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Editor-in-Chief's Note

LAW AND JUSTICE TODAY: HUMAN RIGHTS, CONSTITUTIONAL SUPREMACY, AND EUROPEAN STANDARDS IN THE NEW ISSUE

Iryna Izarova

ABSTRACT

This Editor-in-Chief's Note introduces Issue 4 of the Access to Justice in Eastern Europe journal, providing an overview of the pivotal themes explored in this publication. The editorial highlights the transnational nature of contemporary legal challenges, focusing on the balance between institutional rules and fundamental human rights, the dialogue between national constitutional orders and supranational frameworks, and the protection of economic integrity. Special attention is given to notable scholarly contributions: an analysis of athletes' freedom of expression and Olympic neutrality through the lens of ECtHR jurisprudence; studies on constitutional supremacy and rights-based jurisprudence in Lithuania and Turkey; and evaluations of cartel criminalization and the socio-economic impacts of business closures in the Western Balkans and Kosovo. Furthermore, the Note announces the journal's new

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presence on ResearchGate and welcomes new editorial board members. The editorial concludes by acknowledging the vital contributions of the editorial board and peer reviewers in upholding the journal's commitment to academic excellence.

This issue of our journal covers key topics that are highly relevant to contemporary jurisprudence. Specifically, these include the evolving dynamics of constitutional supremacy, the intersection of digital transformation with fundamental rights—such as digital inheritance, data protection, and surveillance—and the development of economic, medical, and environmental regulations in response to emerging global challenges.

These topics deeply concern scholars and practitioners across many countries and regions, underscoring the increasingly transnational nature of contemporary legal problems. This is perfectly illustrated by the broad geographical scope of the research in this issue. For instance, we examine the impact of European Union law and standards on both Member States and neighboring regions, exploring Lithuania's constitutional jurisprudence, cartel criminalization in the Western Balkans, and the influence of the EU AI Act on Ukrainian medical law. Alongside this, significant attention is given to comparative insights from global legal frameworks, addressing data protection and state-led access to justice models in Vietnam and China, bankruptcy restructuring in Saudi Arabia, and the environmental impacts of fast fashion in Egypt.

What is particularly crucial today is how the law responds to threats to fundamental values and the protection of essential freedoms in times of crisis. The search for effective mechanisms to ensure athletes' freedom of expression and Olympic neutrality amidst the resistance in Ukraine, the legal protection of schools during armed conflicts, and the role of judicial translation in achieving equitable justice all remind us that human rights must remain at the centre of any institutional or technological 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.

The delicate balance between institutional rules and fundamental human rights is masterfully explored **by Csilla Szomolaiová** in her analysis of athletes' freedom of expression and the principle of Olympic neutrality, focusing on the case of Ukrainian athlete Vladyslav Heraskevych. Viewed through the lens of the ECtHR jurisprudence on Article 10 of the Convention, the author evaluates whether restricting political speech in the sporting arena truly pursues a legitimate aim and qualifies as "necessary in a democratic society." The

study emphasizes that any interference with an individual's right to protest against aggression must pass a strict proportionality test, ensuring a fair balance between institutional neutrality and core democratic values.

The complex dialogue between national constitutional orders and supranational frameworks is examined in two complementary studies. **Dovilė Pūraitė-Andrikienė** analyzes how Lithuania's Constitutional Court navigates European Union law, demonstrating that constitutional supremacy can be preserved without triggering normative conflicts. This approach reflects a robust application of harmonious interpretation, closely aligned with the ECtHR's principle of subsidiarity. In a related vein, **Abdullah Eryiğit** investigates the asymmetric shift of the Turkish Constitutional Court toward a rights-based jurisprudence. By comparing this evolution with German constitutional law, the author underscores the principle of proportionality—the cornerstone of the ECtHR's margin of appreciation doctrine—as the essential tool for preventing arbitrary state interference and safeguarding fundamental rights.

Economic integrity and the protection of property rights form another critical pillar of this issue. **Monika Canco** and **Mirela Bogdani** assess the legitimacy of criminalizing cartels in the Western Balkans. Their research invites deeper reflection on the ECtHR standard of legal certainty (nullum crimen sine lege) and the necessity of applying proportionate criminal sanctions to economic behavior. Furthermore, **Fatmire Krasniqi** provides a profound criminological and legal perspective on the socio-economic impacts of business closures in Kosovo. This analysis naturally echoes the protections enshrined in Article 1 of Protocol No. 1 to the ECHR, serving as a reminder that state administrative measures affecting businesses must ensure the peaceful enjoyment of possessions and avoid imposing an excessive individual burden on entrepreneurs.

Before concluding, I am delighted to share some important updates for our academic community. In our continuous effort to expand the reach and discoverability of our publications, AJEE is now officially available on ResearchGate. We believe this platform will significantly enhance the global visibility of our authors' research and foster wider scholarly collaboration.

We are also exceptionally proud to expand our team with distinguished experts. Please join me in welcoming **Dr. iur. Janis Neimanis**, Judge of the Supreme Court of Latvia and Guest Associate Professor at Rīga Stradiņš University, who joins our Editorial Board for a two-year term. We also warmly welcome **Dr. Monika Canco,** Ph.D. (Law), Lecturer at the Faculty of Law, University of Tirana, Albania, who takes on the vital role of Section Editor for European Union Law and the EU Integration Process. Their profound legal expertise and practical experience will be invaluable to our continued growth.

