation in civil and commercial matters was systematically established by Directive 2008/52/EC of the European Parliament and of the Council of

20 Tsuvina and Ferz (n 16).

21 United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) (adopted 20 December 2018) <<https://www.singaporeconvention.org/>> accessed 20 February 2026.

21 May 2008 on certain aspects of mediation in civil and commercial matters.²² Although the Directive is not formally a specific instrument in the field of labour law, its provisions apply to labour disputes insofar as they are of a civil-law nature and are not excluded from its scope by national legislation.²³

Of key importance to the assessment of the Ukrainian draft law is Article 6 of the Directive, which requires Member States to ensure that parties to a mediated settlement agreement may, under certain conditions, request that the agreement be made enforceable. This does not establish a general obligation to guarantee enforceability in all cases, but rather to provide a procedural mechanism enabling, where appropriate, the transformation of a written agreement resulting from mediation into an instrument capable of enforcement.

Thus, the Directive requires Member States to ensure that parties have the possibility, subject to their consent, to apply to a competent authority for a mediated settlement agreement to be made enforceable, to designate a court or other competent authority empowered to grant such enforceability, and to allow refusal of enforceability where the content of the agreement is contrary to national law or otherwise incompatible with applicable legal requirements.

The concept of “enforceability” in EU law denotes the capacity of a legal act to be implemented by means of State coercion without the need for a re-examination of the dispute on the merits. In other words, a settlement agreement resulting from mediation must be in the form of an enforceable instrument or be equivalent thereto.²⁴ The absence of such a mechanism negates the functional purpose of mediation as a full-fledged alternative to judicial proceedings.²⁵

Recent doctrinal research underscores that enforceability is a core component of legal certainty in mediation frameworks. B Köhler argues that inconsistent enforceability of settlement agreements resulting from mediation at the national level may undermine the practical effectiveness of mediation. In this context, they cite international instruments, particularly the Singapore Convention on Mediation, as examples of efforts to enhance predictability and legal certainty in the cross-border enforcement of mediated settlement

22 Directive 2008/52/EC (n 6).

23 Tetiana Tsvina and Alina Serhieieva, ‘Mediation in Ukraine: Considerations in Terms of the EU Accession Prospects’ (2025) 7(14) *Revista Brasileira de Alternative Dispute Resolution* 283, doi:10.52028/rbadr.v7.i14.ART15.UKR.

24 Jie Jeanne Huang, ‘Recognition and Enforcement of Chinese Judicially Confirmed Mediation Decisions Abroad: The Challenges of Finality’ in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *Legal Challenges of China’s One Belt One Road Initiative: Private International Law Considerations* (Routledge 2025).

25 Sanaullah Aman, ‘Enforcement of Arbitral Awards and Mediation Settlement Agreements: Navigating Legal and Practical Challenges’ (2025) 5(3) *Pakistan Islamicus: An International Journal of Islamic & Social Sciences* 7.

agreements.²⁶ It should be noted that the possibility of ensuring the enforceability of mediated settlement agreements is provided for within the framework established by Directive 2008/52/EC and is supported by broader considerations of legal certainty and effectiveness under EU law. However, neither the Directive nor the general principles of EU law impose an unconditional obligation on Member States to guarantee the enforceability of all mediated agreements.

The principle of legal certainty presupposes the foreseeability of legal consequences and the stability of legal relations. Parties who have reached an agreement through mediation must be confident that the settlement reached is final and does not require further judicial review. Accordingly, even a formal assumption in legislation that the same dispute can be re-examined in the absence of a clear enforcement procedure creates legal uncertainty and undermines trust in alternative dispute resolution procedures.

The principle of effectiveness, consistently developed in the case-law of the Court of Justice of the European Union, requires that national procedural rules must not render the exercise of rights conferred by EU law practically impossible or excessively difficult. In the context of mediation, this means that States must establish procedural mechanisms to ensure the procedure functions genuinely. If, after successful mediation, a party is compelled to reapply to a court to resolve the same dispute, the procedure's effectiveness is substantially reduced.²⁷

In labour disputes, particular importance is attached to the principle of finality of dispute resolution. The European approach presupposes that alternative procedures must ensure a stable outcome that minimises the risk of renewed conflict and reduces the burden on the judicial system. For this reason, the enforceability of a settlement agreement resulting from mediation is regarded as a structural condition of its legitimacy.

As regards labour disputes specifically, the regulation and practical use of mediation vary significantly across EU Member States. In addition, various mechanisms have been developed to confer enforceability on settlement agreements arising from mediation in labour disputes. In addition, various mechanisms have been developed for conferring enforceability on settlement agreements resulting from mediation in labour disputes. Notwithstanding differences in procedural details, a common feature is the existence of a clear and foreseeable mechanism of compulsory enforcement.²⁸

26 Ben Köhler, 'Blaming the Middleman? Refusal of Relief for Mediator Misconduct under the Singapore Convention' (2023) 19(1) *Journal of Private International Law* 42, doi:10.1080/17441048.2023.2189779.

27 Case 33-76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (CJEU, 16 December 1976) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61976CJ0033>> accessed 20 February 2026; Case 45-76 *Comet BV v Produktschap voor Siergewassen* (CJEU, 16 December 1976) <<https://eur-lex.europa.eu/legal-content/HR/ALL/?uri=CELEX:61976CJ0045>> accessed 20 February 2026.

28 'Mediation in EU Countries' (*European E-Justice Portal*, 9 July 2024) <https://e-justice.europa.eu/topics/taking-legal-action/mediation/mediation-eu-countries_en> accessed 20 February 2026.

In several EU Member States, mediated settlement agreements may be granted enforceability through approval by a judicial or other competent authority, depending on the national procedural framework. Where such mechanisms exist, refusal to enforce is generally possible if the agreement's terms are contrary to public policy or mandatory legal provisions, including protections for employee rights. This reflects different national approaches to balancing party autonomy with varying degrees of public or judicial oversight.²⁹ One of the most widespread models is that whereby the parties submit the concluded mediated agreement to a court for approval. After verifying the agreement's compliance with the law, the court confers upon it the status of an enforceable instrument. Relevant provisions are provided for in the legislation of Cyprus,³⁰ Lithuania,³¹ and the Netherlands.³²

In Poland, the requirements of Directive 2008/52/EC have been implemented by Articles 116¹–116³ § 1–2 of the Kodeks postępowania cywilnego, pursuant to which the mediator or one of the parties submits the protocol of the settlement agreement to the court (wydział cywilny sądu rejonowego) together with an appropriate application for its approval.³³

Such an approach ensures a balance between the parties' autonomy and the State's control over the agreement's legal content.

The notarial model provides for a mediated agreement to acquire the status of an enforceable instrument upon certification by a notary, without mandatory judicial review, thereby significantly simplifying the procedure and enhancing the promptness of enforcement while preserving guarantees of legality. Such provisions are laid down, *inter alia*, in the German Code of Civil Procedure (paragraphs 796a–796c and 794(1)(5)).³⁴

Several countries consider both possibilities for conferring the status of an enforceable instrument on a mediated agreement. Thus, pursuant to Articles 1733 and 1736 of the Belgian Judicial Code, a mediation agreement may be approved by a judge, thereby rendering such agreement authentic and enforceable.³⁵ In form, the agreement acquires the status of a judicial decision. As an alternative to judicial approval, by the parties' agreement,

29 Tsuvina (n 17).

30 'Mediation' (*Ministry of Justice and Public Order*, 29 March 2024) <<https://www.gov.cy/mjpo/en/justice-sector/legal-affairs-unit/mediation/>> accessed 20 February 2026.

31 Law of the Republic of Lithuania No X-1702 'On Mediation' (adopted 15 July 2008) <https://e-seimas.lrs.lt/rs/legalact/TAD/a1214b42d40911eb9787d6479a2b2829/?utm_source> accessed 20 February 2026.

32 Code of Civil Procedure of the Netherlands 'Wetboek van Burgerlijke Rechtsvordering' (amended 1 January 2026) <<https://wetten.overheid.nl/BWBR0001827/2026-01-01>> accessed 20 February 2026.

33 Code of Civil Procedure of the Republic of Poland 'Kodeks postępowania cywilnego' (amended 7 April 2026) <<https://przepisy.gofin.pl/przepisy,2,9,15,,,ustawa-z-dnia-17-11-1964-r-kodeks-postepowania-cywilnego.html>> accessed 10 April 2026.

34 Code of Civil Procedure of Germany 'Zivilprozessordnung' (amended 10 December 2025) <<https://www.gesetze-im-internet.de/zpo/BJNR005330950.html>> accessed 20 February 2026.

35 'Rules & Belgian Legislation on Mediation' (CEPANI, 2026) <<https://cepani.be/services/mediation/rules-belgian-legislation-on-mediation>> accessed 20 February 2026.

the mediated agreement may be executed as a notarial deed by a notary. In such a case, the agreement likewise becomes authentic and legally binding without recourse to a judge. Similar provisions exist in Spain, where a separate labour court has been established and mediation is mandatory prior to bringing a labour dispute before a court, as well as in Hungary, Romania, Slovakia, Sweden, Estonia, and others.³⁶ At the same time, Spain's experience is particularly illustrative in the context of the development of alternative labour dispute resolution mechanisms, where a well-developed and institutionalised system of autonomous conflict resolution has been established. At the national level, this system is represented by the Servicio Interconfederal de Mediación y Arbitraje (SIMA), while at the regional level, specialised bodies operate, including the Servicio Extrajudicial de Resolución de Conflictos Laborales de Andalucía (SERCLA). A key feature of the Spanish model is the mandatory nature of pre-trial dispute resolution: recourse to conciliation services, such as the Servicio de Mediación, Arbitraje y Conciliación (SMAC), constitutes a prerequisite for filing most labour claims before a court. This approach ensures a systematic reduction of the judicial caseload and encourages parties to reach a compromise at the pre-trial stage. Empirical data confirm the effectiveness of this model.

According to 2025 statistics, 792 labour disputes were processed under SIMA/IRMA procedures, with a settlement rate of 35.96%.³⁷ These procedures involved more than 505,000 workers and approximately 20,000 enterprises, and a significant socio-economic outcome was the prevention of strikes, preserving over 167,000 working days.³⁸ A positive trend is also evident in previous years: in 2024, SIMA handled 511 procedures, representing a 13.3% increase over 2023, with the corresponding processes affecting more than 7 million workers.³⁹ Thus, the Spanish experience demonstrates that the combination of an institutionalised mediation system with mandatory pre-trial conciliation ensures not only a high rate of labour dispute resolution but also a substantial preventive effect, particularly in reducing the number of strikes and associated economic losses.

36 'The Mediation Agreements' (*Daniel Sererols Villalón*, 26 October 2025) <<https://mediadorconflictos.com/en/the-mediation-agreements/>> accessed 20 February 2026; 'Mediation Rules' (CMS, 30 October 2003) <<https://cms-lawnow.com/en/ealerts/2003/10/mediation-rules>> accessed 20 February 2026; Law of the Slovak Republic on Mediation 'Zákon o Mediácii a o Doplnení Niektorých Zákonov' (adopted 25 June 2004) <<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/420/>> accessed 20 February 2026; Swedish Act on Mediation in Certain Private Law Disputes 'Om medling i vissa privaträttsliga tvister' (adopted 22 June 2011) <https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-2011860-om-medling-i-vissa-privatrattsliga_sfs-2011-860/> accessed 20 February 2026; Code of Civil Procedure of the Republic of Estonia 'Tsiviilkohtumenetluse seadustik' (adopted 20 April 2005) <<https://www.riigiteataja.ee/en/eli/510012017004/consolide>> accessed 20 February 2026.

37 'Estadísticas 2025: Datos estadísticos actividad mediación y arbitraje 2025' (Fundación IRMA, 20 January 2026) <<https://www.fundacionirma.org/2026/01/20/estadisticas-2025/>> accessed 20 April 2026.

38 *ibid*

39 *ibid*

Certain legal systems provide for the possibility of conferring enforceability on a mediated agreement without additional approval, if it complies with statutory requirements. In such cases, the agreement is equated to an enforceable instrument subject to compliance with formal criteria.

For example, such provisions have been introduced in the Republic of Croatia, where mediation was regulated by a special legislative act, the Mediation Act (*Zakon o mirenju*).⁴⁰ That Act entered into full force on the date of Croatia's accession to the European Union (1 July 2013), which was an important condition for the harmonisation of national legislation with Directive 2008/52/EC on mediation.

All the models pursue a common objective: to avoid a re-examination of the dispute on the merits and to ensure the prompt enforcement of the settlements reached. The existence of one such mechanism constitutes the criterion of compliance of national legislation with the requirements of Directive 2008/52/EC.

Accordingly, the European legal approach proceeds from the premise that mediation cannot be effective without appropriate instruments for the compulsory enforcement of its results. The absence of a clearly defined enforcement mechanism poses risks of double examination of the dispute, procedural delays, and a decline in trust in alternative forms of justice.

3 MEDIATION UNDER THE DRAFT LABOUR CODE OF UKRAINE

The Draft Labour Code of Ukraine (No. 14386) establishes a three-tier model for resolving individual labour disputes, which includes direct negotiations between the parties to the employment contract, mediation, and judicial proceedings.⁴¹

Article 237 of the draft defines these methods as alternative mechanisms for protecting employees' rights. The primary level consists of direct negotiations between the employee and the employer, reflecting the principle of party autonomy and an orientation toward minimising conflict without third-party involvement. Negotiations are intended to ensure the prompt resolution of a dispute while preserving employment relations and reducing procedural costs.

The second way is mediation, a voluntary procedure involving a neutral mediator.⁴² Its institutionalisation within labour legislation demonstrates the legislator's intention to integrate modern alternative dispute resolution mechanisms into the sphere of labour. Unlike negotiations, mediation presupposes a structured procedure involving a professional mediator, which increases the likelihood of achieving a balanced solution.

40 Law of the Republic of Croatia on Mediation '*Zakon o mirenju*' [2011] Official Gazette 18.

41 Draft Labor Code of Ukraine No 14386 (n 3).

42 Law of Ukraine No 1875-IX (n 8).

The third way consists of judicial proceedings. The court retains the status of the final and universal means of protecting labour rights. The Draft does not restrict the right to judicial protection and does not establish the mandatory completion of prior procedures as a condition for access to justice. The court retains the status of the final and universal means of protecting labour rights, in accordance with Article 55 of the Constitution of Ukraine, which guarantees everyone the right to judicial protection of their rights and freedoms.⁴³ The Draft does not restrict access to justice and does not establish mandatory pre-trial dispute resolution as a precondition for filing a claim, thereby preserving the voluntary nature of mediation in line with Article 6 of the European Convention on Human Rights.⁴⁴

At the same time, the constitutional and procedural framework of Ukraine does not preclude the introduction of mandatory pre-trial mechanisms for certain categories of disputes. Article 124 of the Constitution of Ukraine provides that the jurisdiction of courts extends to any legal dispute, while procedural modalities may be defined by law, provided that such regulation does not undermine the essence of the right to a court.⁴⁵

Procedural legislation already reflects a differentiated approach to amicable dispute resolution. The Civil Procedure Code of Ukraine provides mechanisms for settlement of disputes, including settlement with the participation of a judge,⁴⁶ while the Commercial Procedure Code of Ukraine also promotes amicable settlement and reconciliation between parties⁴⁷. These provisions demonstrate that Ukrainian procedural law already incorporates structured settlement-oriented instruments within judicial proceedings.

In the European Union context, 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 establishes a voluntary framework for mediation and encourages Member States to ensure accessibility and effectiveness of mediation procedures, including the possibility of making settlement agreements enforceable.⁴⁸

In a broader reform context, including the EU–Ukraine Association Agreement (Article 14 on cooperation in the field of justice) and ongoing justice sector reform initiatives, future legislative developments may consider whether enhanced pre-trial mechanisms in selected categories of labour disputes could improve procedural

43 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>> accessed 20 February 2026.

44 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).

45 Constitution of Ukraine (n 43).

46 The Civil Procedure Code of Ukraine No 1618-IV of 18 March 2004 (amended 17 July 2025) <<https://zakon.rada.gov.ua/laws/show/1618-15#Text>> accessed 20 February 2026.

47 Commercial Procedure Code of Ukraine No 1798-XII of 6 November 1991 (amended 31 October 2025) <<https://zakon.rada.gov.ua/laws/show/1798-12#Text>> accessed 20 February 2026.

48 Directive 2008/52/EC (n 6).

efficiency.⁴⁹ Such mechanisms may include mandatory informational sessions or preliminary settlement meetings, provided that they remain proportionate and do not impair the essence of the right of access to a court. This approach is consistent with the case-law of the European Court of Human Rights, which recognises that procedural limitations are permissible only where they pursue a legitimate aim and maintain a reasonable proportionality between means and aim (see, for example, *Kreuz v. Poland*, no. 28249/95, § 54; *Golder v. the United Kingdom*, no. 4451/70).⁵⁰ Thus, the draft law lays down a model of parallel and complementary mechanisms, consistent with the European trend toward developing pluralistic dispute resolution systems.

One of the key characteristics of mediation in the Draft is its voluntary nature. Neither negotiations nor mediation is defined as a mandatory precondition for bringing a claim before a court. If the employer refuses to consider the complaint or the parties fail to reach an agreement, the employee is entitled to apply directly to the court. Such an approach is consistent with the principle of voluntariness of mediation enshrined in Directive 2008/52/EC and, at the same time, guarantees the preservation of the constitutional right to judicial protection. The Draft does not establish any restrictions on access to the court in the event of refusal to engage in mediation or its ineffectiveness.