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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 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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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Слово редактора

ПРАВО ТА ПРАВОСУДДЯ СЬОГОДНІ: ПРАВА ЛЮДИНИ, ВЕРХОВЕНСТВО КОНСТИТУЦІЇ ТА ЄВРОПЕЙСЬКІ СТАНДАРТИ У НОВОМУ ВИПУСКУ

Ірина Ізарова

АНОТАЦІЯ

У вступному слові головного редактора представлено четвертий номер журналу Access to Justice in Eastern Europe та здійснено огляд ключових тем випуску. Наголошується на транснаціональному характері сучасних правових викликів, зосереджуючи увагу на балансі між інституційними правилами та правами людини, діалозі національного конституційного правопорядку з наднаціональними системами та захисті економічної цілісності. Окрему увагу приділено знаковим статтям цього номера: щодо аналізу свободи

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вираження поглядів спортсменів крізь призму практики ЄСПЛ; щодо збереження верховенства конституції та розвитку правозахисної юриспруденції у Литві й Туреччині; а також оцінки криміналізації картелів та соціально-економічних наслідків закриття бізнесу на Західних Балканах і в Республіці Косово. Крім того, у вступному слові анонсується співпраця журналу з платформою ResearchGate та представлено нових членів редколегії. На завершення висловлено подяку редакційній колегії та рецензентам за їхній внесок у підтримання високих академічних стандартів видання.

Ключові слова: *доступ до правосуддя, верховенство конституції, право ЄС, свобода вираження поглядів, практика ЄСПЛ, економічна цілісність, права власності.*

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RESEARCH ARTICLE

Research Article

CONSTITUTIONAL SUPREMACY WITHOUT CONFLICT: LITHUANIA'S CONSTITUTIONAL COURT AND EU LAW

Dovilė Pūraitė-Andrikienė

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ABSTRACT

Background: *Since Lithuania joined the European Union in 2004, the Lithuanian Constitutional Court has gradually developed a distinctive approach to European Union law. Unlike several European constitutional courts, which have justified constitutional limits on European integration through constitutional identity, ultra vires review, or constitutional resistance, the Lithuanian Constitutional Court has consistently pursued a cooperative approach grounded in judicial dialogue and constitutional accommodation. Although this approach has attracted increasing scholarly attention, it has not yet been comprehensively examined as a coherent model of constitutional interaction between national constitutional law and EU law. This article analyses the evolution of the Constitutional Court's approach to EU law and identifies the principal mechanisms through which EU law has been integrated into Lithuanian constitutional adjudication. To achieve this aim, the article addresses three objectives: (1) to examine the constitutional foundations governing the*

relationship between the Constitution and EU law; (2) to analyse the Constitutional Court's judicial dialogue with the Court of Justice of the European Union through the preliminary ruling procedure; and (3) to assess the role of EU law and CJEU jurisprudence as sources of constitutional interpretation.

Method: *The research is based on doctrinal legal analysis of the Constitution of the Republic of Lithuania, the jurisprudence of the Lithuanian Constitutional Court and the Court of Justice of the European Union, relevant legislation, and academic literature. The article employs systemic, logical, comparative, linguistic, and teleological methods of legal interpretation. Comparative analysis situates Lithuanian constitutional jurisprudence within the broader European constitutional context, with particular attention paid to the approaches adopted by the German Federal Constitutional Court, the Italian Constitutional Court, and the Polish Constitutional Tribunal.*

Results and Conclusions: *The article demonstrates that Lithuania has developed a distinctive model of constitutional accommodation that seeks to reconcile constitutional supremacy with the requirements of European integration. This model rests on three mutually reinforcing elements: the constitutional doctrine governing the relationship between EU law and the Constitution, active judicial dialogue through the preliminary ruling procedure, and the increasing reliance on EU law and CJEU jurisprudence as sources of constitutional interpretation. The analysis further shows that, despite academic criticism following the Constitutional Court's 2017 milk market decision, the Court has consistently maintained the Constitution as the supreme law of the State while remaining committed to the effective application of EU law. The Lithuanian experience shows that constitutional supremacy and the primacy of EU law need not inevitably produce constitutional conflict and may instead coexist through judicial cooperation, constitutional accommodation, and mutual respect between national constitutional courts and the Court of Justice of the European Union.*

1 INTRODUCTION

The relationship between national constitutional law and European Union (EU) law remains a central question in contemporary European constitutionalism. Since the landmark judgements of the Court of Justice of the European Union (CJEU) establishing the principles of direct effect and primacy, constitutional courts across Europe have sought to reconcile the constitutional supremacy of their national constitutions with the autonomous legal order of the European Union. While some constitutional courts have developed doctrines of constitutional identity, *ultra vires* review, or constitutional limits to European integration, others, including the Lithuanian Constitutional Court, have favoured a more cooperative approach based on judicial dialogue and constitutional accommodation.

Since Lithuania acceded to the EU in 2004, the Court has consistently sought to reconcile constitutional supremacy with the requirements of European integration through

constitutional interpretation and judicial dialogue rather than constitutional confrontation. Nevertheless, this approach did not emerge immediately upon accession. Instead, it developed gradually through constitutional practice and the Court's growing engagement with EU law and CJEU jurisprudence.

A turning point came on 8 May 2007, when the Constitutional Court, for the first time in its history, referred questions to the CJEU[1] for a preliminary ruling in the *Sabatauskas* case.[2] Ten years later, the Court returned to Luxembourg[3] in the milk market case.[4] Between and following these two references, the Constitutional Court increasingly relied on EU law and CJEU case law when interpreting Lithuanian legislation and, subsequently, constitutional provisions themselves. Together, these developments illustrate the gradual emergence of a distinctive Lithuanian model governing the relationship between constitutional law and EU law. The evolution of this model can be traced through a series of cases, including *Sabatauskas*,[5] the milk market case,[6] *Commission v Lithuania*,[7] and *Coman*.[8]

Although Lithuanian legal scholarship has examined individual aspects of the Constitutional Court's relationship with EU law, it has not yet comprehensively analysed this model's evolution. Existing studies have primarily focused on individual judgements[9] or particular doctrinal issues.[10] In contrast, the interaction between constitutional doctrine,

1 Case 47/04 'Request for a preliminary ruling to the Court of Justice of the European Union' (Constitutional Court of the Republic of Lithuania, 8 May 2007).

2 Case C-239/07 *Julius Sabatauskas and Others* (CJEU, 9 October 2008) ECLI:EU:C:2008:551.

3 Case 11/2016, decision no KT21-S11/2017 'Request for a preliminary ruling to the Court of Justice of the European Union' (Constitutional Court of the Republic of Lithuania, 20 December 2017).

4 Case C-2/18 *Lietuvos Respublikos Seimo narių grupė* (CJEU, 13 November 2019) ECLI:EU:C:2019:962.

5 Case C-239/07 (n 2).

6 Case C-2/18 (n 4).

7 Case C-61/12 *European Commission v Republic of Lithuania* (CJEU, 20 March 2014) ECLI:EU:C:2014:172.

8 Case C-673/16 *Coman and Others* (CJEU, 5 June 2018) ECLI:EU:C:2018:385.

9 Toma Birmontienė, 'Konstitucinė teisė ir Europos Sąjungos teisė: Kas diktuoja teisės sistemų sąveikos ribas?' in Justinas Žilinskas et al. (eds), *XXI amžiaus iššūkiai tarptautinei teisei: Liber amicorum Sauliui Katuokai* (Mykolo Romerio universitetas 2020) 73, doi:10.13165/LA.2020.06.02; Danutė Jočienė, 'Tarptautinės teisės ir Europos Sąjungos teisės įtaka Lietuvos Respublikos Konstitucinio Teismo oficialiajai konstitucinei doktrinai' in Bronius Sudavičius (ed), *Kelyje su Konstitucija: Recenzuotų mokslinių straipsnių rinkinys* (Vilniaus universiteto leidykla, 2022) 91, doi:10.15388/KSK.2022.6.

10 Egidijus Kūris, 'European Union Law in the Case-Law of the Lithuanian Constitutional Court: Still an Open Question?' in Indrė Isokaitė-Valužė and Haroldas Šinkūnas (eds), *The European Union 2004–2024: Twenty Years of Legal Experience, Challenges and Growth after Unprecedented EU Enlargement* (TMC Asser Press 2025) 379, doi:10.1007/978-94-6265-718-2_19; Egidijus Jarašiūnas, 'Is the Concept of Constitutional Identity an Obstacle to Cooperation between the Constitutional Court and the Court of Justice of the European Union?' in Danutė Jočienė et al. (eds), *Thirty Years of Constitutional Justice: Tempore et Loco* (Constitutional Court of the Republic of Lithuania 2024) 705; Irmantas Jarukaitis and Gintaras Švedas, 'The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 997, doi:10.1007/978-94-6265-273-6_21.

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judicial dialogue through the preliminary ruling procedure, and the growing interpretative role of EU law has received comparatively little systematic attention.

This article fills that gap by analysing the evolution of the Constitutional Court's approach to EU law from Lithuania's accession to the European Union to the present day. It argues that the Lithuanian Constitutional Court has developed a distinctive model of constitutional accommodation based on three mutually reinforcing mechanisms: (1) the constitutional doctrine governing the relationship between EU law and the Constitution; (2) judicial dialogue with the CJEU through the preliminary ruling procedure; and (3) the increasing use of EU law and CJEU jurisprudence as sources of constitutional interpretation.

To achieve this aim, the article first examines the constitutional foundations of Lithuania's participation in the European Union and the Constitutional Court's doctrine concerning the relationship between EU law and the Constitution. It then analyses the Constitutional Court's two preliminary references in *Sabatauskas* and the milk market case and evaluates their significance for the development of constitutional jurisprudence. Finally, it examines the Court's growing reliance on CJEU jurisprudence in later constitutional adjudication and assesses the principal characteristics of the Lithuanian model of constitutional accommodation.

The research is based primarily on doctrinal legal analysis of the jurisprudence of the Lithuanian Constitutional Court and the CJEU, relevant constitutional and EU legislation, and legal scholarship. The systemic method examines individual Constitutional Court decisions as part of the broader development of its doctrine on the relationship between EU law and the Constitution, rather than as isolated judgements. The logical and teleological methods identify the reasoning underlying the Court's evolving approach to EU law and assess whether subsequent doctrinal developments are consistent with its earlier jurisprudence. Comparative analysis is used more selectively, primarily to situate the Lithuanian approach within the broader European constitutional context and to contrast it with models based on constitutional identity and *ultra vires* review. Linguistic analysis is applied where the precise wording used by the Constitutional Court, in particular the formulations concerning the priority of EU law and its role as a source of constitutional interpretation, is decisive for assessing the development of the Court's doctrine.

The cases examined in greater detail were selected for their doctrinal and practical significance in shaping the Constitutional Court's relationship with EU law. Particular attention is given to the two cases in which the Constitutional Court itself initiated preliminary ruling proceedings, Sabatauskas and the milk market case, as the clearest examples of direct judicial dialogue between Vilnius and Luxembourg. Commission v Lithuania and Coman were selected because they show a different form of interaction. In both instances, CJEU jurisprudence directly affected the subsequent reasoning or timing of constitutional review. The study examines Constitutional Court rulings that contributed to

the formulation, consolidation, or modification of doctrine on the status, priority, or interpretative role of EU law. The selection is therefore purposive rather than exhaustive and is intended to trace the principal stages in the development of the Lithuanian model of constitutional accommodation.

2 FROM EUROPEAN CHOICE TO CONSTITUTIONAL COMMITMENT

The story of Lithuania's relationship with EU law did not begin in a courtroom. Long before the Constitutional Court was called upon to define the relationship between the Constitution and EU law, Lithuania had already made a profound political and constitutional choice in favour of European integration.

For Lithuania, EU membership carried significance far beyond economic integration. Following five decades of Soviet occupation and the restoration of independence in 1990, accession to the EU was widely perceived as Lithuania's return to the Western political, legal, and cultural community. European integration became associated not only with economic prosperity, but also with democracy, security, stability, and the consolidation of statehood itself. For a country whose modern history had been shaped by foreign domination and the loss of independence, EU membership represented both a geopolitical and a civilisational choice.

This historical experience helps explain why support for European integration in Lithuania was exceptionally strong. In the referendum on accession to the EU held in May 2003, more than 90 per cent of participating voters supported membership.[11] Lithuania joined the European Union on 1 May 2004, and public support for membership has remained consistently among the highest in the EU ever since.[12] While public attitudes towards the EU have fluctuated considerably in many Member States, Lithuania has remained one of the most pro-European societies in the EU. Many of the country's most visible political, economic, and institutional achievements during the last two decades have been associated with EU membership.