At the same time, the voluntary nature of the procedure has a dual effect. On the one hand, it prevents excessive procedural formalism and excludes the risk of artificially complicating access to justice. On the other hand, the absence of any incentive or procedural priority for mediation may diminish its practical appeal and render it an optional mechanism with limited application, potentially used to delay consideration of a case.

The most controversial provision is Part Three of Article 239, which provides that, in the event of non-performance or improper performance of an agreement reached through mediation, the parties are entitled to apply to the court for consideration of the individual labour dispute.

A textual interpretation of this provision indicates the absence of a clear mechanism for the compulsory enforcement of a mediated agreement. The Draft does not define its legal nature, does not provide for the possibility of conferring upon it the status of an enforceable instrument, and does not establish a simplified procedure for its compulsory enforcement.

As a result, normative uncertainty arises as to whether such an agreement should be regarded as a civil-law contract, the performance of which is governed by the general rules

49 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (consolidated version 29 October 2025) <https://eur-lex.europa.eu/eli/agree_internation/2014/295/oj> accessed 20 February 2026.

50 See, *Kreuz v Poland* App no 28249/95 (ECtHR, 19 June 2001) <<https://hudoc.echr.coe.int/eng?i=001-59519>> accessed 20 February 2026; *Golder v the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) <<https://hudoc.echr.coe.int/eng?i=001-57496>> accessed 20 February 2026.

of civil law and contract enforcement mechanisms, and whether a re-examination of the same labour dispute on the merits is permissible.

The absence of an explicit indication of an enforcement mechanism effectively creates a risk of procedural duplication. A party failing to comply with the agreement may provoke a new judicial consideration of the original dispute, thereby nullifying the result achieved through mediation. Such an approach contradicts the very logic of alternative dispute resolution, which presupposes the finality and stability of settlements.

The structural inconsistency of Article 239 becomes particularly visible when the procedural consequences of non-performance are mapped schematically (see Figure 1).

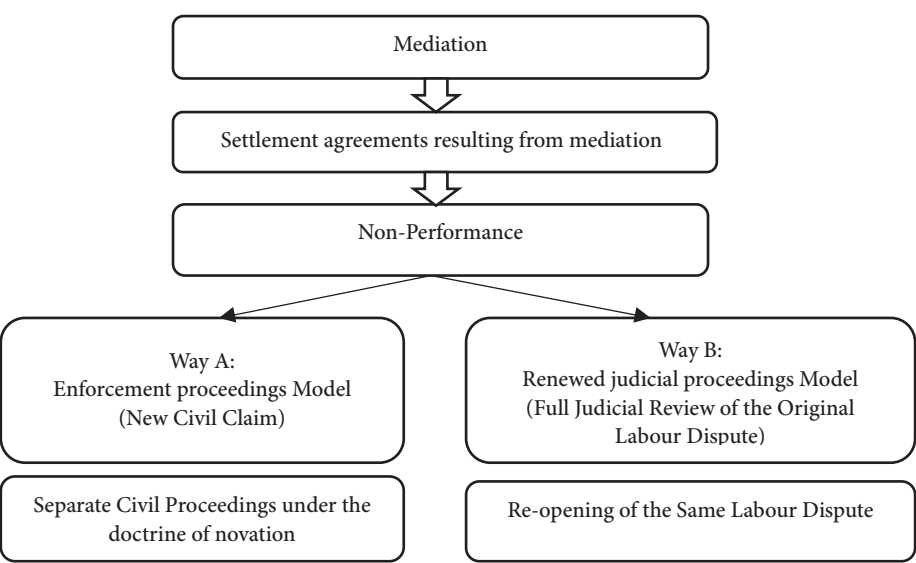


Figure 1. Structural Consequences of Article 239 of the Draft Labour Code of Ukraine

As illustrated above, the current wording creates two parallel and uncoordinated enforcement pathways, neither of which guarantees procedural economy or legal certainty.

Thus, the formal incorporation of a dispute-settlement provision through mediation will not be effective in practice, since both the employee and the employer may lack sufficient incentive to comply with it.

Moreover, given that the conduct of mediation affects the running of procedural time limits, there is a potential risk of abuse of the procedure to delay the resolution of the dispute. In the absence of a clear mechanism for enforcing the agreement, mediation may lose its

effectiveness as an instrument for protecting rights and become merely an additional stage preceding inevitable judicial proceedings.

Accordingly, the current wording of Part Three of Article 239 establishes a model in which a settlement agreement resulting from mediation lacks independent procedural force. This creates a structural inconsistency between the declared objective of institutionalising mediation and the lack of instruments to ensure its outcome. It is precisely this circumstance that requires legislative refinement in light of European standards concerning the enforceability of mediated agreements.

According to the OECD's 2024 Online Dispute Resolution Framework, lack of enforceability remains one of the primary barriers to the uptake of ADR mechanisms, including mediation, as parties often revert to litigation when mediated settlement agreements cannot be effectively enforced.⁵¹

4 THE DUAL PROTECTION MODEL: DOCTRINAL CRITIQUE

Recent scholarship by Tsvina and Serhieieva demonstrates that while Ukraine has adopted a mediation law, significant gaps remain in aligning national mechanisms with the EU *acquis*, particularly regarding the enforceability of mediated agreements and structural compliance with EU procedural effectiveness obligations.⁵²

In the absence of a special mechanism to confer enforceability on a mediated agreement, the Law of Ukraine "On Mediation" effectively permits its classification as an ordinary civil-law contract.⁵³ In such a case, non-performance of the terms of the agreement requires bringing a claim in court for specific performance of the obligation or for damages under the general rules of civil procedure. A qualification of such an agreement as a novation is not presumed and may arise only where the parties have clearly expressed their intention to extinguish the original obligation and replace it with a new one (*animus novandi*), in accordance with Article 604 of the Civil Code of Ukraine.⁵⁴

Such an approach has several doctrinal consequences. First, it alters the legal nature of the labour dispute by transferring it into the sphere of contractual obligations, which does not always align with the specific nature of labour legal relations, characterised by the mandatory nature of a significant portion of the norms and the social orientation of employee protection. Second, the application of the civil model of enforcement effectively presupposes a new judicial process that does not concern the substance of the original dispute but rather concerns proving the fact of breach of contractual obligations.

51 OECD, *OECD Online Dispute Resolution Framework* (OECD Publishing 2024) doi:10.1787/325e6edc-en.

52 Tsvina and Serhieieva (n 23).

53 Law of Ukraine No 1875-IX (n 8).

54 Civil Code of Ukraine No 435-IV of the 16 January 2003 (amended 1 February 2026) <<https://zakon.rada.gov.ua/laws/show/435-15#Text>> accessed 20 February 2026.

As a result, the mediated agreement does not acquire an autonomous procedural status within labour law but is absorbed into the general mechanism of civil-law coercion. This reduces its effectiveness as a specific instrument for the settlement of labour conflicts.

An alternative interpretation of Part Three of Article 239 allows the parties, in the event of non-performance of a mediated agreement, to apply to the court for consideration of the individual labour dispute on the merits. Such an approach effectively entails the possibility of a repeated examination of the same dispute that has already been settled through mediation.

In this case, mediation loses its status as a final method of dispute resolution and becomes an intermediate stage preceding judicial proceedings. The reopening of the dispute nullifies the agreements reached and creates legal uncertainty as to their binding force.⁵⁵ A party that has duly performed the terms of the agreement may find itself in a situation where the original dispute is reconsidered without regard to the fact that a settlement has been achieved.

Thus, in its current wording, Ukrainian legislation effectively establishes two alternative, but not mutually coordinated, models of protection: a contractual model and a repeated-procedural model. The absence of clear priorities or coordination between them creates a structural contradiction within the legal regulatory system.

The dual model of protection generates several practical risks. First, given that participation in mediation may affect the running of time limits for bringing a claim before a court, the parties may use it to delay the resolution of the dispute.⁵⁶ Initiating mediation without a genuine intention to perform the agreed-upon terms may delay judicial consideration and confer additional procedural advantages.

Second, the absence of a mechanism for direct compulsory enforcement creates incentives for bad-faith conduct. A party that has agreed to the terms of the settlement may deliberately refrain from performing it, relying on the possibility of renewed judicial consideration and revision of the original claims.

Third, in the sphere of labour relations, this may lead to potential unjust enrichment. For example, in disputes concerning reinstatement at work or payment of average earnings for the period of forced absence, a prolonged process may increase the amount recoverable.⁵⁷

55 Umut Yüksel, 'The Law Behind Dispute Onset: How Legal Uncertainty Drives Maritime Boundary Disputes' (2025) 69(7-8) *Journal of Conflict Resolution* 1172, doi:10.1177/00220027241305076.

56 Usman Asghar, Aurang Zaib Ashraf Shami and Jahangir Ashraf, 'The Role of Mediation in Family Disputes: Exploring the Benefits and Limitations of Mediation as an Alternative Dispute Resolution Method in Family Law Cases' (2025) 3(2) *Journal for Current Sign* 556.

57 Adam Holesch and Clara Portela, 'Money Talks? The Effectiveness of Sanctions in the "Rule of Law" Conflict in the European Union' (2025) 63 *JCMS: Journal of Common Market Studies* 1178, doi:10.1111/jcms.13693.

Under such conditions, mediation may be transformed into an instrument of strategic behaviour rather than a mechanism for the good-faith settlement of a conflict.

Accordingly, in the absence of a clear enforcement mechanism for mediation-based settlement agreements, the risk of procedural duplication and abuse increases significantly.

The existence of a dual model of protection calls into question Article 239's compliance with the requirements of Directive 2008/52/EC.⁵⁸ As noted above, Article 6 of the Directive imposes on States the obligation to ensure that a settlement agreement resulting from mediation can be made enforceable. At the same time, the Draft Labour Code establishes neither a procedure for judicial approval of the agreement, nor the possibility of certifying it as an enforceable instrument, nor any other special enforcement mechanism.

Such a construction does not comply with the principle of legal certainty, since the parties cannot foresee the legal consequences of non-performance of the agreement. Furthermore, it contradicts the principle of effectiveness, as it renders the implementation of the settlement achieved dependent upon renewed judicial proceedings.

The consequence is a reduction in the functional capacity of mediation as an alternative method of dispute resolution. If the procedure does not ensure finality and guaranteed enforcement of its outcome, it cannot be regarded as a full-fledged instrument of access to justice.

Accordingly, in its current wording, Article 239 creates an internally contradictory model of legal protection that ensures neither procedural economy nor legal certainty nor compliance with European standards governing mediation, thereby substantiating the necessity of its legislative refinement.⁵⁹

At the same time, it should be emphasised that the effective implementation of such a provision requires appropriate procedural regulation. The current legal framework of Ukraine does not provide a specific mechanism for enforcing mediation-based settlement agreements. Therefore, the introduction of corresponding amendments to procedural legislation, particularly the Civil Procedure Code of Ukraine, is necessary to establish a clear and coherent procedure for judicial approval and enforcement of such agreements. Without such alignment, the proposed provision risks remaining declaratory in nature.

To address these shortcomings, it is advisable to introduce amendments that ensure the binding nature of mediated settlement agreements, provide a clear procedural pathway for their enforcement without re-examination of the dispute on the merits, and improve the coherence of national legislation in light of the framework established by Directive 2008/52/EC. It is proposed to amend the Civil Procedure Code of Ukraine by introducing a separate section entitled "Enforcement of Settlement Agreements Resulting from Mediation", providing for a procedural mechanism comparable to that governing court settlements, but applicable independently of ongoing judicial proceedings.

58 Directive 2008/52/EC (n 6).

59 Draft Labor Code of Ukraine No 14386 (n 3).

These amendments are aimed at enhancing the effectiveness of mediation as an instrument of alternative dispute resolution and at creating a predictable and reliable mechanism for protecting the rights of employees and employers.

Proposed wording of Part Three of Article 239:

“3. In the event of non-performance or improper performance of an agreement reached as a result of mediation, the parties shall have the right to apply to the court with a request for compulsory enforcement of such agreement in accordance with the procedure established by the Civil Procedure Code without re-examining the substance of the dispute on the merits.”

The implementation of the proposed wording establishes an effective and harmonised system for resolving labour disputes that complies with European standards and contemporary requirements of legal practice.

5 CONCLUSIONS

Mediation, as introduced in the Draft Labour Code of Ukraine No. 14386, represents a progressive innovation that reflects contemporary approaches to resolving labour disputes. It aims to reduce conflict, support social dialogue, decrease the burden on the judicial system, and align national legislation with European standards. The current drafting of Article 239 risks institutionalising procedural inefficiency. Without legislative clarification, mediation in labour disputes may remain formally recognised but practically ineffective.

The absence of a clear mechanism to enforce mediated agreements substantially undermines the effectiveness of this reform. A voluntary and structured mediation procedure loses its practical significance if the parties do not have a guaranteed opportunity to secure the implementation of the agreements reached without renewed judicial proceedings.

To comply with the provisions of Directive 2008/52/EC and the principles of legal certainty and effectiveness, it is necessary to establish a legislative procedure for the compulsory enforcement of settlement agreements resulting from mediation. Such a mechanism must confer on the agreement the status of an enforceable instrument and preclude a repeated examination of the dispute on the merits.

The proposed wording of Part Three of Article 239 restores legal coherence and consistency within the system of labour legislation, ensures the enforceability of mediated agreements, and enhances the effectiveness of alternative dispute resolution. The implementation of these amendments will contribute to the development of a modern, predictable, and Europe-oriented labour law system in Ukraine.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Форум реформ

ЗАБЕЗПЕЧЕННЯ МЕДІАЦІЇ У ТРУДОВИХ СПОРАХ: ДОКТРИНАЛЬНИЙ АНАЛІЗ СТАТТІ 239 ПРОЄКТУ ТРУДОВОГО КОДЕКСУ УКРАЇНИ

Наталія Черевко

АНОТАЦІЯ

Вступ. У цій статті розглядається можливість виконання мирових угод, укладених в результаті медіації в індивідуальних трудових спорах, відповідно до статті 239 проєкту Трудового кодексу України 2026 року (№ 14386). Хоча проєкт запроваджує медіацію як прогресивний та орієнтований на ЄС механізм врегулювання спорів, він не встановлює чіткої процесуальної моделі надання виконавчої сили мировим угодам, укладеним в результаті медіації.

Методи. У статті застосовано доктринальний та порівняльно-правовий аналіз, за допомогою якого було здійснено оцінку сумісності запропонованої системи правозастосування зі статтею 6 Директиви 2008/52/ЄС та принципами ЄС щодо ефективності (*effet utile*) та правової визначеності.

Результати та висновки. У статті стверджується, що чинне формулювання статті 239 створює подвійну та внутрішньо суперечливу модель захисту прав: мирові угоди, укладені у результаті медіації, можуть розглядатися як звичайні договори, що підлягають окремо виконавчому провадженню, або призводити до поновлення судового провадження щодо первісного трудового спору. Така неоднозначність підриває процесуальну економію, послаблює значення остаточності врегулювання спору та створює ризики стратегічного зловживання правом на медіацію.

З огляду на порівняльні моделі окремих держав-членів ЄС у статті пропонується законодавча поправка для запровадження прямого механізму затвердження мирових угод, що виникають в результаті судової медіації, без повторного розгляду суті спору. Запропонована реформа узгодить українське трудове законодавство з європейськими стандартами та зміцнить медіацію як надійний та ефективний механізм доступу до правосуддя в контексті інтеграції в ЄС та післявоєнної правової трансформації.

Ключові слова: альтернативне врегулювання спорів; трудові спори; виконання мирової угоди; Директива 2008/52/ЄС; принцип правової визначеності.

Case Note

PERSONAL NON-PECUNIARY RIGHTS
AND CRIMINAL JUSTICE COMMUNICATION:
A CIVIL LAW PERSPECTIVE
FROM UKRAINIAN CASE LAW

Sergiy Glotov

ABSTRACT

Background: *The issues discussed in this article arise at the intersection of civil, constitutional, and criminal procedural law and are connected to determining the limits of permissible public communication during a pre-trial investigation by law enforcement bodies. Case no.761/1004/20 brings into focus a fundamental legal conflict between the presumption of innocence and the right to respect for honour, dignity, and private life, on the one hand, and freedom of expression and the public's right to receive information, on the other. The problem becomes particularly acute in cases involving the personalised disclosure of information about individuals who have not yet been found guilty by a court, potentially leading to their social stigmatisation through reputational damage. In this context, the interpretation of part four, Article 296 of the Civil Code of Ukraine is essential, particularly the catch-all phrase "in other cases provided by law," as well as the determination of the permissible limits of using civil-law*

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remedies in response to such actions by the state. The need for this study is determined by the lack of well-established case law, the existence of conflicting approaches within the Supreme Court, and the need to develop a doctrinally coherent model for balancing competing rights and freedoms.

Method: The methodological basis of the study combines doctrinal analysis of norms in civil, constitutional, and criminal procedural law with elements of comparative legal and practice-oriented approaches. The study applies systemic and teleological interpretation of part four of Article 296 of the Civil Code of Ukraine in conjunction with constitutional guarantees (in particular Articles 3, 8, 32, and 62 of the Constitution of Ukraine) as well as the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms. Considerable attention is paid to the case law of the European Court of Human Rights concerning the criteria of the “quality of law,” the proportionality of interference, and the standards of caution in public statements by state authorities. The source base of the work consists of court decisions in case no. 761/1004/20, relevant Supreme Court practice, legal doctrine (in particular the works of L. Fuller, J. Raz, J. Waldron, R. Alexy, and A. Barak), and contemporary Ukrainian research in the field of criminal procedure and the protection of personal non-pecuniary rights.