Lithuania's constitutional development also reflected a broad political and societal consensus in favour of European integration. Unlike in several Member States where

11 Kūris (n 10) 381.

12 Public support for European integration in Lithuania has remained consistently high since accession. Eurobarometer surveys regularly place Lithuania among the most pro-European Member States, with levels of trust in the European Union significantly exceeding the EU average. In recent surveys, 64–66 per cent of Lithuanians reported trusting the EU, compared with an EU average of approximately 47–51 per cent. Lithuania has also ranked among the Member States most supportive of further EU enlargement and deeper European cooperation. See, 'Lithuanians' Trust in NATO, Support for EU Enlargement Grows – Eurobarometer' *The Baltic Times* (Riga, 21 March 2023) <https://www.baltictimes.com/lithuanians__trust_in_nato__support_for_eu_enlargement_grows__eurobarometer/> accessed 2 July 2026.

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accession triggered extensive constitutional controversy or later generated significant constitutional resistance to European integration, Lithuania approached membership through a process of constitutional accommodation. The constitutional debate focused less on whether European integration should occur and more on how to structure it constitutionally.

This process culminated in the adoption of the Constitutional Act on Membership of the Republic of Lithuania in the European Union in 2004.[13] Incorporated into the Constitution through Article 150, the Constitutional Act became the principal constitutional foundation of Lithuania's participation in the European Union. It remains one of the most significant constitutional developments since the restoration of independence.

The Constitutional Act was carefully drafted to reconcile participation in the European integration project with the preservation of constitutional sovereignty. On the one hand, it recognised that Lithuania may share or entrust certain competences of state institutions to the EU in areas governed by EU Treaties. On the other hand, it deliberately avoided any suggestion that sovereignty itself was transferred. Sovereignty remained vested in the Lithuanian state, while certain competences could be exercised jointly within the framework of European integration.

The Constitutional Act also established that EU law forms part of the Lithuanian legal system and takes priority of application over ordinary legislation and other legal acts. Although the full implications of this provision became apparent only later in the Constitutional Court's jurisprudence, it provided a constitutional basis for Lithuania's participation in a legal order built on the principles of direct effect and primacy. In addition, the Constitutional Act introduced constitutional mechanisms ensuring parliamentary participation in European decision-making and cooperation between the Government and the Seimas in matters relating to EU affairs.

Several additional constitutional amendments were adopted in preparation for accession. Amendments to Articles 47 and 119 ensured compatibility with EU requirements concerning property ownership and the electoral rights of EU citizens residing in Lithuania.[14] Together, these reforms reflected a broader constitutional effort to embed Lithuania within the European legal and political order.

Lithuania's openness to European integration became particularly visible during debates over the Treaty establishing a Constitution for Europe.[15] Across Europe, the

13 Constitutional Act 'On Membership of the Republic of Lithuania in the European Union' [2004] Žin 111-4123.

14 Law of the Republic of Lithuania no IX-959 'On the Amendment of Article 119 of the Constitution of the Republic of Lithuania' (adopted 20 June 2002) [2002] Žin 65-2629; Law of the Republic of Lithuania no IX-1305 'On the Amendment of Article 47 of the Constitution of the Republic of Lithuania' (adopted 23 January 2003) [2003] Žin 14-540.

15 Treaty establishing a Constitution for Europe (signed 29 October 2004) [2004] OJ C 310/1.

Constitutional Treaty provoked profound constitutional discussions about the nature of European integration and the future of the European project. For many constitutional scholars, the Treaty's very title raised fundamental questions.[16] Constitutionalism had traditionally been built upon the idea of a constitution as the supreme law of a sovereign state. The notion that a non-state entity could possess a "constitution" challenged deeply rooted constitutional assumptions.

These worries became especially visible in several Member States, where the Treaty triggered extensive political and constitutional debates. Ultimately, referendums in France and the Netherlands rejected the Constitutional Treaty, effectively ending the project.

Lithuania's reaction was notably different. The Treaty was ratified swiftly and without significant political controversy. Significantly, it was approved as an ordinary international treaty rather than through a special constitutional amendment procedure.[17] Although this Treaty never came into force, the episode revealed the extent to which European integration had already become embedded in Lithuania's constitutional and political imagination. At a time when many constitutional courts and scholars across Europe were debating whether deeper European integration threatened national constitutional identity, Lithuania largely viewed the project as compatible with its constitutional traditions and geopolitical aspirations.

In retrospect, this episode foreshadowed the Constitutional Court's later approach towards European integration. The Court would repeatedly emphasise that Lithuania's EU membership reflects a broader constitutional and geopolitical choice, not merely participation in an international organisation.

The constitutionalisation of European integration did not end with accession. As Lithuania moved towards participation in the Economic and Monetary Union and eventual adoption of the euro, further constitutional adjustments became necessary. One notable example concerned Article 125 of the Constitution, which granted the Bank of Lithuania the exclusive constitutional right to issue currency. Because this provision became incompatible with the European Central Bank's competences, a 2006 constitutional amendment abolished Article 125(2).[18]

What initially appeared to be a relatively technical amendment later became the subject of one of the most remarkable constitutional disputes in Lithuania's post-independence history. In its 24 January 2014 ruling, the Constitutional Court declared the amendment

16 Kūris (n 10) 395.

17 Law of the Republic of Lithuania no IX-2530 'On the Ratification of the Treaty Establishing a Constitution for Europe' [2004] Žin 181-6707.

18 Law of the Republic of Lithuania no X-572 'On the Amendment of Article 125 of the Constitution of the Republic of Lithuania' (adopted 25 April 2006) [2006] Žin 48-1701.

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unconstitutional.[19] Importantly, the Court did not object to participation in the Economic and Monetary Union or to the adoption of the euro itself. Instead, the Court invalidated the amendment because it was adopted in breach of the constitutional amendment procedure. A parliamentary committee, rather than one-quarter of the Members of the Seimas or 300,000 citizens, submitted the final version of the amendment, as the Constitution required. Lithuania thus experienced the rare phenomenon of an unconstitutional constitutional amendment. Yet the ruling became important not only because of the procedural violation itself, but because of what the Court said about European integration.

While annulling the amendment, the Constitutional Court simultaneously reaffirmed Lithuania's constitutional commitment to the European project. The Court emphasised that membership of the EU and NATO reflects the State's "positive geopolitical orientation", which forms part of Lithuania's fundamental constitutional choices. Referring to the Constitutional Act on Membership of the Republic of Lithuania in the European Union, the Court held that Lithuania has a constitutional obligation to participate as a fully-fledged Member State in European integration processes, including participation in the Economic and Monetary Union and the adoption of the common currency. According to the Court, the Constitutional Act expresses Lithuania's commitment to "fully-fledged participation in European integration", thereby creating a constitutional imperative to implement obligations arising from EU membership.[20]

3 "SAVE THE CONSTITUTION ITSELF": LITHUANIA'S VERSION OF EU PRIMACY

Lithuania's relationship with EU law is, in many respects, part of a broader European constitutional story. Once Lithuania had constitutionally committed itself to European integration, a more difficult question inevitably emerged: How should a national legal order founded on the supremacy of the Constitution coexist with a supranational legal order built on direct effect and the primacy of EU law?

More broadly, the challenge is how to ensure the harmonious coexistence of two legal systems that differ in their nature and sources of authority yet are rooted in shared European values and constitutional traditions. As Jarašiūnas has observed, European integration ultimately depends on maintaining a balance between constitutional autonomy and supranational integration. The EU derives its legitimacy from the constitutional consent of its Member States and may operate only within the competences conferred upon it through EU Treaties, which themselves must comply with the constitutional requirements of the Member States. European integration is therefore not based on the subordination of

19 Case 22/2013, decision no KT2-N1/2014 (Constitutional Court of the Republic of Lithuania, 24 January 2014) [2014] TAR 478.

20 ibid

national constitutions to EU law, but on a continuous effort to reconcile the autonomy of national constitutional orders with the effectiveness of the EU legal system.[21]

This constitutional dilemma stems from the CJEU's foundational jurisprudence. Through a series of landmark judgements, the Court gradually constructed the constitutional architecture of the European legal order. In Van Gend en Loos (1963),[22] the Court famously described the European Economic Community as a "new legal order" capable of creating rights directly enforceable by individuals before national courts. In Costa v ENEL (1964),[23] it formulated the principle of primacy by holding that Member States had permanently limited their sovereign rights in certain areas and, therefore, could not give precedence to national law over Community law. In Internationale Handelsgesellschaft (1970),[24] the Court further strengthened this doctrine by declaring that the validity and effectiveness of EU law cannot be affected even by national constitutional norms. Finally, in Simmenthal (1978),[25] it clarified that national courts must disapply conflicting national legislation without waiting for its formal repeal or constitutional review. Together, these judgements established the doctrines of direct effect, primacy, and autonomy that continue to underpin the EU legal order today.

Not surprisingly, these developments generated constitutional tensions across Europe. Constitutional courts sought to preserve constitutional autonomy while remaining committed to European integration. The German Federal Constitutional Court played a particularly influential role in this process. It first developed the well-known Solange doctrine, holding that as long as the European Communities ensured a level of fundamental rights protection substantially equivalent to that guaranteed by the German Basic Law, it would refrain from reviewing EU law against constitutional standards.[26] Later, in its Maastricht, Lisbon, and PSPP judgements, the German Court further elaborated the doctrines of constitutional identity and *ultra vires* review, insisting that certain core constitutional principles, including democracy, state sovereignty, and constitutional identity, remain beyond the reach of European integration.[27]

21 Jarašiūnas (n 10) 704.

22 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (CJEU, 5 February 1963) ECLI:EU:C:1963:1.

23 Case 6/64 *Flaminio Costa v ENEL* (CJEU, 15 July 1964) ECLI:EU:C:1964:66.

24 Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (CJEU, 17 December 1970) ECLI:EU:C:1970:114.

25 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (CJEU, 9 March 1978) ECLI:EU:C:1978:49.

26 *Solange II* (Federal Constitutional Court of Germany (Bundesverfassungsgericht), 22 October 1986) BVerfGE 73, 339.

27 *Maastricht-Urteil* (Federal Constitutional Court of Germany (Bundesverfassungsgericht), 12 October 1993) BVerfGE 89, 155; *Treaty of Lisbon* (Federal Constitutional Court of Germany (Bundesverfassungsgericht), 30 June 2009) BVerfGE 123, 267; *PSPP* (Federal Constitutional Court of Germany (Bundesverfassungsgericht), 5 May 2020) BVerfGE 154, 17.

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Similar worries emerged elsewhere. The Italian Constitutional Court developed the doctrine of controlimiti ("counter-limits"), according to which EU law cannot override the fundamental principles of the Italian constitutional order.[28] The Polish Constitutional Tribunal likewise stressed that the Constitution remains the supreme law of the state and that constitutional identity imposes substantive limits on the primacy of EU law.[29] Although these courts differed in their reasoning, they shared the common aim of preserving constitutional self-government without undermining the effectiveness of the European legal order.

These tensions became particularly visible during the ratification of the Treaty of Lisbon. Constitutional courts and equivalent institutions in France, Germany, Latvia, Hungary, the Czech Republic, Austria, and several other Member States were asked to assess the Treaty's compatibility with their national constitutions. While generally recognising the openness of national constitutional orders to European integration, they simultaneously emphasised constitutional identity, democratic legitimacy, and the preservation of state sovereignty. The Lisbon litigation became one of the clearest manifestations of the continuing tension between deeper European integration and constitutional autonomy.[30]

These constitutional tensions became particularly visible in cases concerning the European Arrest Warrant, the Lisbon Treaty, judicial independence, and the limits of competences conferred upon the EU. National constitutional courts repeatedly stressed that European integration rests on Member States' constitutional consent and, therefore, cannot entirely displace national constitutional identity. As the German Federal Constitutional Court famously stated in its Lisbon judgement, the European Union "remains an association of sovereign states" whose legitimacy ultimately derives from the constitutional orders of the Member States.[31]

At the same time, these courts generally did not reject European integration itself. Rather, they sought to develop constitutional mechanisms that balance the effectiveness and uniformity of EU law with the preservation of constitutional identity and democratic legitimacy at the national level. Academic literature has often described this search for coexistence as a form of "constitutional tolerance", constitutional pluralism, or cooperative constitutionalism.[32]

28 Judgment 183/1973, *Frontini v Ministero delle Finanze* (Italian Constitutional Court (Corte Costituzionale), 27 December 1973); Judgment 170/1984, *Granital v Amministrazione delle Finanze* (Italian Constitutional Court (Corte Costituzionale), 8 June 1984).