Results and Conclusions: The study substantiates that part four, Article 296 of the Civil Code of Ukraine should be regarded as a private-law instrument for implementing the constitutional principle of the presumption of innocence in the field of the state’s public communication, aimed at preventing the individual’s premature reputational stigmatisation.

It is proven that the phrase “in other cases provided by law” does not create open discretion for state authorities, but requires the existence of a clear, specific, and foreseeable legislative basis (*lex specialis*), defining the purpose, limits, and the interference procedure. It is established that the general provisions of laws governing the activities of law enforcement bodies, which provide for informing the public, may not be regarded as a sufficient legal basis for disclosing suspects’ personal data. The paper substantiates the need to distinguish between standards applicable to state authorities and journalists, given the difference in the legal nature of their activities: the State is required to exercise heightened restraint and to act within the limits of the principle of legality, whereas the media operate within the paradigm of the freedom of speech.

The practical significance of the findings lies in formulating criteria for the lawfulness of public communication by law enforcement bodies, clarifying the limits on the application of civil-law remedies, and developing recommendations to improve legislation to ensure legal certainty and prevent human rights violations.

1 INTRODUCTION

This paper discusses the study of the legal nature and limits of applying part four of Article 296 of the Civil Code of Ukraine¹ in the context of public communication by law enforcement bodies regarding the course of a pre-trial investigation. The relevance of the topic is determined by the growing role of the state's public communication in criminal proceedings, as well as by the risks of violating the presumption of innocence and individuals' non-pecuniary rights due to the premature disclosure of their personal data. The study focuses on court case No. 761/1004/20,² which illustrates a systemic conflict between the public's right to receive information and an individual's right to respect for honour, dignity, and private life.

Particular attention is paid to analysing the normative content of the blanket formula "in other cases provided by law" and its correlation with constitutional guarantees and the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms.³ The study reveals the problem of the absence of clear legislative criteria defining the permissible limits of disclosing personal data within criminal proceedings, and also demonstrates the risk of substituting the court procedure with the formation of a public perception of a person's guilt outside the legal proceedings framework. Yet, the research emphasises the difference in the legal nature of the state's public communication and mass media activities, which requires applying different standards of lawfulness to them.

The study substantiated that part four of Article 296 of the Civil Code of Ukraine serves as a private-law mechanism to uphold the presumption of innocence and protect the individual from premature reputational stigmatisation. It is established that departure from the general rule prohibiting the disclosure of a name is possible exclusively where there exists a direct and specific legislative basis meeting the requirements of legal certainty. It is established that general provisions of laws regulating the activities of law enforcement bodies do not create such authority. The article reveals the need for normative clarification of the limits of the state's public communication and for the development of uniform judicial approaches to ensure a balance between the right to information and the effective protection of human rights.

1 Civil Code of Ukraine no 435-IV of 16 January 2003 (amended 1 February 2026) <<https://zakon.rada.gov.ua/laws/show/435-15#Text>> accessed 21 March 2026.

2 All materials of case no 761/1004/20 are available in the *Unified State Register of Court Decisions* <<https://reyestr.court.gov.ua>> accessed 21 March 2026.

3 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).

2 METHODOLOGY

Given the dispersed and fragmented nature of the legal regulation of personal non-pecuniary rights in national legislation, as well as the complex cross-sectoral nature of the issue under study, the methodological basis of this study is a systemic approach to interpreting legal norms. The method of systemic interpretation was chosen as the dominant one since it involves establishing the content of a legal norm by identifying its functional and structural connections with other legal norms and with the general principles of legal regulation. This approach is determined by the intrinsic coherence of law as a unified normative system, where an individual norm cannot be properly understood outside the context of the relevant body of law.

Within the framework of this study, systemic interpretation is applied not in isolation but as part of a consistent algorithm for interpreting legal norms that include linguistic, logical, systemic, and teleological interpretations. This sequence enables the shift from a formal-textual understanding of a legal norm to a clarification of its content in light of its place in the legal system and its purpose. In this context, systemic interpretation serves as the central link, ensuring the consistency of the meaning of part four, Article 296 of the Civil Code of Ukraine, with constitutional guarantees, the provisions of related branches of law, and international legal standards.

The application of the systemic method necessitates a comprehensive analysis of normative acts at different hierarchical levels, in particular, the provisions of the Constitution of Ukraine, the Civil Code of Ukraine, criminal procedural legislation, as well as special laws regulating the activities of law enforcement bodies. At the same time, the study is not limited to formal normative material but also encompasses case law, which serves to concretise and develop legal norms.

An important component of the methodology is the analysis of the factual circumstances of case No. 761/1004/20, which is treated as a practical case study to test the selected interpretative approach. The materials in this case make it possible to verify the relevance and practical effectiveness of the formulated theoretical conclusions and to ensure a connection between abstract legal constructions and their implementation in law enforcement practice.

Thus, the study methodology combines systemic interpretation as the dominant instrument with the comprehensive use of other interpretative approaches, thereby ensuring the integral and coherent disclosure of the meaning of the legal norm under consideration.

3 NORMATIVE FRAMEWORK OF THE STUDY

Given that the subject of this study is the interpretation of the general norm specified in part four, Article 296 of the Civil Code of Ukraine, it is appropriate to reproduce the provisions of this part four only in full:

“Article 296. Right to Use One’s Name

...4. The name of a natural person who has been detained, is suspected or accused of committing a criminal offence, or of a person who has committed an administrative offence, may be used (disclosed) only after a guilty verdict has become effective or a decision in a case concerning an administrative offence has been issued, as well as in other cases provided by law. ...”⁴

This approach is determined by the need to ensure a holistic understanding of the norm's content, structure, and internal logic, which is fundamental to correctly specifying the limits of applying the phrase “in other cases provided by law”. The reproduction of the norm in full enables the avoidance of fragmentary analysis and also creates an appropriate context for further examination of its normative content, functional purpose, and relationship with other provisions of national legislation and constitutional guarantees.

4 FACTS OF THE CASE

The facts of case No. 761/1004/20⁵ are even more interesting in light of the above-cited article of the Civil Code of Ukraine. The dispute, which became the subject of court consideration and, at the time of writing this paper, remains pending before the cassation instance, arose from a claim brought by natural persons against the Ministry of Internal Affairs of Ukraine and against broadcasting organisations as entities engaged in the mass dissemination of information. It constitutes a complex dispute concerning the protection of personal non-pecuniary rights, arising from the public disclosure by law enforcement bodies of information about the course of the pre-trial investigation in a high-profile criminal case and its subsequent retransmission by the mass media.

The factual background of the dispute is based on the fact that in December 2019, during an official briefing broadcast by nationwide television channels, officials of the Ministry of Internal Affairs of Ukraine disclosed information concerning the plaintiffs’ involvement in serious crimes, in particular, the murder of journalist Pavlo Sheremet and the attempted murder of another person. This information was accompanied by the display of the plaintiffs’ photographs and personal data, as well as visually and verbally framed messages

4 Civil Code of Ukraine (n 1) art 296, para 4.

5 Case no. 761/1004/20 (n 2).

that, by their content, created the impression that their participation in the relevant criminal offences had been established.

The said information was not only disseminated once during the briefing, but was also reproduced in subsequent television programmes, which significantly expanded the audience reached and extended the duration of its impact.

In substantiating their claim, the plaintiffs proceeded from the assumption that such form and content of dissemination effectively equated them with persons guilty of committing crimes, which, in their view, constituted a violation of the constitutional principle of the presumption of innocence, as well as damage to their honour, dignity, and business reputation.

A separate and independent section of arguments concerned the allegation of unlawfulness in disclosing their names and photographs in the absence of a guilty verdict, which, according to the plaintiffs, violated their personal non-pecuniary rights guaranteed by civil legislation, in particular the right to a name and the right to one's image. In this regard, they asked the court not only to declare the disseminated information false and hold that it violated their rights, but also to require the defendants to refute it in a manner analogous to its dissemination, and to cease further dissemination of the relevant materials by removing them from information resources.

By contrast, the defendants built their legal position on the argument that the contested information did not contain categorical assertions of the plaintiffs' guilt, but reflected exclusively interim results of the pre-trial investigation, which had been communicated to the public because of the significant public interest in the relevant criminal case. Thus, part two of Article 9 of the Law of Ukraine "On the National Police" provides that the police shall ensure the regular informing state authorities, local self-government bodies, and the public about their activities in the area of protection and defence of human rights and freedoms, combating crime, and ensuring public safety and order.⁶

Special emphasis was set on the fact that the information was disseminated within the powers of the law enforcement body, in compliance with the requirements of criminal procedural law, in particular, where permission had been granted to disclose pre-trial investigation data, and that statements made by officials could be regarded as value judgements, opinions or as communication of the investigative version of events, rather than as establishing the fact of guilt.

The courts of first and appellate instance, in dismissing the claim, proceeded on the basis that the disputed information had been disclosed in the context of informing the public about the course of the investigation and did not contain unequivocal statements regarding

6 Law of Ukraine no. 580-VIII 'On the National Police' of 2 July 2015 (amended 13 March 2026) <<https://zakon.rada.gov.ua/laws/show/580-19#Text>> accessed 21 March 2026.

the plaintiffs' guilt. Therefore, it did not violate the presumption of innocence. Yet, the appellate court acknowledged that the disclosure of the plaintiffs' names and photographs had occurred in breach of the requirements for the protection of personal data. However, it concluded that this violation could not be remedied by instituting a refutation of false information, since the latter applies exclusively to the spread of false factual information, whereas a violation of the right to privacy entails other civil-law remedies.

The cassation review of the case revealed significant issues with law enforcement regarding the proper classification of the information disseminated and the determination of the limits of permissible public communication by law enforcement bodies. The Supreme Court, setting aside the appellate decision in part and remitting the case for a new hearing, pointed to the need of examining whether the statements of the officials had the nature of factual assertions of guilt, whether they complied with the criteria of caution and restraint formulated in the case law of the European Court of Human Rights, and whether the disclosure of the plaintiffs' personal data in the absence of a guilty verdict had been lawful. However, following the new appellate review, the court again found no grounds to satisfy the claim, maintaining its approach of classifying the information as not containing assertions of guilt.

In the subsequent proceedings, the case took on special importance as the Supreme Court received a request regarding the possibility and limits of using civil-law remedies to refute information concerning a person's involvement in a criminal offence. The panel of the Civil Cassation Court raised the issue of the need to depart from the previously formulated legal position of the Supreme Court of Ukraine, according to which such statements may be recognised as false and violating person's honour and dignity, proposing instead an approach under which disputes aimed at denying the fact of involvement in a crime or a person's procedural status in criminal proceedings should not be examined within the framework of civil proceedings.

Therefore, the conceptual core of this case lies in determining the limits of permissible state interference in the area of a person's personal non-pecuniary rights through public communication about criminal proceedings, as well as in clarifying whether the institution of protection of honour, dignity, and business reputation may serve as a procedural mechanism to refute public statements on the involvement in a crime. In a broader context, the case reflects a collision between the principle of the presumption of innocence, the right to respect for private life and reputation, on the one hand, and the freedom of expression and the public's right to receive information, on the other. These require systemic reconciliation in light of the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In the context of the above-mentioned, the following issues of legal application were essentially put before the Supreme Court:

- 1) How should the phrase “and in other cases provided by law,” contained in part four of Article 296 of the Civil Code of Ukraine, be interpreted from the viewpoint of legislative drafting?
- 2) Does the phrase “and in other cases provided by law,” contained in part four of Article 296 of the Civil Code of Ukraine, permit the application to the disputed legal relations of the provisions of the Laws of Ukraine “On the National Police,” “On the National Anti-Corruption Bureau of Ukraine,” and “On the Security Service of Ukraine,” etc., and allow them to be regarded as special laws granting state authorities the right to use (disclose) the name of a natural person suspected or accused of committing a criminal offence to inform about their activities?
- 3) Is it permissible to distinguish between subjects that may use (disclose) the name of a natural person suspected or accused of committing a criminal offence by dividing them into certain groups, in particular, journalists and public bodies, and, depending on this, to assess the lawfulness of the actions carried out by the subject in relation to using (disclosing) the name of a natural person suspected or accused of committing a criminal offence?

It is the sequence of these questions that structures this article.

5 INTERPRETATION OF STATUTORY EXCEPTIONS

Part four, Article 296 of the Civil Code of Ukraine, from the standpoint of contemporary legal theory and human rights protection standards, should be regarded as a private-law mechanism for the preventive restraint of state power against the premature stigmatisation of an individual's reputation, primarily in the field of criminal prosecution. That is, actually in the area where the risk of society prematurely convincing a person's involvement in an offence through public communication by state authorities is the highest.

The normative construction of this provision, which permits the use of the name of a detained, suspected, or accused person only after a guilty verdict has become effective or after a ruling in a case on an administrative offence has been issued, and in other cases provided by law, should be interpreted as an exception to the general rule based on constitutional guarantees: the presumption of innocence (Article 62 of the Constitution of Ukraine), respect for a person's honour, dignity, and reputation (Articles 3, 28, 34, and 68 of the Constitution of Ukraine), and the right to non-interference in personal and family life (Article 32 of the Constitution of Ukraine), as components of the principle of the rule

of law envisaged in Article 8 of the Constitution of Ukraine.⁷ This exception is narrow in content and may be applied only if there is a clear legislative basis.

In other words, the point here is the balance between two legitimate interests. On the one hand, there is the protection of personal and family life, honour, and dignity. On the other hand, there is a need for the state to inform society, ensure public safety, and guarantee the effectiveness of the criminal justice system. In a state governed by the rule of law, this balance cannot be established by administrative expediency or an expansive interpretation of the general powers of public authorities. It is achieved exclusively by law, which defines the limits of interference according to the criteria of accessibility, foreseeability, and legal certainty.⁸

It is this requirement that constitutes the substance of the rule of law.

As Lon L. Fuller emphasised, law presupposes congruence between the proclaimed rule and the practice of its application by officials, which excludes arbitrary deviations from established procedures.⁹ Similarly, Joseph Raz noted that the rule of law requires accessibility, foreseeability, and clarity of legal norms as a precondition for the autonomous planning of an individual's conduct.¹⁰ Jeremy Waldron, in turn, argues that it is the procedural form of law and its definiteness that ensures respect for human dignity as the status of an equal participant in the legal order.¹¹

Therefore, the provisions of part four of Article 296 of the Civil Code of Ukraine should be understood as an instrument for ensuring legality and legal certainty at a level that does not permit the substitution of the court procedure by public condemnation prior to establishing the guilt as prescribed by law.

As regards the legislative significance of the phrase "in other cases provided by law," which constitutes a general blanket norm, legislative technique does not endow it with the properties of a free zone of discretion for the law-applying subject. On the contrary.

7 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>> accessed 21 March 2026.

8 The established case-law of the European Court of Human Rights requires that any interference with an individual's rights be prescribed by law, necessary in a democratic society, and accompanied by adequate procedural safeguards. See, *Sunday Times v the United Kingdom* (No. 1) App no 6538/74 (ECtHR, 26 April 1979) paras 49–51 <<https://hudoc.echr.coe.int/eng?i=001-57584>> accessed 21 March 2026; *Malone v the United Kingdom* App no. 8691/79 (ECtHR, 2 August 1984) para 67 <<https://hudoc.echr.coe.int/fre?i=001-57533>> accessed 21 March 2026.

9 Lon L Fuller, *The Morality of Law* (Yale UP 1969) 41-3, 81-91.

10 Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 214-8, doi:10.1093/acprof:oso/9780198253457.003.0011.

11 Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43(1) *Georgia Law Review* 28-30.

This reference signals that departure from the general rule is possible only where there is direct and specific legislative regulation¹², where the legislature has clearly defined the grounds, limits, and manner of such interference.¹³ This concerns, in particular:

- the establishment of a legitimate purpose of disclosure (for example, searching for a person, preventing danger, or protecting victims);
- proof of the need for personalised identification rather than anonymised information;
- determination of the competent subject and the procedure for adopting the relevant decision; and
- the introduction of safeguards preventing the formation of a public perception of a person's guilt prior to any court decision.

In constitutional doctrine, such requirements may be designated as the criterion of the "quality of law."¹⁴

In general, where exceptions are to be established in spheres involving intense interference with human rights, the law, according to Aharon Barak,¹⁵ must delineate the limits of the state's discretion with sufficient clarity so as to exclude arbitrary exercise of power. Robert Alexy demonstrates that the more intensive the interference, the more convincing the justification it requires.¹⁶

For this very reason, the phrase "in other cases provided by law" should be interpreted as permitting the application of *lex specialis* exclusively where there is a direct legislative provision. It cannot be regarded as an unconditional general authorisation to disclose the

12 *Sunday Times v the United Kingdom* (n 8) para 49: "In the Court's opinion, the words 'prescribed by law' imply two requirements. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail ..."

13 At the same time, attention should be drawn to one of the case no. 1-135/2018(5846/17) decisions no 1-r/2019 (Constitutional Court of Ukraine, 26 February 2019) [2019] Official Gazette of Ukraine 36/1291, which, inter alia, states as follows: "The Constitution of Ukraine contains no exceptions either to the principle of the presumption of innocence or to the right of a person not to testify or provide explanations regarding himself or herself, members of his or her family, or close relatives. Moreover, Part Two of Article 64 of the Constitution of Ukraine emphasizes the inadmissibility of restricting a number of rights and freedoms, in particular those provided for in Articles 62 and 63 of the Constitution of Ukraine."

14 Svitlana K Dudar, 'Quality of the Law Criteria: Problem the Aspect of Legal Integration of Ukraine and EU' (2015) 1 Law Review of Kyiv University of Law 23.

15 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 103-10 (limitation by law), 330-6 (necessity), doi:10.1017/CBO9781139035293.