29 Case K 18/04 *Accession Treaty case* (Polish Constitutional Tribunal, 11 May 2005); Case K 32/09 *Lisbon Treaty case* (Polish Constitutional Tribunal, 24 November 2010).

30 Birmontienė (n 9) 86.

31 *Treaty of Lisbon* (n 27).

32 Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart; Bloomsbury 2003) 501; Joseph HH Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 54, doi:10.1093/0199245002.003.0003.

Consequently, European constitutionalism has increasingly focused on finding a legal *modus vivendi* that would allow both EU law and national constitutional orders to coexist without either side entirely surrendering its claim to supremacy. However, no universally accepted constitutional formula for resolving this tension has emerged. Instead, European constitutionalism has developed largely through judicial dialogue and what is often described as "cooperative constitutionalism", whereby national constitutional courts and the CJEU attempt to ensure the coexistence of national constitutional orders and the supranational EU legal order without subordinating one entirely to the other.

For states such as Lithuania, which restored independence after decades of Soviet occupation and pseudo-constitutionalism, the idea of an authentic constitution and genuine rule of law took on particular importance. In this context, constitutional courts viewed national constitutions as the highest legal authority and therefore consistently maintained that EU law could not possess higher legal force than the Constitution itself. From a constitutionalist perspective, the national constitutional order remains primary, while EU law derives its authority from the Member States' constitutional consent.

Lithuania entered this broader European debate from a different starting point. Unlike several constitutional courts that developed their doctrines in response to perceived threats to constitutional identity or national sovereignty, the Lithuanian Constitutional Court approached European integration against a background of strong public support for EU membership and an explicitly pro-European constitutional framework. The Court's challenge was therefore not whether to accommodate EU law, but how to do so while preserving the Constitution as the state's supreme law.

Against this background, the Constitutional Court adopted a comparatively cooperative, integration-friendly approach. In its landmark ruling of 14 March 2006,[33] later reaffirmed in the rulings of 21 December 2006[34] and 8 May 2007,[35] it formulated the constitutional doctrine governing the relationship between EU law and Lithuanian law.

The Court first emphasised that compliance with voluntarily assumed international obligations and respect for generally recognised principles of international law, including the principle *pacta sunt servanda*, constitute a constitutional principle and form part of Lithuania's legal tradition as a restored independent state. It further clarified that the constitutional doctrine according to which ratified international treaties acquire the force of law cannot be interpreted as allowing Lithuania to disregard its international obligations whenever national legislation or constitutional laws establish different legal regulation. On the contrary, where national legal acts conflict with obligations arising from international treaties, the international treaty must prevail.

33 Case 17/02-24/02-06/03-22/04 (Constitutional Court of the Republic of Lithuania, 14 March 2006) [2006] Žin 30-1050.

34 Case 30/03 (Constitutional Court of the Republic of Lithuania, 21 December 2006) [2006] Žin 141-5430.

35 Case 47/04 (n 1).

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The Court then distinguished the constitutional status of EU law from ordinary international law. Referring to the Constitutional Act on Membership of the Republic of Lithuania in the European Union, it stressed that EU law forms part of the Lithuanian legal system, may have direct effect, and enjoys explicit priority over national legislation and other legal acts in cases of conflict. According to the Court, the Constitution establishes not merely a general principle favouring compliance with international obligations, but a specific constitutional rule of collision expressly recognising the priority of EU law deriving from EU Treaties over conflicting national legal regulation.

At the same time, however, the Constitutional Court expressly limited this priority by emphasising that it does not extend to the Constitution itself. Referring to Article 7(1) of the Constitution, according to which no law or other legal act contrary to the Constitution may be valid, the Court made clear that although EU law enjoys constitutional recognition and priority of application within the Lithuanian legal system, this primacy ultimately operates only "save the Constitution itself".

The Constitutional Court thus attempted to reconcile constitutional supremacy with European integration through what may be described as a model of cooperative constitutionalism. Rather than focusing on an abstract hierarchy between legal systems, the Court shifted attention to the practical priority of application of EU law while preserving the Constitution as the ultimate legal authority.

According to Jarukaitis and Švedas, although some authors interpreted the ruling as a declaration of the Constitution's unconditional supremacy over EU law, that conclusion appears overly broad, since the Court deliberately avoided explicitly defining the exact hierarchy between EU law and the Constitution. Instead, it preferred a cautious, case-by-case approach aimed at preserving flexibility and avoiding unnecessary constitutional confrontation.[36]

The likelihood of direct conflict is further mitigated by the fact that Lithuania's membership in the EU derives from the Constitution itself, namely from the Constitutional Act on Membership of the Republic of Lithuania in the European Union. The Constitution, as interpreted by the Constitutional Court, contains principles that facilitate the accommodation of EU law and guide the resolution of potential tensions between the two legal systems.