16 Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 47-55, 102-4.

name of a natural person for reasons of informing the public or for the reporting purposes of state authorities. Otherwise, the blanket formula would effectively serve to circumvent the restriction established by Article 296 of the Civil Code of Ukraine, which is incompatible with the requirements of legal certainty and the prohibition of arbitrary state interference, as components of the principle of the rule of law.

6 SPECIFIC STATUTORY BASIS

In light of the above considerations, a negative answer to the second question follows naturally.

The provisions of the Laws of Ukraine “On the National Police,” “On the National Anti-Corruption Bureau of Ukraine,” and “On the Security Service of Ukraine,” which provide for informing the public about the activities of these bodies, are organisational in nature and aim at ensuring openness, accountability, and public trust in state power.¹⁷ They only define the general principles of communication policies concerning the activities of the authority, but do not establish special rules on using (disclosing) personal data of the participants in criminal proceedings. Hence, such provisions may not be regarded as legal grounds for disclosing the name of a suspect or an accused person, contrary to the limitations set out in Article 296 of the Civil Code of Ukraine.

The domestic legal doctrine consistently emphasises that the competence of a subject vested with public authority must be directly, clearly, and unambiguously defined by law. General functions, tasks, or areas of activity of a public authority cannot in themselves create a specific power to interfere with the domain of human rights or restrict them, because the legal certainty of the limits of state power, enshrined, inter alia, in the provisions of Article 19 of the Constitution of Ukraine, constitutes a key requirement of the principle of the rule of law.¹⁸

The foregoing demonstrates that entrusting a law enforcement body with the duty to inform the public does not in itself mean granting it the right to disclose personal data in a manner capable of shaping a public perception of a person’s guilt prior to rendering a guilty verdict.

From the criminal procedural perspective, the requirements of caution are even stricter, since information relating to the pre-trial investigation falls within the field of special safeguards aimed at ensuring a balance between the effectiveness of the investigation, the rights of the suspect, and the interests of victims. As emphasised in the contemporary Ukrainian procedural studies, the disclosure of such information is permissible only within

17 See, for example, Petro A Trachuk (ed), *Administrative Activity of the Police Authorities of Ukraine: Academic Course* (RIK-U 2024).

18 Mykola I Koziubra, ‘The Rule of Law and Ukraine’ (2012) 1-2 *Law of Ukraine* 30.

the limits expressly established by law, taking into account the presumption of innocence and the inadmissibility of causing harm to a person's reputation.¹⁹

It is obvious that public communication by law enforcement bodies concerning criminal proceedings is a high-risk area for violating the presumption of innocence, since it can influence public perception of a person outside the court procedure.²⁰ Accordingly, information may not be disclosed unless there is a special legal basis, with the purpose, limits, and procedural safeguards clearly defined,²¹ in order to prevent institutional temptations of the state to influence public perception of a particular criminal proceeding.

7 DIFFERENTIATION OF LEGAL STANDARDS

The third issue, concerning the permissibility of distinguishing between the subjects disseminating information, in particular, journalists and state authorities, is relatively easily resolved from the theoretical and legal perspective. This differentiation is not only permissible but conceptually necessary, since the freedom of expression of private media and official communication by the state have different legal natures.

Journalistic activity operates within the paradigm of freedom of speech, public interest and public scrutiny of government, whereas the activities of state authorities are governed by the principles of legality, institutional neutrality and positive obligations to secure and protect human rights. In the case law of the European Court of Human Rights, this distinction is articulated through the concept of the press as a “public watchdog”. In *Bladet Tromsø and Stensaas v. Norway*,²² *Pedersen and Baadsgaard v. Denmark*,²³ *Stoll v. Switzerland*,²⁴ *Magyar*

19 Oleg M Fedoriv, ‘European Standards of Effectiveness of Pre-trial Investigation’ (Ph.D (Law) thesis, Lviv State University of Internal Affairs 2023) 95; Iryna V Hloviuk, *Theoretical and Practical Problems of Pre-trial Investigation* (ODUVS 2017) 198-201; Iryna V Hloviuk, ‘The Case “Mamaladze v. Georgia” and the Presumption of Innocence: Experience for Ukraine’ (The Right to a Fair Trial in Criminal Proceedings: Round table, Lviv, 24 May 2024) 107; Olha O Varchenko, ‘Problematic Issues of Compliance with the Principle of Respect for Human Dignity in Connection with the Disclosure of Criminal Proceedings Information’ (Science and Social Life of Ukraine in the Era of Global Challenges of Humanity in the Digital Age: International scientific and practical conference, Odesa, 21 May 2021) vol 2, 247.

20 See also, Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 66-7, 78-80, 96-102, doi:10.1093/he/9780199672684.001.0001; Varchenko (n 19).

21 In this context, the following is also relevant: Volodymyr H Uvarov, ‘The Principle of Proportionality in Criminal Proceedings’ (2014) 6-2 Law and Society 210.

22 *Bladet Tromsø and Stensaas v Norway* App no. 21980/93 (ECtHR, 20 May 1999) paras 59, 62–65, 68 <<https://hudoc.echr.coe.int/eng?i=001-58369>> accessed 21 March 2026.

23 *Pedersen and Baadsgaard v Denmark* App no. 49017/99 (ECtHR, 17 December 2004) paras 71–78 <<https://hudoc.echr.coe.int/eng?i=001-67818>> accessed 21 March 2026.

24 *Stoll v Switzerland* App no. 69698/01 (ECtHR, 10 December 2007) paras 101–110, 126–141 <<https://hudoc.echr.coe.int/eng?i=001-83870>> accessed 21 March 2026.

*Helsinki Bizottság v. Hungary*²⁵ and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*,²⁶ the Court consistently referred to the fact that the press, journalists and other actors involved in information dissemination on matters of public interest perform a special democratic function, and that State interference with such activity, therefore, requires truly convincing justification.

In the liberal legal tradition, freedom of speech is regarded as a key instrument of democratic control over public power.²⁷ Objectively, it is believed that public authorities, by using information resources and the authority of the State, are capable of creating an asymmetric impact on an individual's legal position. Accordingly, freedom of public debate should be understood as primarily seeking to restrain State power, rather than to enable its informational dominance. This approach is consistent with the position of the ECtHR in *Castells v. Spain*,²⁸ where the Court emphasised that the limits of permissible criticism are wider with regard to the Government than in relation to a private individual or even a politician, since in a democratic society the actions or omissions of the Government must be subject to close scrutiny not only by Parliament and the courts, but also by the public. The same logic is reflected in *Vides Aizsardzības Klubs v. Latvia*,²⁹ *Dyuldin and Kislov v. Russia*,³⁰ *Radio Twist a.s. v. Slovakia*,³¹ *Romanenko and Others v. Russia*,³² *Toranzo Gomez v. Spain*³³ and *Lombardo and Others v. Malta*,³⁴ where the Court confirmed that State authorities, public officials and institutions performing public functions must accept wider limits of acceptable criticism.

25 *Magyar Helsinki Bizottság v Hungary* App no. 18030/11 (ECtHR, 8 November 2016) paras 165–170 <<https://hudoc.echr.coe.int/fre?i=001-167828>> accessed 21 March 2026.

26 *Medžlis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina* App no. 17224/11 (ECtHR, 27 June 2017) paras 75–88 <<https://hudoc.echr.coe.int/eng?i=001-175180>> accessed 21 March 2026.

27 This conclusion may be made based on the role assigned by the ECtHR to the press – a public watchdog for democracy. See, *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985) para 58 <<https://hudoc.echr.coe.int/eng?i=001-57432>> accessed 21 March 2026; *Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986) para 44 <<https://hudoc.echr.coe.int/eng?i=001-57523>> accessed 21 March 2026.

28 *Castells v Spain* App no. 11798/85 (ECtHR, 23 April 1992) series A no. 236, paras 42–46 <<https://hudoc.echr.coe.int/eng?i=001-57772>> accessed 21 March 2026.

29 *Vides Aizsardzibas Klubs v Latvia* App no. 57829/00 (ECtHR, 27 May 2004) paras 40–46 <<https://hudoc.echr.coe.int/eng?i=001-66349>> accessed 21 March 2026.

30 *Dyuldin and Kislov v Russia* App no. 25968/02 (ECtHR, 31 July 2007) paras 43–48 <<https://hudoc.echr.coe.int/eng?i=001-82038>> accessed 21 March 2026.

31 *Radio Twist as v Slovakia* (App no. 62202/00 (ECtHR, 19 December 2006) paras 53–65 <<https://hudoc.echr.coe.int/eng?i=001-78603>> accessed 21 March 2026.

32 *Romanenko and Others v Russia* App no. 11751/03 (ECtHR, 8 October 2009) paras 39–43 <<https://hudoc.echr.coe.int/eng?i=001-94843>> accessed 21 March 2026.

33 *Toranzo Gomez v Spain* App no. 26922/14 (ECtHR, 20 November 2018) paras 58–66 <<https://hudoc.echr.coe.int/eng?i=001-187736>> accessed 21 March 2026.

34 *Lombardo and Others v Malta* App no. 7333/06 (ECtHR, 24 April 2007) paras 50–61 <<https://hudoc.echr.coe.int/eng?i=001-80217>> accessed 21 March 2026.

Consequently, the State cannot be regarded as an ordinary speaker, since its statements have a different legitimating force and different legal consequences for their addressees. Provided that a journalist, even when mistaken in certain details, acts in good faith, on a sufficient factual basis and aiming at informing the public of a matter of public interest, the State, by contrast, does not enjoy an analogous freedom of editorial discretion. Its communications are not an expression of private autonomy, but a form of exercising public power. Accordingly, State communication must be assessed not only against the criteria governing the permissibility of expression under Article 10 of the Convention, but also against the requirements of legality, proportionality, institutional restraint, accuracy and the prevention of arbitrary interference with individual rights.

In the context of these considerations, Jeremy Waldron's position is apposite: he noted that law, as a form of governance, addresses the human being not as an object of administrative influence, but as a rational participant in the legal order, capable of understanding the grounds for State decisions, responding to them with reasoned argument, and relating individual legal prescriptions to the coherent and systemic logic of legal regulation as a whole; this constitutes one of the ways the law shows respect for human dignity.³⁵

It follows that, where a journalist informs the public in good faith about an event of public interest, the State is required to act according to different standards. Its communications must be limited to the purpose that directly derives from law, for example, the search for a person, the prevention of danger, informing the population of risks, or ensuring the proper functioning of justice. They must be neutral, factually accurate, minimally necessary for both content and form, and adopted through a procedure that provides for internal control and the accountability of public officials. In this respect, the Court's approaches in *Bédát v. Switzerland*,³⁶ *Brisic v. Romania*,³⁷ *Tourancheau and July v. France*³⁸ and *Dupuis and Others v. France*³⁹ are particularly illustrative: in those cases, the Court highlighted the risks of violating the secrecy of the investigation, the presumption of innocence, the private life of participants in criminal proceedings, and the proper administration of justice.

It is especially important that the ECtHR case law does not identify the status of a person subject to criminal proceedings with that of a public figure. The very fact of a criminal investigation does not deprive a person of the right to respect for private life, reputation and the presumption of innocence. In *Bédát v. Switzerland*, the ECtHR emphasised that

35 Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) The Cambridge Law Journal 210.

36 *Bédát v. Switzerland* App no. 56925/08 (ECtHR, 29 March 2016) paras 48–81 <<https://hudoc.echr.coe.int/eng?i=001-161898>> accessed 21 March 2026.

37 *Brisic v. Romania* App no. 26238/10 (ECtHR, 11 December 2018) paras 99–124 <<https://hudoc.echr.coe.int/eng?i=001-188274>> accessed 21 March 2026.

38 *Tourancheau and July v. France* App no. 53886/00 (ECtHR, 24 November 2005) paras 65–79 <<https://hudoc.echr.coe.int/eng?i=001-71307>> accessed 21 March 2026.

39 *Dupuis and Others v. France* App no. 1914/02 (ECtHR, 7 June 2007) paras 35–46 <<https://hudoc.echr.coe.int/eng?i=001-80903>> accessed 21 March 2026.

information from the case file in criminal proceedings may require the highest level of protection, and that the State is required not only to refrain from its unlawful disclosure but also to ensure the effective protection of the accused person's rights. Therefore, an official communication by a state authority, which virtually shapes the public perception of a person's guilt before a court judgement, or which excessively personalises negative information, may acquire the features of a *de facto* punishment without trial, which is incompatible with the presumption of innocence and the right to respect for private and family life.

At the same time, this logic does not mean that journalists are released from their professional duties. The ECtHR has consistently emphasised that freedom of the press entails "duties and responsibilities". However, these duties are of a different nature from those incumbent on the State. For a journalist, the key requirements are good faith, the availability of sufficient facts, the distinction between facts and value judgements, the proper use of sources, and a contribution to debate on matters of public interest. By contrast, for a state authority, the determining criteria include competence, a lawful aim, procedural discipline, neutrality, and the prevention of abuse of State authority.

Thus, the differentiation of standards applicable to journalists and to state authorities is not a manifestation of inequality or double standards; on the contrary, it is a necessary condition for ensuring the rule of law. Freedom of speech serves to control public power, whereas public power itself, when engaging in public communication, must act with heightened restraint, procedural discipline, and respect for human dignity. It is for this reason that the standards developed by the ECtHR for the protection of journalistic activity cannot be mechanically transposed to the official communication of State authorities: private media exercise freedom of expression, while the State exercises public competence.

8 CONCLUSIONS

The phrase "in other cases provided by law" should be interpreted as permitting the application of *lex specialis* exclusively where there is a direct legislative provision.

The phrase "and in other cases provided by law," contained in part four, Article 296 of the Civil Code of Ukraine, does not enable to apply it to the disputed legal relations among the provisions of the Laws of Ukraine "On the National Police," "On the National Anti-Corruption Bureau of Ukraine," and "On the Security Service of Ukraine," etc., and to regard them as special laws granting state authorities the right to use (disclose) the name of a natural person suspected or accused of committing a criminal offence for the purpose of informing about their activities, due to the absence of direct legislative regulation.

The differentiation of the subjects entitled to use (disclose) the name of a natural person suspected or accused of committing a criminal offence into certain groups, in particular journalists and state bodies, is not only permissible, but also necessary.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

ОСОБИСТІ НЕМАЙНОВІ ПРАВА ТА КОМУНІКАЦІЯ У КРИМІНАЛЬНОМУ ПРАВОСУДДІ: ЦИВІЛЬНО-ПРАВОВИЙ ВИМІР КРИЗЬ ПРИЗМУ УКРАЇНСЬКОЇ СУДОВОЇ ПРАКТИКИ

Сергій Глотов

АНОТАЦІЯ

Вступ. Питання, що розглядаються у цій статті, виникають на перетині цивільного, конституційного та кримінального процесуального права і пов'язані з визначенням меж допустимої публічної комунікації правоохоронних органів під час досудового розслідування. Судова справа №761/1004/20 актуалізує фундаментальний правовий конфлікт між презумпцією невинуватості та правом на повагу до честі, гідності й приватного життя, з одного боку, та свободою вираження поглядів і правом громадськості на отримання інформації — з іншого. Проблема набуває особливої гостроти у справах, пов'язаних із персоналізованим розголошенням інформації про осіб, яких суд ще не визнав винними, що потенційно може призвести до їхньої соціальної стигматизації через завдання шкоди їхній репутації. У цьому контексті суттєве значення має тлумачення частини четвертої статті 296 Цивільного кодексу України, зокрема формулювання «в інших випадках, встановлених законом», а також визначення допустимих меж використання цивільно-правових способів захисту у відповідь на такі дії держави. Необхідність цього дослідження зумовлена відсутністю усталеної судової практики, наявністю суперечливих підходів у практиці Верховного Суду та потребою в розробленні доктринально обґрунтованої моделі забезпечення балансу між правами і свободами.

Методи. Методологічну основу дослідження становить поєднання доктринального аналізу норм цивільного, конституційного та кримінального процесуального права з елементами порівняльно-правового та практико-орієнтованого підходів. У дослідженні застосовано системне та телеологічне тлумачення частини четвертої статті 296 Цивільного кодексу України у взаємозв'язку з конституційними гарантіями (зокрема статтями 3, 8, 32 та 62 Конституції України), а також стандартами Конвенції про захист прав людини і основоположних свобод. Значну увагу приділено практиці Європейського суду з прав людини щодо критеріїв «якості закону», пропорційності втручання та стандартів належної обережності у публічних висловлюваннях органів державної влади. Джерельну основу роботи становлять судові рішення у справі № 761/1004/20, відповідна практика Верховного Суду, правова доктрина (зокрема праці Л. Фуллера, Дж. Раза, Дж. Волдрона, Р. Алексі та А. Барака), а також сучасні українські дослідження у сфері кримінального процесу та захисту особистих немайнових прав.

Результати та висновки. У дослідженні обґрунтовано, що частину четверту статті 296 Цивільного кодексу України слід розглядати як приватноправовий

інструмент реалізації конституційного принципу презумпції невинуватості у сфері публічної комунікації держави, спрямований на запобігання передчасній репутаційній стигматизації особи.

Доведено, що формулювання «в інших випадках, встановлених законом» не створює відкритої дискреції для органів державної влади, а вимагає наявності чіткої, конкретної та передбачуваної законодавчої підстави у вигляді спеціальної правової норми (*lex specialis*), яка визначає мету, межі та порядок втручання. Встановлено, що загальні положення законів, які регулюють діяльність правоохоронних органів і передбачають інформування громадськості, не можуть розглядатися як достатня правова підстава для розголошення персональних даних підозрюваних. У роботі обґрунтовано необхідність розмежування стандартів, що застосовуються до органів державної влади та журналістів, з огляду на відмінність правової природи їхньої діяльності: держава зобов'язана виявляти підвищену стриманість та діяти в межах принципу законності, тоді як медіа здійснюють діяльність у межах свободи слова.

Практичне значення отриманих результатів полягає у формулюванні критеріїв правомірності публічної комунікації правоохоронних органів, уточненні меж застосування цивільно-правових способів захисту та розробленні рекомендацій щодо вдосконалення законодавства для забезпечення правової визначеності та запобігання порушенням прав людини

Ключові слова. Презумпція невинуватості; захист честі та гідності; право на ім'я; персональні дані; публічні заяви органів державної влади; частина четверта статті 296 Цивільного кодексу України; свобода вираження поглядів; верховенство права; баланс прав.

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Case Note

A COURT'S *INTER PARTES* RECOGNITION
OF A TRADEMARK AS WELL-KNOWN
AS PART OF THE REASONS
FOR THE JUDGMENT'S,
AND NOT THE DECLARATORY
JUDGMENT ITSELF -
COMMENT ON THE CITRAMON CASE

Kostiantyn Pilkov

ABSTRACT

Background: Ukrainian trademark law allows the owner of a well-known trademark to obtain recognition of its well-known status either through an administrative procedure or through court proceedings. These mechanisms are generally perceived as alternative options available to the trademark owner, both of which produce *erga omnes* effects. The Grand Chamber of the Supreme Court was required to determine whether this understanding is compatible with the principle that a judgment in a commercial dispute is binding only on the parties to that dispute, i.e., that it has only *inter partes* effect.

Method: The study employs doctrinal and normative methods. It combines cross-jurisdictional doctrinal analysis, used to identify how the doctrine of the *inter partes* effect of judicial

decisions has developed in modern Ukrainian jurisprudence, with a case-study methodology illustrating the practical consequences of the identified doctrinal problem. The study also employs interpretive and argumentation analysis to reconstruct the Court's reasoning. Normative analysis assesses the Court's decision against the requirements of adversarial proceedings, courts' statutory duty to provide an effective remedy, and the enforceability of judgments.

Results and Conclusions: *The Grand Chamber's decision confirms the Supreme Court's established approach, emphasising courts' duty to provide an adequate and effective remedy. In disputes involving a well-known trademark and a competing registered trademark, the appropriate remedy is not standalone declaratory relief recognising a trademark as well-known. Rather, the court should invalidate the competing trademark registration and order the IP Office to record its cancellation, while recognising the claimant's trademark as well-known as a necessary precondition for granting that relief. This approach preserves the inter partes effect of judicial decisions. It avoids undermining the time limit under Article 6bis of the Paris Convention for cancelling a good faith competing registration, as allowing separate proceedings for recognition of well-known status could effectively restart the limitation period for cancellation and deprive bona fide owners of competing registered trademarks of a legitimate limitation defence.*

1 INTRODUCTION

On 17 April 2024, the Grand Chamber of the Supreme Court of Ukraine delivered its ruling in the case initiated by the private joint-stock company pharmaceutical firm Darnytsia (hereinafter the 'Firm') against the joint-stock company 'Lubnypharm' (hereinafter the 'Company') and the State organisation the Ukrainian National Office for Intellectual Property and Innovations¹ (hereinafter the 'IP Office') to obtain the court's recognition of the designation 'Citramon'² as the Firm's well-known trademark, as well as to invalidate the Company's certificate for the trademark 'Citramon-U'³ and require the IP Office to register and officially publish information on this recognition of the Firm's trademark as well-known and information on the cancellation of the Company's certificate.⁴

1 The legal action was initiated against the Ministry for Development of Economy, Trade and Agriculture of Ukraine as the State body that administers the IP Office and establishes the regulatory framework for trademark registration. Following this, the defendant was replaced by the State enterprise 'Ukrainian Intellectual Property Institute' and, later, by the IP Office, as its legal successor.

2 In Ukrainian 'Цитрамон'.

3 In Ukrainian 'Цитрамон-У'.

4 See the ruling of the Supreme Court of Ukraine in the case of PJSC Pharmaceutical firm Darnytsia v the Ukrainian National Office for Intellectual Property and Innovations and JSC 'Lubnypharm': Case no. 910/13988/20 (*Darnytsia v Lubnypharm*) (Grand Chamber of the Supreme Court, 17 April 2024) <<https://reyestr.court.gov.ua/Review/118601114>> accessed 10 February 2026.

The core of the dispute revolved around two pivotal questions: first, whether the Firm should be recognised as the owner of a well-known trademark, and second, whether there were sufficient grounds to invalidate the Company's competing trademark certificate. Both companies are major players in the pharmaceutical market, producing drugs under various trademarks containing the word 'Citramon'.

Following the court of first instance's satisfaction of the Firm's claims, that is to say, the recognition of the designation 'Citramon' as the Firm's well-known trademark and the invalidation of the Company's trademark certificate, and the order to the IP Office to enter the respective data into the List of well-known trademarks and the State Register of Certificates of Ukraine for Trademarks (hereinafter the 'Register'), and to make official publications, the appellate court upheld this judgment. The Company then appealed these decisions to the Supreme Court. The case was referred to the Grand Chamber of the Supreme Court, which ultimately overturned the lower courts' decisions. In its ruling, the Grand Chamber dismissed the Firm's claim for recognition of the trademark as well-known, as well as the claim seeking to require the IP Office to enter information about the well-known trademark in the List and to make a corresponding official publication. In relation to the claims for the invalidation of the Company's certificate, and the associated derivative claims for the IP Office to enter the data on the cancellation of the certificate in the Register and to make an official publication, the Grand Chamber remitted the case for a new review by the court of first instance.

The first part (II) of this article will provide a concise overview of the dispute, with particular emphasis on the wording of the relief sought by the Firm, as this will be pertinent to the pivotal conclusions of the case. This section outlines the opinions of the first instance and appellate courts, along with the arguments raised by the Company in its appeal against those decisions. Additionally, it provides a synopsis of the legal issues the Grand Chamber of the Supreme Court is likely to address in this case. The second part of the article (III) examines the primary issue of this case, namely, the effect (*erga omnes* or *inter partes*) of the court's recognition of a trademark as well-known. This section also explores whether this recognition constitutes a remedy that the court can grant to protect the trademark owner's rights. The third part of the article (IV) elucidates the rationale for remitting the case to the court of first instance for a new review, following the Grand Chamber's resolution of the primary issue. The article further expounds on the matters that the court of first instance was tasked with resolving during this new review. Finally (V), the article examines subsequent developments in the case, how the Grand Chamber's opinion in *Darnytsia v Lubnypharm* was incorporated into the Supreme Court's jurisprudence, and how the amendments to trademark legislation proposed in 2026 align with this jurisprudence.

2 THE NATURE OF THE DISPUTE, COURT DECISIONS AND LEGAL ISSUES RAISED IN THE CASE

The Firm initiated legal proceedings before a local commercial court against the Company and the IP Office, seeking the following relief:

- to recognise the designation 'Citramon' as a well-known trademark in Ukraine as of 1 January 1997 for goods in Class 05 of the Nice Classification, namely 'pharmaceutical preparations,' in the name of the Firm.
- to obligate the IP Office to record the recognition of the designation 'Citramon' as a well-known trademark in the List of well-known trademarks in Ukraine and to publish the relevant information in the official electronic bulletin.
- to declare invalid in its entirety Ukraine Certificate for the trademark 'Citramon-U', owned by the Company (issued on 15 February 2002 pursuant to an application dated 24 February 1997); and
- to require the IP Office to amend the Register to reflect the invalidation of the above certificate owned by the Company and to publish the relevant information in the official electronic bulletin.

The claim was supported by the following argument, as summarised: For many years, the Firm has utilised trademarks bearing the designation 'Citramon'. The Firm's pharmaceutical products are so well known in the market under this designation that, at least since 1 January 1997, the designation 'Citramon' should be considered a well-known trademark for the Firm's products. The Law of Ukraine No. 3689-XII dated 15 December 1993 'On the Protection of Rights to Marks for Goods and Services'⁵ (hereinafter referred to as the 'Trademarks Act') provides alternative mechanisms for recognising a trademark as well-known: either the Appeals Chamber of the IP Office or a court may recognise a trademark as such. The Firm has alleged that its rights have been violated by its competitor, the Company, which is distributing products on the market bearing a mark including the word 'Citramon'. The court is thus asked to recognise the designation 'Citramon' as a well-known mark and, in this regard, to protect the Firm's rights as the owner of a well-known mark by invalidating the certificate for the competitor's mark.

The Company objected to the claim, noting that it had been labelling its pharmaceutical products with the designation 'Citramon' since at least 1982. The certificate of the Company, the invalidation of which is requested by the Firm, was issued in 2002 upon the application filed in 1997. In this regard, the Company requested that the limitation period be applied to

5 Law of Ukraine No 3689-XII 'On the Protection of Rights to Marks for Goods and Services' of 15 December 1993 (amended 26 February 2026) <<https://zakon.rada.gov.ua/laws/show/3689-12>> accessed 28 February 2026.

both the claim for recognition of the designation 'Citramon' as a well-known mark and the claim for invalidation of the Company's certificate.

The court of first instance granted the Firm's claim in full, and the court of appeal upheld the judgment and concurred with the lower court's arguments in substantial respects.

The primary line of argument advanced by the courts can be summarised as follows. The core issue was whether the evidence presented demonstrated that the Firm had utilised the designation 'Citramon' to the extent that it had become a well-known trademark for the Firm's products. In light of the courts' determination that the response to the aforementioned question was in the affirmative, a decision was made to formally recognise the 'Citramon' mark as a well-known trademark owned by the Firm. Consequently, from the moment the court's decision is rendered, the mark attains this status, thereby empowering its owner to exercise the right accorded by the legislation to the owner of a well-known trademark. This right includes the ability to claim invalidation of the certificate for a competitor's mark whose utilisation is deemed to infringe upon the Firm's rights. In this regard, the courts considered the Company's references to the limitation period to be irrelevant.

In accordance with the courts' decisions, the limitation period for the claim for invalidation of the Company's certificate commenced on the date the designation 'Citramon' was recognised as a well-known trademark. This reasoning is based on the premise that 'the rights to the well-known trademark were confirmed only with the court's decision on the merits of this case and, therefore, were considered violated as of the date stated in the claim.'⁶

The Company appealed the Supreme Court.

The case was initially reviewed by the panel of judges of the chamber specialising in intellectual property disputes of the Commercial Cassation Court. However, the panel subsequently referred the case to the Grand Chamber. One of the circumstances in which a case may be referred to the Grand Chamber is that of the so-called exceptional legal issue. In this instance, the panel of judges identified two key aspects. (1) It is clear that the Trademarks Act provides for the recognition of a trademark as well-known by the Office or a court. These two pathways are considered alternatives, and the choice between them is at the applicant's discretion. Nevertheless, if the recognition of a trademark as being well-known in a court constitutes an alternative to the administrative procedure before the IP Office (where there is no specific infringer as a counterparty), how does this align with the fact that an individual or an entity should resort to a commercial court only to protect their violated rights or interests or to prevent such violation, in both cases by a particular person? (2) The second key question pertains to the applicability of the

6 See Case no. 910/13988/20 (Northern Commercial Court of Appeal, 29 September 2022) <<https://reyestr.court.gov.ua/Review/106539042>> accessed 10 February 2026. See also, *Darnytsia v Lubnypharm* (n 4) para 2.15.

provisions of the Civil Code on limitation of actions in instances where an individual seeks recognition of a well-known mark, contingent upon the infringement of that right by a specific individual or entity. If such an infringement is proved, it is essential to ascertain the point at which the rights of the owner of a well-known trademark have been violated, and the owner had the right to initiate legal action. Consequently, the limitation period should commence. The court of first instance dismissed the defendant's motion for the application of the limitation period because 'the Firm's right to submit such a claim to the court arises from the moment the court recognises the trademark as well-known'.⁷ This could be perceived as a paradox, since, in accordance with Ukrainian legal doctrine, the right to initiate legal proceedings arises from the moment of violation or threat of violation of a particular right and must be exercised in good faith, usually within the limitation period. However, it is equally evident that for a violation to occur, the existence of a specific right on the part of the plaintiff is an indispensable prerequisite.

The Court of Appeal clarified this contradictory logic. It stated that the rights to a well-known trademark are *confirmed* only by a decision on the merits of the dispute and are, therefore, considered violated as of the date stated in the claim.⁸

However, if the court decision is the starting point from which the right to sue arises, how can the plaintiff submit a claim in good faith without having such a right at the time of submission? This paradoxical situation arose from the formal recognition of the claim for recognition of a well-known trademark as a separate relief a plaintiff might seek. The decision to refer this case to the Grand Chamber indicates that this paradox had to be resolved.

In its appeal to the Supreme Court, the Company emphasised its efforts to demonstrate that, at the time the Firm claimed to utilise the 'Citramon' designation as a well-known trademark (i.e., 1 January 1997), Ukrainian IP law did not recognise such an object of intellectual property as a well-known trademark.

Additionally, the appellant highlighted the lower courts' failure to appropriately examine the evidence of the Company's long-standing utilisation of the contested mark⁹, and the courts' reliance on inadmissible evidence to establish the Firm's use of the said mark.¹⁰ Furthermore, the Company noted that the Firm did not utilise the 'Citramon' designation itself, but rather a related one that incorporated the word 'Citramon'. However, as of 1997, the Trademarks Act did not provide for the possibility of recognising a designation as a well-known trademark because a similar designation had been used.¹¹ Finally, the Company also drew the Court's attention to the fact that the limitation period should still

7 *Darytsia v Lubnypharm* (n 4) para 2.11.

8 *ibid*, para 2.15.

9 *ibid*, paras 4.2, 4.3.

10 *ibid*, para 4.4.

11 *ibid*, para 4.5.

have been applied to the main and derivative claims from the date indicated by the claimant as the starting point from which the claimant's alleged right to the mark should be traced, i.e., from 1 January 1997.

The long-standing use of the disputed mark, as well as the fact that the issue of creation of the disputed mark in the Soviet Union should have been analysed in this case, were also emphasised in a dissenting opinion by one of the judges of the panel of the Commercial Court of Cassation, which referred the case to the Grand Chamber.¹² It is, therefore, important to note that the case could also raise the issue of the special regime of trademarks that were a legacy of the Soviet era.

The question of whether the designation 'Citramon' had lost its distinctiveness at all and whether the word had become a generic designation of a medicinal product, which, as it turned out, was produced by several pharmaceutical plants in the Soviet Union¹³, could be considered close to this. However, it should be understood that the Supreme Court did not address this aspect, and that this omission is entirely consistent with the court's function. In the context of Ukrainian case law, the determination of whether a specific designation possesses a distinctive character has historically been approached by courts as a matter of fact rather than of law. Furthermore, this issue is traditionally regarded as requiring expert knowledge. The Supreme Court cannot interfere with how the lower courts determine issues of fact. It can only set aside a court's decision and remit the case to a lower court if a party claims that the decision was based on inadmissible evidence or if the lower court failed to examine evidence relevant to the case. In other words, the Supreme Court cannot intervene in this matter on its own initiative. An appeal to the Supreme Court must be clearly motivated by these violations of evidentiary matters. Since the party did not claim that the lower courts did not take into account any evidence on the basis of which they should have concluded that the designation had lost its distinctive features, as can be seen from the description of the appellant's arguments, the Supreme Court could not address this issue *sua sponte*.

Taking into account the arguments raised by the Company in its appeal to the Supreme Court, as well as the Court's limited powers to raise certain issues on its own initiative, the Grand Chamber first focused on the question of whether such an intellectual property object as a well-known trademark existed in law in 1997, i.e., when, according to the Firm, the designation 'Citramon' used by it allegedly acquired the characteristics of a well-known trademark.

12 Case no. 910/13988/20, Dissenting opinion of Judge I Benedysyuk (Commercial Cassation Court of the Supreme Court, 26 January 2023) <<https://reyestr.court.gov.ua/Review/108739263>> accessed 10 February 2026.

13 *Darnytsia v Lubnypharm* (n 4) para 7.23.

The Company argued that it did not. In doing so, it relied primarily on an analysis of domestic law, specifically the Trademarks Act, which at that time did not contain separate provisions for safeguarding and protecting well-known marks.

However, the Grand Chamber drew attention to the fact that such provisions were contained in Article 6*bis* of the Paris Convention for the Protection of Industrial Property (hereinafter the ‘Paris Convention’), as amended by the Stockholm Act of 1967,¹⁴ which came into force in the USSR on 26 April 1970. For Ukraine separately, the Paris Convention entered into force on 25 December 1991.¹⁵ In other words, even during the time of the USSR, when production of Citramon began, the law provided a basic mechanism for protecting rights to a well-known trademark.

As the Paris Convention contains rules that are directly applicable to matters concerning the safeguarding and protection of industrial property, as well as rules requiring countries of the Union (see Article 1) to regulate certain issues in their domestic legislation, the Grand Chamber concluded that the provisions of Article 6*bis*, stating that the court should protect the rights of the interested person (owner of a well-known trademark) at their request, were rules of direct application. In reaching this decision, the Grand Chamber referred to a similar interpretation of the Paris Convention set out in the 1968 Guide to the Application of the Paris Convention published by the World Intellectual Property Organization (hereinafter ‘WIPO’).¹⁶

Therefore, the Grand Chamber found that the Ukrainian IP law recognised a well-known trademark as an object of intellectual property in 1997 and subsequently, rejecting the Company’s assertion to the contrary.¹⁷

3 THE KEY ISSUE OF THE CASE: THE EFFECT OF THE COURT RECOGNISING A TRADEMARK AS WELL-KNOWN

Given that the main claim in this case was recognition of the ‘Citramon’ designation as a well-known trademark belonging to the Firm, the question arose as to the implications of such recognition. Domestic civil law and intellectual property law specifically mention the recognition of a well-known trademark. According to the Trademarks Act, a trademark may be recognised as well-known by either an administrative body (the Appeals Chamber of the IP Office) or a court.¹⁸ It also sets out the general procedure for such recognition by an administrative body. The detailed procedure for recognising a trademark as well-known by

14 Paris Convention for the Protection of Industrial Property [1977] UNTS 828/305.

15 *Darnytsia v Lubnypharm* (n 4) para 8.9.