In particular, the Constitutional Court has emphasised Lithuania's "positive geopolitical orientation", reflected in its membership of both the European Union and NATO, as well as the constitutional obligation to honour the commitments arising from such membership. Consequently, although the Constitution remains the supreme legal authority within the Lithuanian legal order, the relationship between the Constitution and EU law has generally been characterised by constitutional openness, mutual accommodation, and judicial

36 Jarukaitis and Švedas (n 10) 1009.

dialogue rather than confrontation. Lithuanian constitutional doctrine has developed a distinctly EU-friendly approach, seeking to ensure the harmonious coexistence of the national constitutional order and the EU legal system.[37]

The doctrine formulated in 2006 was, however, only the first step. The Constitutional Court's EU-friendly approach would subsequently be reinforced through two additional mechanisms. First, the Court embraced judicial dialogue with the CJEU through the preliminary ruling procedure. Second, it increasingly recognised EU law and CJEU jurisprudence as important sources for interpreting Lithuanian law and, eventually, constitutional provisions themselves. These developments further strengthened the cooperative model of constitutionalism that came to characterise Lithuania's relationship with EU law.

4 PRELIMINARY RULINGS, JUDICIAL DIALOGUE, AND THE LIMITS OF COOPERATION: FROM SABATAUSKAS TO THE MILK CASE

One of the most visible manifestations of the Lithuanian Constitutional Court's EU-friendly approach has been its willingness to engage directly with the CJEU through the preliminary ruling procedure. While constitutional courts across Europe were initially divided on whether they could or should make use of Article 267 of the Treaty on the Functioning of the European Union (TFEU), the growing influence of EU law gradually encouraged many constitutional courts, including the Lithuanian Constitutional Court and those of Germany, Belgium, Austria, Italy, Spain, Slovenia, France, and Lithuania, to regard preliminary references as compatible with their constitutional functions.[38]

To date, the Lithuanian Constitutional Court has referred questions to the CJEU on two occasions: in its decisions of 8 May 2007 and 20 December 2017. Although these references later generated considerable academic discussion, they illustrate the Court's broader understanding of judicial dialogue as an essential component of Lithuania's participation in the European legal order. For the Constitutional Court, cooperation with the CJEU is linked to the constitutional value of EU membership and to the constitutional imperative of ensuring the proper implementation and application of EU law. Beyond the preliminary ruling procedure itself, the Court has consistently recognised the importance of EU law and CJEU jurisprudence for the interpretation and application of national law. Judicial dialogue with the CJEU and the use of EU law as a source of interpretation have become important instruments through which the Court promotes a cooperative and integration-friendly relationship between the Lithuanian constitutional order and the EU legal system.[39]

37 Jočienė (n 9) 98.
38 Birmontienė (n 9) 88.
39 Jarašiūnas (n 10) 707.

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The first chapter of this dialogue began in 2007. A key turning point in the relationship between the Constitutional Court and EU law came when the Court submitted its first request[40] for a preliminary ruling to the Court of Justice in the *Sabatauskas* case, concerning the interpretation of Directive 2003/54/EC on the internal electricity market. The dispute concerned Lithuanian legislation regulating consumers' connection to electricity transmission networks. The applicants argued that the national legal regulation restricted consumer choice and conflicted with EU law governing the internal electricity market. Because the challenged legislation implemented EU law, the Constitutional Court considered that it could not properly perform its constitutional review without first obtaining clarification from the CJEU on the interpretation of the relevant provisions of EU law.

The significance of the reference extended well beyond the electricity market. By making the request, the Constitutional Court joined the relatively small group of constitutional courts willing to engage directly with the CJEU under Article 267 TFEU. The case confirmed that the Court regarded itself not merely as a guardian of the Constitution but also as a participant in the broader European judicial dialogue about the interpretation and application of EU law. At the same time, the case demonstrated the Court's willingness to integrate EU law into constitutional adjudication while preserving constitutional autonomy.

Yet the Court entered that dialogue on its own constitutional terms. Even while requesting the preliminary ruling, it reaffirmed the doctrine formulated in 2006. The Court again emphasised that EU law enjoys priority of application over ordinary national legislation, but not over "the Constitution itself". Judicial dialogue therefore did not imply unconditional acceptance of absolute EU primacy. Rather, the Court sought to engage with EU law while preserving the Constitution as the supreme legal authority within the Lithuanian legal order.

The CJEU ultimately held in *Sabatauskas* that the directive granted national legislators broad discretion to regulate the electricity market.[41] Following the preliminary ruling, the Constitutional Court concluded that the challenged Lithuanian legislation did not violate the Constitution. In practice, the dialogue functioned precisely as intended. Nevertheless, the case also revealed certain underlying tensions within the otherwise cooperative relationship between the Constitutional Court and the CJEU.

As discussed above, in its earlier jurisprudence the Constitutional Court had formulated the so-called "rule of collision", according to which EU law enjoys priority over ordinary national legislation, but not over "the Constitution itself". However, when referring to this doctrine in its judgement, the CJEU omitted the crucial concluding words preserving constitutional supremacy. Although this omission did not ultimately affect the outcome of the case, it attracted attention in academic literature. The question has been raised whether the CJEU would have treated the constitutional jurisprudence of larger and more

40 Case 47/04 (n 1).
41 Case C-239/07 (n 2).

influential constitutional courts, such as the German Federal Constitutional Court or the French Constitutional Council, in the same manner.[42] The episode illustrated the different constitutional perspectives underlying the dialogue between national constitutional courts and the CJEU. While the Court of Justice naturally seeks to preserve the uniformity and effectiveness of EU law, national constitutional courts remain attentive to constitutional identity and the continuing supremacy of national constitutions within their domestic legal orders.

A decade later, the Constitutional Court returned to Luxembourg under quite different circumstances. The tensions inherent in this relationship became visible again in the Constitutional Court's later jurisprudence, particularly in the 2017 milk market case.[43] That case also involved judicial dialogue with the Court of Justice through the preliminary ruling procedure. Faced with questions concerning the compatibility of Lithuanian market regulation with EU law governing the common agricultural policy and competition within the internal market, the Constitutional Court requested a preliminary ruling from the CJEU before completing its constitutional review. In its decision of 20 December 2017, the Court referred questions concerning the interpretation of provisions of an EU regulation governing the milk market. Once again, the Constitutional Court demonstrated its willingness to engage directly with the CJEU in matters where constitutional adjudication intersected with EU law.