16 See GHC Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (BIRPI 1968) doi:10.34667/tind.28637.

17 *Darnytsia v Lubnypharm* (n 4) para 8.15.

18 See Law of Ukraine No 3689-XII (n 5) art 25(1).

the Appeals Chamber is set out in a special Regulation.¹⁹ This involves deciding on an application from a person or entity who considers themselves to be the owner of a well-known trademark and entering information about the decision into the IP Office's List of well-known trademarks. This procedure vaguely resembles the trademark registration process, which may result in the issuance of a trademark certificate to the applicant and registration in the Register, which is publicly available and maintained by the IP Office.

According to the Trademarks Act, the holder of a trademark certificate is entitled to use the respective trademark. Therefore, the certificate is traditionally considered as a title document, and registration in the Register constitutes official State recognition of the certificate holder's rights, with *erga omnes* effect.

Consequently, if any person challenges the certificate holder's rights to the mark or attempts to terminate them in the future, they can do so by initiating a claim-based proceeding for the certificate's invalidation (cancellation) before the court.

As mentioned previously, the administrative procedure for recognising a mark as well-known is only remotely similar to the procedure for issuing a certificate. However, rather than receiving a certificate, the applicant receives a decision from the Appeals Chamber, and rather than being registered in the Register, the decision is entered into the List of well-known marks.

Adopting this simplistic analogy, the Appeals Chamber's decision to recognise a trademark as well-known, along with the information contained in the List of well-known trademarks, should be accorded *erga omnes* effect. Furthermore, if we consider only that the law states that a trademark may be recognised as well-known by either the IP Office or a court, and that the law does not distinguish between the effects of these two forms of recognition, we can conclude that they are alternative forms with the same character, i.e., they have an effect on an unlimited number of third parties. After all, information on court decisions recognising a trademark as well-known is also subject to inclusion in the above List.

However, this oversimplified logic raises several issues.

So far, the courts in Ukraine have considered the issue of recognising a trademark as well-known in claim-based proceedings, in which only claims brought by a person whose rights have been infringed are reviewed against the infringer. The current commercial procedural law does not provide for any other procedure. Notably, Ukraine is planning to establish a specialised High Court for Intellectual Property to adjudicate disputes related to intellectual property rights.

19 See Order of the Ministry of Economic Development, Trade, and Agriculture of Ukraine No 433 of 2 March 2021 'Regulations of the Appeals Chamber of the National Intellectual Property Authority' [2021] Official Gazette of Ukraine 39/2336. These Regulations superseded the Procedure for Recognizing a Mark as Well-Known in Ukraine by the Appeals Chamber of the State Intellectual Property Service of Ukraine, approved by Order no. 228 of the Ministry of Education and Science of Ukraine dated 15 April 2005.

If established, the procedural law may be improved, including by establishing a separate procedure for recognising a trademark as well-known, irrespective of disputes with particular infringers. This would allow the court to inform the general public about such cases and involve all interested parties. In such a procedure, the court's powers to establish the circumstances of the trademark's use and whether it complies with the characteristics of a well-known trademark could be broader, as they would not be limited by the principles of party autonomy and adversarial process that apply in claim-based proceedings and restrict the court's ability to obtain evidence and determine the circumstances relevant to the case.

However, the current procedural law, by which the courts were guided at the time of the case, did not provide for all these opportunities.

It is, therefore, imperative that there exists not only a plaintiff, who is the alleged owner of a well-known trademark, but also a defendant who has infringed upon the rights of the former. It is then difficult to accept that the court's decision to resolve a dispute between these persons, who, according to the principles of party autonomy and the adversarial process, have the power to limit the court in what it finds and decides, can have an *erga omnes* effect.

This also creates grounds for abuse, since obtaining a court decision recognising a mark as well-known, which would have this *erga omnes* effect, could allow an interested party to initiate a bad-faith claim against a 'friendly' defendant.

The Paris Convention and the Trademarks Act constitute the legal framework within which the safeguarding and protection of rights to a well-known mark, irrespective of its registration status, is achieved. The registration of a trademark is subject to time limits, and if the owner fails to renew the registration, the exclusive rights to the trademark expire. Termination of these rights may also occur if the owner fails to utilise the trademark for a stipulated period. However, the Trademarks Act does not contain any provisions about the validity of rights to an unregistered well-known trademark. In Ukrainian procedural doctrine, a court decision resolving a commercial dispute and having the effect of *res judicata* is generally not considered to have a duration (the issue is not the period for enforcement, but rather the period during which the court's determination is valid). It is evident that, in acknowledging the court's ability to grant recognition of a well-known mark as a distinct remedy, the issue of the duration of such recognition becomes pertinent. Moreover, should the *erga omnes* effect of such a decision be recognised, the magnitude of the problem would increase, as it is to be expected that there would be a mechanism for interference with such a court decision by other interested parties. Otherwise, in a dispute between two persons, the status of a well-known trademark may be established indefinitely. The claimant will be recognised as having rights that are not contingent on changes in the trademark's state of use (for example, the trademark may cease to be so recognisable over time) or on temporal limitations. This stands in direct opposition to the fundamental principles of the doctrine of exclusive rights.

This approach also creates another logic 'trap'. As previously stated, an effective recourse for the owner of a well-known trademark to protect their rights against another person using a similar trademark for which that person holds a valid certificate is to file a claim to invalidate that certificate. However, it should be noted that such a claim is subject to a limitation period. Ukrainian courts have developed well-established jurisprudence in holding that the limitation period is calculated from the moment when a person becomes aware of, or could reasonably be expected to become aware of, the violation of their right or the identity of the individual responsible for the violation. It can thus be concluded that in the event of a court decision recognising a trademark as being well-known, the limitation period for claims against specific infringers is also calculated from the moment of that decision. The courts of first instance and appeal in this case fell into this perplexing paradox.

The Grand Chamber was not satisfied with this simplistic analogy, which also created the basis for the paradox described above. As can be seen from its ruling, the Grand Chamber delved into the legal meaning of both ways of recognising a trademark as well-known, i.e., in administrative proceedings and in court.

It became apparent that there was no ground for drawing an analogy between, on the one hand, a trademark certificate and its registration in the Register, which has an *erga omnes* effect, and, on the other hand, the decision of the Appeals Chamber and the entry of information about it in the List of well-known marks.

The administrative procedure for reviewing applications for recognition of a trademark as well-known in the Appeals Chamber, analysed by the Grand Chamber, although not adversarial, enables the Appeals Chamber to establish the necessary circumstances *ex officio* to decide whether a trademark has the characteristics of a well-known one. However, this procedure does not provide an effective mechanism for involving other interested parties. Moreover, the aforementioned Regulation, which stipulates this procedure, expressly states that the Appeals Chamber's decision is binding on the parties concerned, namely the applicant and the IP Office. The decision in question does not possess an *erga omnes* effect. This decision binds the IP Office, as it will prevent the registration of identical or confusingly similar marks.

The recognition of a trademark as well-known by a court differs from the above administrative procedure. As previously emphasised, a court decision in a commercial dispute does not confer new rights; rather, its function is to protect existing rights. Therefore, the rights of the owner of a well-known trademark must already exist and must be violated. It is only in these circumstances that the court can provide adequate protection.

In the scenario where the owner of a well-known trademark alleges that the rights to the said trademark are being infringed by the owner of another trademark, which the latter uses based on the respective trademark certificate registration, the rights of the owner of the well-known trademark should be protected in a manner that results in the invalidation of the certificate, thereby preventing the infringer from using the identical or similar trademark.

Accordingly, the Grand Chamber has determined that the recognition of a trademark as well-known does not constitute a legal remedy in itself but rather serves as a prerequisite for the court to protect the right of the trademark's owner against a specific infringement in a manner that is effective.²⁰ In summary, the conclusion that the mark is well-known constitutes an integral element within the court's reasoning, rather than representing an independent declaratory judgment. Consequently, the conclusion regarding the trademark does not have *erga omnes* effect; rather, it applies only to the parties to the specific dispute. In this opinion, the Grand Chamber also referred to the comments of the WIPO International Bureau, which emphasised the inter partes effect of any court decision establishing that a mark is well-known.²¹

The Grand Chamber was also tasked with elucidating the consistency of its aforementioned opinion with the explicit provisions of the Commercial Procedural Code (Articles 20(2) and 20 (3)), which establish a distinct category of cases within the ambit of commercial courts' jurisdiction. This category pertains to 'cases related to the recognition of a trademark as well-known'.²² Furthermore, the Grand Chamber was tasked with addressing the utilisation of the term 'a trademark recognised as well-known in accordance with the procedure established by law' as set out in Article 494 of the Civil Code.²³

For proponents of a literal interpretation of the law, these could be significant arguments in favour of a separate declaratory judgment on the recognition of a trademark as well-known.

However, the Grand Chamber explained that the rules on remedies in Ukrainian law are an integral part of substantive, not procedural, law.²⁴ In the Ukrainian legal tradition, the division of branches of law into substantive and procedural law is deeply entrenched. In view of this, it is evident that the provisions of procedural law, including those concerning the jurisdiction of commercial courts in adjudicating cases about the recognition of a trademark as well-known, do not govern legal remedies. In essence, the case under consideration involves a dispute wherein the plaintiff, the owner of a well-known trademark, seeks to invalidate a competing trademark certificate. This case falls within the purview of recognising a trademark as well-known. However, in such circumstances, the court's approach is not to issue a declaratory judgment recognising the trademark as well-known. Instead, the court employs the most effective and concrete remedy available, namely the invalidation of the competing trademark's certificate.

20 *Darnytsia v Lubnypharm* (n 4) paras 8.36, 8.37.

21 See International Bureau of the World Intellectual Property Organization, *Protection of Well-Known Marks: Memorandum* (WKM/CE/III/2, 20 August 1997) <https://www.wipo.int/edocs/mdocs/mdocs/en/wkm_ce_iii/wkm_ce_iii_2.pdf> accessed 10 February 2026.

22 *Darnytsia v Lubnypharm* (n 4) para 8.31.

23 *ibid*, para 8.43.

24 *ibid*, para 8.32.

The Grand Chamber also did not interpret the provision of the Civil Code on 'a trademark recognised as well-known in accordance with the procedure established by law' literally as requiring courts to recognise a trademark as well-known in the operative part of the judgment, i.e., by way of granting this recognition as declaratory relief. One of the main reasons for not adopting this interpretation has already been outlined above: it would result in a court decision recognising a mark as well-known being perceived as having an *erga omnes* effect. It would constitute a way of acquiring rights to a trademark rather than a tool for its protection. The idea that a court decision resolving a commercial dispute is not a means of acquiring subjective rights, but only an instrument for their protection, is deeply rooted in Ukrainian case law.²⁵

It is important to note that the question of whether recognition of a well-known mark constitutes a separate remedy was not raised in the statements of the parties.

The Supreme Court raised this issue *sua sponte*, as the appropriateness of remedies is decided ex officio by the court in Ukraine. Since December 2017, new versions of the procedural codes have come into force, assigning the courts the task of *effectively* protecting violated rights. In jurisprudence, this, as well as the requirement of Article 13 of the European Convention on Human Rights to provide effective remedies for the protection of conventional rights, as interpreted by the courts, has become the basis for the doctrine that the court independently assesses the appropriateness and effectiveness of the remedy requested by the plaintiff. If the plaintiff insists on obtaining protection in a manner that the court deems to be ineffective or generally inadequate, this constitutes an independent ground for dismissing the claim that embodies the request for an inadequate remedy.

This approach is predicated on the court's assumption of responsibility for ensuring that the awarded remedy is effectively enforceable and leads to the real protection of the infringed right. That is to say, the plaintiff does not have to go to court again with subsequent claims if one judgment does not change their situation. This approach also implies that the defendant should not be held liable if the plaintiff has accumulated several claims against him that were not necessary. It is important to note that the plaintiff must pay a court fee for each claim, and if the claim is satisfied, the defendant typically bears the financial burden. In instances where the plaintiff, whose right has been violated and can be protected in one particular way, submits a comprehensive list of claims that are devoid of practical significance and whose satisfaction by the court does not result in tangible protection for

25 See for example, Case no. 760/20948/16-ц (Grand Chamber of the Supreme Court, 10 April 2024) para 46 <<https://reyestr.court.gov.ua/Review/118520073>> accessed 10 February 2026; Case No 916/1608/18 (Grand Chamber of the Supreme Court, 19 May 2020) para 76 <<https://reyestr.court.gov.ua/Review/89819917>> accessed 10 February 2026; Case no. 909/337/19 (Grand Chamber of the Supreme Court, 23 June 2020) para 78 <<https://reyestr.court.gov.ua/Review/90359317>> accessed 10 February 2026; Case No 923/1283/16 (Commercial Cassation Court of the Supreme Court, 22 May 2018) para 14 <<https://reyestr.court.gov.ua/Review/74346080>> accessed 10 February 2026.

the plaintiff, the court does not satisfy these superfluous claims and, consequently, does not impose the burden of costs on the defendant.

As is evident from the Grand Chamber's ruling, this approach was applied to the claimant's request that the IP Office enter information regarding the recognition of the trademark as well-known in the List. In light of the *inter partes* effect of the court's decision on the protection of rights to a well-known trademark and given the fact that the List is exclusively informational and its data has no effect on third parties, only the IP Office, the claim to enter data into the List was deemed by the Grand Chamber to be incapable of protecting the rights of the owner of a well-known trademark.

Furthermore, as the Grand Chamber has held that the effective protection of the rights of the owner of a well-known trademark from infringements in the form of use of a similar mark by the owner of a competing certificate can be achieved by invalidating the competing certificate, it would, therefore, have been necessary for the courts to focus on this claim as the main one.

4 SUBSEQUENT QUESTIONS OF THE CASE: GOOD FAITH OF REGISTRATION AND USE OF A SIMILAR MARK BY A COMPETITOR

Consequently, the Grand Chamber did not concur with the simplistic approach adopted by the lower courts in finding the Company's certificate invalid. They regarded this matter as one that should be resolved automatically, upon the resolution of the issue of recognising the trademark as well-known: once the mark is recognised as well-known, its owner may exercise the right to prohibit the use of a competing mark by invalidating the certificate.

In this particular logical construction, the circumstances of the Company's use of the 'Citramon' designation (including the question of whether the use of this mark was in good faith) were mistakenly dismissed as irrelevant. In the opinion of the Grand Chamber, the courts failed to examine the relevant evidence submitted by the Company. Accordingly, as the courts effectively suspended their deliberations at an intermediate stage in regards to the circumstances relevant to the case, thereby reducing the subject of proof²⁶, the Grand Chamber remitted the case to the court of first instance for a new review of two claims brought by the plaintiff (namely the invalidation of the Company's certificate and the obligation of the IP Office to amend the Register)²⁷ for the purpose of examining the evidence relating to the aforementioned circumstances.

26 *Darnytsia v Lubnypharm* (n 4) para 8.94.

27 *ibid*, para 9.4.

The issue of good faith on the part of the Company in its use of the 'Citramon' designation was also a matter of relevance for the application of the limitation period.

The Grand Chamber clarified the alignment between Article 6*bis* of the Paris Convention, stipulating that the time limit for filing a claim for cancellation of a competing mark is 'at least five years from the date of registration' and domestic civil law provisions on limitation of actions.

As previously mentioned, the Ukrainian courts have a well-established approach in their jurisprudence that the limitation period commences from the moment an individual becomes aware of, or could reasonably be expected to become aware of, the infringement or the identity of the infringer. This latter point is of particular significance, as without such knowledge, it would not be possible to initiate legal proceedings against the specific infringer. The general limitation period is set out in Article 257 of the Civil Code of Ukraine and is three years.

The Grand Chamber concluded that the limitation period for invalidation of a trademark certificate is three years from the date on which the owner of a well-known trademark became aware, or could not have been unaware, of the infringement of their rights by the use of a registered competing mark. The owner may become aware of such use, for example, as a result of a competitor introducing products under such a mark. Subsequently, a period of three years should be calculated as described; however, a minimum of five years must be calculated from the date of registration of the competing trademark.

This approach is applicable in instances where the competing trademark was registered in good faith, as the Paris Convention imposes no temporal restrictions on the cancellation of a registration undertaken in bad faith. In view of this, it is justified that the Grand Chamber also set out some guidelines as to what circumstances the courts should examine to draw conclusions about this aspect of the registration of a competing trademark.

It is noteworthy that the Grand Chamber had to refer to the CJEU's case law to illustrate that, in principle, two competitors can use in good faith the same word that is the central element of both competitors' trademarks.²⁸

5 IMPACT OF THE GRAND CHAMBER'S OPINION

5.1. Further Developments in the Case

During the rehearing before the court of first instance, the court focused on the evidence of the use of trademarks containing the 'Citramon' designation by the Firm and the Company. As a result, the court found that due to the long-term use of this designation by many

28 *ibid*, para 8.68.

manufacturers, including the parties to this case, it had lost its distinctive character. The court concluded that the ‘Citramon’ designation could be included in the trademark as an unprotected element that does not occupy a dominant position in the trademark’s design.²⁹

Having found that the designation did not meet the criteria for protectability due to a lack of distinctive character, the court consequently concluded that there was no evidence that the ‘Citramon’ designation was widely known as a designation for the Firm’s products specifically at the time alleged by the plaintiff.

Although the court had already reached the conclusion outlined above, it nevertheless examined the question of when the plaintiff should be deemed to have become aware that the Company was using the ‘Citramon’ designation. Having established a specific date, the court did not, however, conclude that the statute of limitations for challenging the Company’s competing trademark had expired, nor did it examine the issue of whether the Company had registered its trademarks in good faith.

Overall, this may indicate that the court of first instance took into account the Grand Chamber’s opinion regarding the sequence in which the issues should be addressed in cases concerning the protection of rights to a well-known trademark: first, it must be determined whether the plaintiff holds the rights to a well-known trademark, and only if the answer to this question is in the affirmative should it be determined whether the opponent’s registration of a competing trademark was in good faith and, depending on that determination, whether the statute of limitations applies and, if so, whether it has expired.

The court of appeal, in reviewing the Firm’s appeal of this decision, upheld the findings of the court of first instance that the ‘Citramon’ designation had lost its distinctiveness. Furthermore, in light of this conclusion, it considered the determination of the date from which the Firm should be deemed to have been aware of the Company’s use of the competing mark to be erroneous and, in essence, superfluous.³⁰

At the end of 2025, the Firm sought a review of these court decisions in the Supreme Court, and in January 2026, on the day of the first hearing on its appeal, the Firm filed a motion to dismiss the case. Under Ukrainian procedural law, a plaintiff may withdraw a claim in the Court of Cassation, even if the decisions of the lower courts were not in its favour. In light of this, the Supreme Court granted the motion, declared the lower courts’ decisions invalid, and dismissed the case. This procedural outcome eliminates the preclusive effect of the lower courts’ factual findings, which may be significant to the plaintiff. At the same time, the Firm can no longer initiate a similar dispute.

29 See Case no. 910/13988/20 (Commercial Court of Kyiv, 14 May 2025) <<https://reyestr.court.gov.ua/Review/127497932>> accessed 10 February 2026.

30 See Case no. 910/13988/20 (Northern Commercial Court of Appeal, 2 October 2025) <<https://reyestr.court.gov.ua/Review/131156225>> accessed 10 February 2026.

Consequently, this case no longer permits a complete examination of the application of the approach established by the Grand Chamber in all its aspects (establishing the characteristics of a well-known trademark, determining the good faith of the registration of a competing trademark, and applying the statute of limitations).

5.2. The Reception of the Grand Chamber's Opinion in the Jurisprudence of the Supreme Court

The Grand Chamber's opinion in *Darnytsia v Lubnypharm* influenced the jurisprudence in disputes related to well-known trademarks immediately following the publication of the ruling.

In another case concerning the protection of rights to a well-known trademark, which was pending before the Supreme Court at the same time, the plaintiff withdrew the claim seeking recognition of its trademark as well-known following the publication of the Grand Chamber's opinion. As for the remaining claims, the case was also remitted to the court of first instance for a new trial.³¹

In light of the Grand Chamber's opinion regarding the *inter partes* effect of a court decision recognising a trademark as well-known, the Supreme Court also ruled in 2024 that it was correct to dismiss appeals and refuse substantive review of court decisions recognising a trademark as well-known where the appellant was not a party to those proceedings but argued that if such recognition were to have *erga omnes* effect, it would affect its interests. Thus, the Court reiterated that such a decision has no *erga omnes* effect with respect to persons who were not parties to the proceedings.³²

5.3. The Impact of the Grand Chamber's Ruling on Legislative Changes

It should be noted that, for several years now, there has been an ongoing discussion among intellectual property law experts about the need for comprehensive reform of the Trademarks Act. The IP Office has organised several such discussions.

Most recently, on July 15, 2026, the Ministry of Economy, Environment, and Agriculture of Ukraine published the draft of a revised Trademarks Act.³³

The draft law fully incorporates the approach established by the Grand Chamber in *Darnytsia v Lubnypharm*. Its Article 12 addresses well-known trademarks and explicitly states, among other things, that '*the recognition of a trademark as well-known is not binding*

31 See Case no. 910/4085/23 (Commercial Cassation Court of the Supreme Court, 16 July 2024) <<https://reyestr.court.gov.ua/Review/120485335>> accessed 10 February 2026.

32 See Case no. 522/10809/20 (Civil Cassation Court of the Supreme Court, 29 May 2024) <<https://reyestr.court.gov.ua/Review/119559718>> accessed 10 February 2026.

33 Draft Law of Ukraine 'On Amendments to the Civil Code of Ukraine Regarding Trademarks' (15 July 2026) <<https://www.me.gov.ua/view/a32a989e-6a43-43dd-b0bb-5b0c5ee0fe62>> accessed 17 July 2026.

on persons who are not parties to the case', which is consistent with the Grand Chamber's approach regarding the *inter partes* effect of a decision in which a trademark is recognised as well-known. The draft's authors even went as far as to provide a degree of detail rarely found in legislation regarding the remedies available to protect trademark owners' rights, since the law of remedies is an area traditionally shaped by case law. Nevertheless, in the same Article 12 of the draft, its authors proposed including the following provision: '*the judicial recognition of a trademark as well-known is not an independent remedy for the protection of a civil right or legally protected interest*'.

6 CONCLUSIONS

The case reviewed by the Grand Chamber demonstrated that the Supreme Court has consistently upheld the approach established in its case law since 2017, emphasising the court's responsibility to provide an adequate and effective remedy.

In considering this case from the aforementioned perspective, it becomes evident that the most appropriate remedy for the court to grant to a plaintiff who asserts ownership of a well-known trademark and has sought court intervention to protect against a competitor's use of a similar registered trademark is the cancellation of the registration of a competing trademark, accomplished by satisfying the claim to invalidate the competitor's trademark certificate and requiring the IP Office to enter that information in the Register. The judicial recognition of a trademark's well-known status is made by the court when considering such a dispute as a condition for granting the aforementioned relief, and not as an independent declaratory judgment.

This approach is advantageous in that it preserves the *inter partes* effect of the court's decision and the implications of the conclusion that the trademark is well-known, and it does not distort the time-limited mechanism for cancelling a good-faith registration of a competing trademark set out in Article 6*bis* of the Paris Convention. Such a distortion would undoubtedly ensue if it were hypothesised that the owner of a well-known trademark could, at any given moment, initiate a standalone claim-based proceeding for the recognition of the trademark as well-known. Consequently, upon the satisfaction of this claim and the granting of recognition as declaratory relief, the limitation period for the subsequent cancellation of the registration of a competing trademark would begin to elapse. This effectively negates any potential defence that may be asserted by a *bona fide* defendant who is the owner of a registered competing trademark, by invoking the limitation period.

The Grand Chamber in *Darnytsia v Lubnypharm* held that in modern commercial litigation, where, apart from bankruptcy proceedings, commercial litigation consists exclusively of claim-based proceedings with their inherent adversarial character and party autonomy, it is precisely within claim-based proceedings that the rights of the owner of a well-known trademark can be protected. However, the Grand Chamber's opinion was formulated in

such a way as not to preclude the fundamental possibility of establishing a procedure similar to separate proceedings in civil cases, where the court would be granted procedural authority to involve all interested parties to establish, with *erga omnes* effect, the well-known status of a trademark. The amendments proposed by the IP Office in the draft Trademarks Act are aimed at retaining judicial recognition that operates only *inter partes* in commercial proceedings, which is preferable because this approach generally aligns closely with the purpose of litigation in commercial courts, which is the effective protection of rights against particular infringements by identified parties.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Практична нотатка

ВИЗНАННЯ СУДОМ ТОРГОВЕЛЬНОЇ МАРКИ
ДОБРЕ ВІДОМОЮ З ЕФЕКТОМ *INTER PARTES*
ЯК ЕЛЕМЕНТ МОТИВУВАЛЬНОЇ ЧАСТИНИ СУДОВОГО РІШЕННЯ,
А НЕ САМОСТІЙНЕ ДЕКЛАРАТИВНЕ РІШЕННЯ:
КОМЕНТАР ДО СПРАВИ «ЦИТРАМОН»

Костянтин Пільков

АНОТАЦІЯ

Вступ. Українське законодавство у сфері охорони прав на торговельні марки передбачає можливість визнання торговельної марки добре відомою як в адміністративному, так і в судовому порядку. Ці механізми зазвичай розглядаються як альтернативні способи захисту, доступні власнику торговельної марки, кожен із яких має наслідки *erga omnes*. Велика Палата Верховного Суду мала визначити, чи узгоджується таке розуміння з принципом, згідно з яким судові рішення у господарському спорі є обов'язковим лише для сторін цього спору, тобто має лише ефект *inter partes*.

Методи. У дослідженні використовуються доктринальний та нормативний методи. Порівняльно-правовий доктринальний аналіз, спрямований на з'ясування розвитку доктрини *inter partes*-ефекту судових рішень у сучасній українській судовій практиці, поєднано з методом аналізу конкретної справи, що ілюструє практичні наслідки виявленої доктринальної проблеми. У статті також застосовуються методи тлумачення та аналізу юридичної аргументації для реконструкції мотивів судового

рішення. Нормативний аналіз спрямовано на оцінку рішення Великої Палати крізь призму вимог змагального судочинства, встановленого законом обов'язку судів забезпечувати належний та ефективний спосіб судового захисту, а також можливості примусового виконання судових рішень.

Результати та висновки. Рішення Великої Палати підтверджує усталений підхід Верховного Суду, який наголошує на обов'язку судів забезпечувати належний та ефективний спосіб захисту. У спорах щодо добре відомої торговельної марки та зареєстрованої торговельної марки іншої особи належним способом захисту є не самостійне декларативне рішення про визнання торговельної марки добре відомою, а визнання недійсною реєстрації іншої торговельної марки із зобов'язанням Українського національного офісу інтелектуальної власності та інновацій внести запис про її скасування. Водночас суд має встановити, що торговельна марка позивача є добре відомою, оскільки це є необхідною передумовою застосування зазначеного способу захисту. Такий підхід забезпечує збереження *inter partes*-ефекту судових рішень. Він також запобігає обходу строку, передбаченого статтею 6bis Паризької конвенції для скасування добросовісно зареєстрованої торговельної марки іншої особи, оскільки можливість окремого судового провадження щодо визнання торговельної марки добре відомою фактично дозволила б обійти встановлений строк для оскарження такої реєстрації та позбавила б добросовісних власників зареєстрованих торговельних марок права посилалися на вплив встановленого строку як на підставу для захисту.

Ключові слова: добре відома торговельна марка, ефект *erga omnes*, доктрина способів правового захисту, добросовісність, *inter partes*-ефект судового рішення, *res judicata*.

Case Note

PROCEDURAL GAPS IN UAE SOCIAL MEDIA REGULATION: ACCESS TO JUSTICE AND REFORM PERSPECTIVES

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ABSTRACT

Background: The rapid expansion of social media platforms has significantly altered public discourse and media governance, posing complex legal challenges regarding content regulation and access to justice. In the United Arab Emirates (UAE), Federal Decree-Law No 55 of 2023 represents a major legislative development aimed at modernising media regulation in the digital era. However, questions remain regarding the adequacy of procedural safeguards available to individuals affected by unlawful or harmful online content. This study evaluates the effectiveness of the UAE regulatory framework in ensuring meaningful access to justice in social media content disputes and identifies areas requiring legislative reform.

Method: The analysis adopts a doctrinal approach, focusing on the UAE legal framework, with limited comparative reference to European regulatory standards, including the Digital Services Act and relevant European Court of Human Rights (ECtHR) jurisprudence.

Results and Conclusions: *The study identifies gaps in transparency, appeal mechanisms, judicial review, and procedural clarity that may limit effective user protection. Targeted reforms, particularly strengthening procedural guarantees and independent review mechanisms, are necessary to enhance legal certainty and balance freedom of expression with the protection of individual rights in the UAE's digital environment.*

1 INTRODUCTION

This contribution adopts a doctrinal legal methodology centred on the systematic interpretation of statutory texts, regulatory instruments, and judicial practice relevant to social media content governance in the United Arab Emirates. The primary analytical focus lies on Federal Decree-Law No. 55 of 2023¹ and its interaction with Federal Decree-Law No. 34 of 2021², as well as associated executive regulations and institutional mandates governing media oversight.

This study is designed as a doctrinal and reform-oriented analysis. It aims to identify regulatory gaps and propose targeted legal improvements, rather than to provide a comprehensive empirical or comparative analysis. In applying this methodology, the analysis examines the structure, scope, and procedural implications of the relevant legal provisions, with particular attention to how regulatory standards are formulated, enforced, and challenged in practice. This approach enables the identification of procedural gaps not only through the absence of explicit legal provisions but also through the limited accessibility and clarity of existing mechanisms.

To contextualise the reform analysis, the study incorporates a limited comparative dimension by referencing selected European regulatory instruments, most notably the Digital Services Act,³ and relevant ECtHR jurisprudence concerning freedom of expression and procedural guarantees.⁴

The comparative element is employed as a normative benchmark rather than a full structural comparison, enabling the evaluation of procedural safeguards such as notice-and-action mechanisms, transparency obligations, appeal procedures, and judicial review standards. The selection of sources is based on their direct relevance to the regulatory

1 UAE Federal Decree-Law No (55) of 2023 Regulating Media (adopted 2 October 2023) [2023] Official Gazette 762.

2 UAE Federal Decree-Law No (34) of 2021 on Countering Rumors and Cybercrimes (adopted 20 September 2021) [2021] Official Gazette 712.

3 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act) [2022] OJ L 277/1.

4 Judit Bayer, 'Procedural Rights as Safeguard for Human Rights in Platform Regulation' (2022) 14(4) Policy & Internet 755, doi:10.1002/poi.3.298.; Lorna Woods, 'Digital Freedom of Expression in the EU' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017) 394, doi:10.4337/9781782546405.00029.

framework governing social media content in the UAE. The analysis prioritises primary legislative instruments, including federal decree-laws and related regulatory provisions, as well as relevant judicial practice where available.⁵

For the purposes of this study, access to justice is understood as the ability of individuals to effectively challenge regulatory decisions and seek remedies through transparent, accessible, and procedurally fair legal mechanisms.

The analytical framework is structured around four evaluative criteria:

- (1) clarity of regulatory standards governing digital content;
- (2) institutional allocation of supervisory powers;
- (3) availability and accessibility of procedural remedies; and
- (4) proportionality and judicial oversight mechanisms.

These criteria are applied throughout the analysis to assess whether the current UAE framework adequately balances freedom of expression with the protection of individual rights while ensuring meaningful access to justice in the digital environment.

2 THE LEGAL NATURE AND REGULATORY CONTEXT OF SOCIAL MEDIA PLATFORMS

The regulation of social media content requires a clear understanding of platforms as legal actors. Social media platforms are generally understood as digital systems enabling user-generated content and interaction within networked environments.⁶ Unlike traditional media, these platforms decentralise editorial control and allow users to function simultaneously as content creators and distributors.⁷

From a legal perspective, their defining feature lies in their hybrid role as intermediaries that facilitate content dissemination while exercising varying degrees of content moderation

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- 5 Habiba Al Shamsi, 'Enhancing Digital Transactions with Blockchain Technology: Descriptive-Analytical Study' (2024) 7(3) Access to Justice in Eastern Europe 485, doi:10.33327/AJEE-18-7.3-a000322.
 - 6 Caleb T Carr and Rebecca A Hayes, 'Social Media: Defining, Developing, and Divining' (2015.) 23 (1) Atlantic Journal of Communication 46, doi:10.1080/15456870.2015.972282; Andreas M Kaplan and Michael Haenlein, 'Users of the World, Unite! The Challenges and Opportunities of Social Media' (2010) 53(1) Business Horizons 59, doi:10.1016/j.bushor.2009.09.003.
 - 7 Mohamed El-Erian and others, 'The Role of Artificial Intelligence in Enhancing Corporate Governance and Achieving Sustainable Development' (2026) 9(1) Access to Justice in Eastern Europe 208, doi:10.33327/AJEE-18-9.1-a000177.

and algorithmic control. This structure complicates traditional distinctions among publisher, host, and distributor, particularly regarding liability and procedural safeguards.⁸

While social media platforms vary in format, their legal significance lies in their regulatory impact rather than technical classification.⁹ Different platform models pose distinct legal challenges, including copyright, misinformation, privacy, and algorithmic amplification. UAE regulatory instruments reflect this diversity but do not adopt the granular classification model in the Digital Services Act, which differentiates obligations by platform size and systemic risk.¹⁰

European legislation has progressively clarified this role. The Digital Services Act (Regulation (EU) 2022/2065) establishes a harmonised framework for intermediary services and introduces procedural obligations, including notice-and-action mechanisms and internal complaint systems.¹¹

In the UAE, social media platforms are regulated indirectly through broader legislative instruments. Federal Decree-Law No. 34 of 2021 criminalises unlawful online content,¹² while Federal Decree-Law No. 55 of 2023 extends regulatory oversight to digital media activities.¹³ However, these instruments focus primarily on content control rather than intermediary liability structures.

This limitation becomes particularly relevant in the context of access to justice, as the absence of differentiated procedural obligations such as complaint mechanisms, transparency requirements, and appeal processes may restrict users' ability to effectively challenge platform decisions or seek remedies.

Social media platforms play a central role in contemporary public discourse and digital governance. Their capacity to shape information flows and influence public opinion has intensified legal concerns regarding content moderation and the protection of user rights.

This regulatory significance highlights the need for legal frameworks that integrate procedural safeguards and accessible remedies. In this context, access to justice emerges as a key dimension of digital governance, requiring mechanisms that enable individuals to effectively challenge decisions and seek legal redress.

8 Enas Mohammed Alqodsi, 'Extended Producer Responsibility in E-Waste Recycling: A Secure Path to a Sustainable Future for UAE' (2025) 33(1) Sustainable Development 309, doi:10.1002/sd.3107.

9 Kaplan and Haenlein (n 6).

10 Maya Khater, 'Electronic Intellectual Terrorism and the Islamic Efforts to Combat It' (2024) 68(1) Islamic Quarterly 59.

11 Regulation (EU) 2022/2065 (n 3).

12 UAE Federal Decree-Law No (45) of 2021 Concerning the Protection of Personal Data (adopted 20 September 2021) [2021] Official Gazette 712.

13 UAE Federal Decree-Law No (55) of 2023 (n 1).

For the purposes of this study, social media platforms are understood as digital intermediaries that facilitate user-generated content while exercising moderation functions, making them central to disputes concerning unlawful online expression and access to justice.

3 SUBSTANTIVE CONTENT STANDARDS IN THE UAE LEGAL FRAMEWORK

The rapid expansion of social media platforms has significantly altered the way individuals communicate, exchange information, and participate in public discourse. While these platforms facilitate freedom of expression and access to information, they also pose legal risks to privacy, reputation, consumer protection, public order, and social stability.¹⁴ In response, the United Arab Emirates has adopted a regulatory approach that focuses primarily on the substantive legality of online content rather than on intermediary liability structures. This approach is reflected in the UAE Cybercrime Law and related legislation, which prohibit a broad range of online activities including defamation, privacy violations, dissemination of false information, and content deemed harmful to public order, social values, or individual rights.

The UAE legal framework adopts a content-centred regulatory model. Under this model, liability is primarily attached to the person who creates, publishes, or disseminates unlawful content. Consequently, courts have played an important role in clarifying the boundaries of lawful digital expression and in determining the extent to which online communications may give rise to criminal and civil consequences.¹⁵ Judicial practice demonstrates a consistent willingness to enforce substantive content standards even when the disputed content is published on personal social media accounts rather than in traditional media outlets.

A prominent example is the Dubai Court of Cassation Case No. 55/2023,¹⁶ which concerned a social media user who published a critical review of a hospital on Instagram. The defendant argued that the publication was motivated by dissatisfaction with medical services and was made in good faith. Nevertheless, the Court rejected these arguments and held that the public dissemination of statements that damaged the hospital's reputation constituted defamation under the applicable cybercrime legislation. The Court further clarified that neither emotional motivation nor the author's subjective belief in the accuracy of the statements was sufficient to exclude liability. This ruling is particularly

14 Basem Mohamed Fadel Madbouly, 'Tort Liability for Promoters of Rumors Via Social Media Platforms' (2022) 8(1) *Journal of Legal and Economic Studies* 343, doi:10.21608/JDL.2022.222366 [in Arabic].

15 Robin Kabha and others, 'Comparison Study between the UAE, the UK, and India in Dealing with WhatsApp Fake News' (2019) 10 *Journal of Content, Community and Communication* 176, doi:10.31620/JCCC.12.19/18.

16 Case no 55/2023 (Dubai Court of Cassation, 26 October 2023).

significant because it confirms that social media users are subject to the same standards of responsibility that traditionally applied to conventional forms of publication. The decision further illustrates the judiciary's preference for protecting reputation and institutional integrity where these interests conflict with expansive interpretations of online freedom of expression.

The importance of the judgment extends beyond the specific facts of the case. It reflects a broader judicial tendency to treat online publications as capable of producing serious social and legal consequences due to their speed of dissemination, permanence, and ability to reach large audiences. Consequently, courts have shown little tolerance for content that may undermine reputation or public confidence, even when the publication originates from a personal account and is framed as a consumer opinion or personal experience.

A similar approach can be observed in a recent judgment of the Dubai Court of Appeal,¹⁷ in which an individual was ordered to pay AED 250,000 in civil compensation after publishing a former employer's photograph along with false allegations of fraud on Instagram. The claimant had already secured a criminal conviction against the defendant under the Cybercrime Law for privacy violations and public insult. Building upon that criminal judgment, the civil court concluded that the online publication had caused substantial reputational and personal harm warranting financial compensation. The award demonstrates that unlawful online content may have consequences that extend beyond criminal sanctions and may expose individuals to significant civil liability.¹⁸

This case is particularly important because it illustrates the interaction between criminal and civil enforcement mechanisms within the UAE legal framework. The criminal conviction established the unlawfulness of the conduct, while the subsequent civil proceedings focused on compensating the injured party for the resulting damage. Such an approach strengthens the law's deterrent effect by ensuring that individuals who misuse social media platforms may face both punitive and compensatory consequences. The judgment further confirms that the UAE legal system views the protection of reputation and privacy as interests deserving robust legal protection in digital environments.

Taken together, these decisions demonstrate the UAE judiciary's commitment to enforcing substantive content standards and protecting individual and institutional interests against harmful online conduct. They confirm that digital speech is not treated as a legally exceptional category but is subject to ordinary principles of liability adapted to the realities

17 Reda Hegazy, Mohamed Elimam and Ahmed Adel, 'Defamation Has a Price: Alsuwaidi & Company Recovers AED 250,000 for Client in Social Media Defamation Case' (*Alsuwaidi & Company*, 22 May 2026) <<https://alsuwaidi.ae/defamation-has-a-price-alsuwaidi-company-recovers-aed-250000-for-client-in-social-media-defamation-case/>> accessed 5 January 2026.

18 Enas Mohammed Alqodsi, 'Teacher Civil Liability in the Case of Breaching Educational and Control Obligations' in Asma Khaleel Abdallah and Ahamed M Alkaabi (eds), *Restructuring Leadership for School Improvement and Reform* (IGI Global 2023) 327.

of modern communication technologies. At the same time, the cases reveal that the UAE model remains primarily focused on regulating user-generated content and imposing liability upon content creators rather than developing a comprehensive intermediary liability framework for platform operators. Consequently, while the current framework provides strong mechanisms for controlling harmful content and protecting reputation, privacy, and public order, it leaves important questions concerning platform accountability and intermediary responsibility relatively underdeveloped.

4 PROCEDURAL GAPS AND ACCESS TO JUSTICE CHALLENGES

The UAE has responded proactively to the growing challenges posed by social media platforms and digital communications by implementing a comprehensive legislative framework to protect privacy, reputation, public order, and societal interests. Federal Decree-Law No. 34 of 2021 on Combating Rumors and Cybercrimes criminalises a wide range of harmful online activities, including the dissemination of false information, violations of privacy, digital defamation, and other unlawful online conduct. These provisions operate alongside broader civil and criminal liability mechanisms, creating a robust legal framework capable of addressing the risks associated with contemporary digital communication. Consequently, the UAE model reflects a strong commitment to ensuring responsible online behaviour while safeguarding legally protected rights and interests.

The effectiveness of this framework is further demonstrated through judicial practice. UAE courts have consistently affirmed the enforceability of substantive content standards and adopted a strict approach to conduct that infringes on privacy, damages reputation, or threatens public order. A widely cited example is the 2015 case involving an Australian resident who faced legal proceedings after publishing a photograph on Facebook documenting a parking violation. Although the publication was motivated by concerns regarding public conduct, the authorities considered the dissemination of the image to constitute a violation of privacy protections under applicable UAE legislation. The case attracted significant international attention and illustrates the importance that UAE law attaches to protecting personal privacy and to the responsible use of digital platforms. More broadly, it demonstrates the State's determination to ensure that technological developments and social media engagement remain consistent with legal and ethical standards governing online conduct.

From a procedural perspective, the UAE legal system provides individuals with access to judicial remedies through the ordinary court system, while enforcement actions remain subject to established legal procedures and judicial oversight. Individuals affected by unlawful online content may pursue both criminal complaints and civil claims, and courts possess broad powers to provide appropriate remedies where legal rights have been violated. Accordingly, procedural safeguards are not absent from the UAE framework;

rather, they operate through the broader judicial and administrative structure governing civil, criminal, and cybercrime disputes.

This position is consistent with access-to-justice scholarship, which emphasises that the effectiveness of legal protection depends not only on the existence of substantive rights but also on the availability of mechanisms enabling individuals to enforce those rights and obtain meaningful remedies.¹⁹ In this respect, the UAE legal system already provides multiple avenues through which affected parties may seek legal protection and challenge unlawful conduct. Nevertheless, the increasing complexity of digital platforms and online content moderation raises new questions regarding the visibility, accessibility, and procedural clarity of these mechanisms in highly digitalised environments.²⁰ The need to reassess traditional legal concepts in response to technological transformation has been recognised in UAE legal scholarship, which has highlighted the limitations of conventional legal frameworks when applied to emerging digital environments.²¹ This need for procedural clarity is closely connected to the broader principle of legality, which requires that legal rules be sufficiently clear, predictable, and capable of guiding individual conduct. Although Al-Shawabkah's analysis was developed in the context of tax regulation, his discussion of legality and propriety remains relevant to regulatory frameworks more generally, particularly where legal obligations may significantly affect individual rights and liabilities. In the context of digital regulation, these principles support the argument that individuals should be able to understand not only the substantive limits of online conduct but also the procedural avenues available for challenging enforcement measures or seeking remedies.²²

Comparative developments provide useful insights in this regard. In *Delfi AS v. Estonia* (2015), the ECtHR recognised the legitimacy of imposing liability for harmful online content while emphasising the importance of balancing regulatory objectives with procedural safeguards and effective judicial review.²³ Similarly, in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (2016), the Court stressed that liability frameworks governing digital communications should be accompanied by

19 Emad Abdel Rahim Dahiyat, 'A Legal Framework for Online Commercial Arbitration in UAE: New Fabric but Old Style!' (2017) 26(3) *Information and Communications Technology Law* 272, doi:10.1080/13600834.2017.1374055.

20 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.

21 Emad Abdel Rahim Dahiyat, 'The Legal Recognition of Online Brokerage in UAE: Is a Conceptual Rethink Imperative?' (2016) 25(2) *Information and Communications Technology Law* 173, doi:10.1080/13600834.2016.1184455.

22 Ibrahim Kamil Al-Shawabkah, 'Sales Tax Law in Jordan: Questions of Legality and Propriety' (2010) 24(2) *Arab Law Quarterly* 209, doi:10.1163/157302510X12607945807313.

23 *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) <<https://hudoc.echr.coe.int/fre?i=001-155105>> accessed 5 January 2026.

mechanisms that ensure proportionality, legal certainty, and effective access to remedies.²⁴ More recent European initiatives, including the Digital Services Act, have further reinforced the role of transparency obligations, complaint mechanisms, and structured review procedures within digital governance frameworks.

Viewed from this perspective, the UAE framework already provides strong substantive protection and meaningful avenues for judicial recourse. However, as digital ecosystems continue to evolve, there remains an opportunity to further strengthen procedural clarity through more explicit notice requirements, enhanced transparency obligations, structured appeal mechanisms, and clearly articulated standards of review in content-related disputes. Such developments would not alter the fundamental policy objectives of UAE digital regulation; rather, they would complement existing protections by enhancing accessibility, predictability, and legal certainty for individuals operating within increasingly complex digital environments.

Accordingly, the UAE regulatory model should be understood not as lacking procedural safeguards, but as a framework that has successfully prioritised the protection of privacy, reputation, and public order while retaining significant potential for further procedural refinement. Strengthening procedural visibility and accessibility would enhance access to justice and contribute to a more balanced approach among regulatory effectiveness, individual rights, and technological innovation.

5 REFLECTIONS AND PERSPECTIVES

This study has examined the evolving regulation of social media content in the United Arab Emirates and assessed its implications for access to justice in the digital environment. While UAE legislation establishes comprehensive substantive standards to protect public order, privacy, and societal values, the analysis demonstrates that procedural safeguards remain comparatively underdeveloped. To strengthen meaningful access to justice in digital content disputes, several targeted reforms may be considered. Legislation should codify structured notice-and-response procedures to ensure that individuals affected by unlawful content or regulatory action are granted a clear right to be heard before sanctions are imposed.

The introduction of explicit appeal mechanisms and time-bound administrative review procedures would further enhance transparency and legal certainty. In addition, clarifying judicial oversight standards, particularly in cases involving restrictions on freedom of expression, is essential to ensure proportionality and consistency with constitutional principles. Regulatory authorities should also adopt enhanced transparency obligations, including publishing enforcement guidelines and anonymised decision summaries, in line with emerging international practices.

24 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) <<https://hudoc.echr.coe.int/eng?i=001-160314>> accessed 5 January 2026.

Such reforms would not undermine the protective objectives of UAE media legislation. Rather, they would reinforce its legitimacy by balancing regulatory enforcement with procedural fairness. Strengthening these safeguards would enhance public trust, improve legal certainty, and align national regulation with evolving global standards of digital governance.

This study is subject to certain limitations. It adopts a doctrinal legal approach and does not incorporate empirical data on enforcement practices or user experiences. In addition, the comparative analysis is limited to selected European standards used as normative benchmarks rather than to a full structural comparison. These limitations may affect the generalizability of the findings but do not undermine the relevance of the reform-oriented conclusions.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Нотатка

ПРОЦЕСУАЛЬНІ ПРОГАЛИНИ В РЕГУЛЮВАННІ СОЦІАЛЬНИХ МЕРЕЖ ОАЕ: ДОСТУП ДО ПРАВОСУДДЯ ТА ПЕРСПЕКТИВИ РЕФОРМ

Хабіба Аль-Шамісі

АНОТАЦІЯ

Вступ. Швидке поширення платформ соціальних мереж суттєво змінило суспільний дискурс та управління медіа, створюючи складні правові виклики щодо регулювання контенту та доступу до правосуддя. В Об'єднаних Арабських Еміратах (ОАЕ) Федеральний декрет-закон № 55 від 2023 року є важливим законодавчим зрушенням, спрямованим на модернізацію регулювання медіасфери в цифрову епоху. Проте залишаються питання щодо достатності процесуальних гарантій, доступних особам, які постраждали від незаконного або шкідливого онлайн-контенту. Це дослідження оцінює ефективність нормативно-правової бази ОАЕ у забезпеченні дієвого доступу до правосуддя у спорах щодо контенту в соціальних мережах та визначає сфери, які потребують законодавчого реформування.

Методи: В аналізі застосовується доктринальний підхід із зосередженням на правовій системі ОАЕ та з обмеженим порівняльним зверненням до європейських нормативних стандартів, зокрема Акту про цифрові послуги (Digital Services Act) та відповідної судової практики Європейського суду з прав людини (ЄСПЛ).

Результати та висновки: Дослідження виявляє прогалини в прозорості, механізмах оскарження, судовому контролі та процесуальній ясності, які можуть обмежувати ефективний захист користувачів. Цілеспрямовані реформи, зокрема посилення процесуальних гарантій та механізмів незалежного перегляду, є необхідними для підвищення правової визначеності та збалансування свободи вираження поглядів із захистом індивідуальних прав у цифровому середовищі ОАЕ.

Ключові слова: доступ до правосуддя; процесуальні гарантії; регулювання соціальних мереж; Об'єднані Арабські Емірати; цифрові механізми правозастосування.

ABSTRACT IN ARABIC*

الحالة مذكرة

الفجوات الإجرائية في تنظيم وسائل التواصل الاجتماعي في دولة الإمارات العربية المتحدة: الوصول إلى العدالة وآفاق الإصلاح

حبيبة الشامسي

الخلفية:

أدى التوسع المتسارع لمنصات التواصل الاجتماعي إلى إحداث تحولات جوهرية في الخطاب العام وحوكمة الإعلام، مما أفرز تحديات قانونية معقدة تتعلق بتنظيم المحتوى وضمان الوصول إلى العدالة. وفي دولة الإمارات العربية المتحدة، مثل المرسوم بقانون اتحادي رقم (55) لسنة 2023 بشأن تنظيم الإعلام تطوراً تشريعياً مهماً يهدف إلى تحديث الإطار القانوني المنظم للإعلام في البيئة الرقمية. ومع ذلك، لا تزال هناك تساؤلات حول مدى كفاية الضمانات الإجرائية المتاحة للأفراد المتضررين من المحتوى غير المشروع أو الضار عبر الإنترنت. وتتناول هذه الدراسة مدى فعالية الإطار التنظيمي

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الإماراتي في ضمان وصول فعال إلى العدالة في منازعات محتوى وسائل التواصل الاجتماعي، مع تحديد الجوانب التي تستدعي الإصلاح التشريعي.

:المنهجية

اعتمدت الدراسة المنهج التحليلي القانوني (الفقهي) من خلال تحليل النصوص التشريعية الإماراتية ذات الصلة، مع الاستعانة بمقارنات محدودة مع بعض المعايير التنظيمية الأوروبية، وعلى وجه الخصوص قانون الخدمات الرقمية للاتحاد الأوروبي (Digital Services Act) والاجتهادات القضائية ذات الصلة الصادرة عن المحكمة الأوروبية لحقوق الإنسان.

:النتائج والاستنتاجات

أظهرت الدراسة وجود عدد من الفجوات الإجرائية المتعلقة بالشفافية، وآليات التظلم والطعن، والمراجعة القضائية، ووضوح الإجراءات، بما قد يحد من فعالية حماية المستخدمين في البيئة الرقمية. وتخلص الدراسة إلى ضرورة تبني إصلاحات تشريعية موجهة لتعزيز الضمانات الإجرائية وآليات المراجعة المستقلة، بما يساهم في تحقيق قدر أكبر من اليقين القانوني والتوازن بين حرية التعبير وحماية الحقوق الفردية في دولة الإمارات العربية المتحدة.

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