Unlike *Sabatauskas*, however, the case's significance lay not only in the preliminary reference itself but also in what the Constitutional Court said about EU law's role within the Lithuanian constitutional order. In the same decision, the Constitutional Court reformulated its earlier doctrine by stating that EU law constitutes a source for interpreting Lithuanian law, including the Constitution itself, in areas where Lithuania shares competences with the European Union under the Constitutional Act on EU Membership. Because agriculture and the internal market fall within areas of shared competence, the Court concluded that constitutional provisions related to these fields, including Article 46 of the Constitution concerning economic activity, should not be interpreted differently from EU law.

This statement marked one of the most significant doctrinal developments in the Court's EU-related jurisprudence. Whereas the 2006 doctrine focused primarily on the priority of application of EU law, the 2017 decision appeared to go further by recognising EU law and CJEU jurisprudence as sources that can shape constitutional interpretation itself. The formulation significantly strengthened EU law's constitutional influence, including secondary EU legislation such as regulations and directives. In this decision, the Court no longer explicitly referred to the constitutional safeguard that EU law enjoys priority only "save the Constitution itself". Nor did it distinguish between EU primary law and

42 Kūris (n 10) 395.

43 Case 11/2016 (n 3).

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secondary legislation, even though the latter is subject to frequent political and legislative changes at the EU level.

The Court later repeated the same approach in its final ruling, adopted after receiving the CJEU's preliminary ruling.[44] The doctrinal shift attracted extensive academic criticism, as many commentators questioned whether the constitutional dispute before the Court genuinely required such a far-reaching reformulation of the relationship between EU law and the Constitution.

The most substantial criticism came from Lithuanian constitutional law scholars, many of whom regarded the decision as a significant departure from the Court's earlier doctrine governing the interaction between EU law and the Constitution.[45] In particular, concerns were raised that the Court effectively transformed both substantive EU law and CJEU jurisprudence into sources for interpreting the Constitution itself, thereby considerably expanding EU law's constitutional influence. Lithuanian constitutional scholars emphasised that the Court's statement that constitutional provisions in areas within shared EU competence should not be interpreted differently from EU law substantially broadened EU law's role within constitutional adjudication.[46] Although the Court sought to limit this approach to fields in which Lithuania shares or confers competences upon the European Union under the Constitutional Act on EU Membership, scholars questioned whether this constituted a genuine doctrinal limitation.[47] Since EU law, by its very nature, already operates only within the competences conferred upon the Union by the Member States, some commentators regarded the limitation as largely formal rather than substantive.

Particular criticism focused on the fact that the Court no longer clearly distinguished between EU primary law and secondary legislation. According to Kūris, the earlier constitutional doctrine had been developed primarily with reference to the constitutional status of the EU Treaties that form the foundation of the European legal order. The 2017 decision, however, appeared to extend the same interpretative significance to secondary legislation and CJEU jurisprudence without sufficiently explaining the constitutional implications of that extension.[48] Scholars noted that regulations and directives are subject to frequent legislative and political change and that their compatibility with EU primary law cannot simply be presumed in every case. Consequently, scholars expressed concerns that the new approach blurred important distinctions within the EU legal order itself.

Lithuanian constitutional law commentators also argued that the decision weakened the earlier constitutional safeguard embodied in the Court's "rule of collision", under which EU

44 Case 11/2016, decision no KT22-N1/2020 (Constitutional Court of the Republic of Lithuania, 6 February 2020) [2020] TAR 14609.
45 Birmontienė (n 9); Kūris (n 10).
46 Birmontienė (n 9) 95.
47 ibid
48 Kūris (n 10) 395.

law enjoys priority of application over national legislation but not over the Constitution itself. While the Court did not formally abandon that doctrine, several authors observed that the new interpretative formula left considerably less room for maintaining a meaningful distinction between constitutional supremacy and the primacy of EU law.[49]

A further line of criticism concerned the Court's reasoning itself. Commentators questioned whether the constitutional dispute before the Court genuinely required such a significant doctrinal development and argued that the judgement did not adequately justify either the necessity or the inevitability of the new approach. In particular, it was noted that the Court did not clearly explain how the expanded interpretative role of EU law could be reconciled with its longstanding understanding of the Constitution as the supreme law of the state.[50] For these reasons, the decision has frequently been described in Lithuanian constitutional scholarship as one of the most controversial and extensively debated developments in the Constitutional Court's EU-related jurisprudence.[51]

Nevertheless, the story did not end with doctrinal controversy. In subsequent jurisprudence, the Constitutional Court largely returned to its traditional constitutional language, reaffirming the "rule of collision", according to which EU law enjoys priority of application over ordinary national law, but not over the Constitution itself.[52] The episode therefore did not produce a permanent constitutional transformation. Instead, it revealed the constitutional sensitivities that may arise when judicial dialogue evolves into constitutional interpretation.

Taken together, the *Sabatauskas* and milk market references illustrate both the strengths and the limits of Lithuania's cooperative constitutional model. They show a Constitutional Court willing to engage openly with Luxembourg, seek guidance when necessary, and treat EU law as an important component of constitutional adjudication. At the same time, they reveal that questions about constitutional supremacy, constitutional identity, and the limits of EU influence remain even within one of the EU's most integration-friendly constitutional systems.

Although both references subsequently generated academic discussion, particularly on the evolving role of EU law in constitutional interpretation, they nevertheless illustrate the Constitutional Court's generally cooperative and EU-friendly approach. Rather than treating the CJEU as a competing judicial authority, the Constitutional Court has consistently regarded the preliminary ruling procedure as an important instrument of judicial dialogue and cooperation between national constitutional courts and the CJEU. This approach is linked to the Constitutional Court's understanding of Lithuania's membership in the EU as a constitutional value and to the constitutional imperative of

49 Birmontienė (n 9); Kūris (n 10).

50 Birmontienė (n 9) 96.

51 Kūris (n 10) 395-6.

52 Decision no KT70-A-S65/2020 (Constitutional Court of the Republic of Lithuania, 8 April 2020).

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ensuring the proper fulfilment of obligations arising from that membership. The Court has therefore shown a willingness to engage directly with the CJEU whenever clarifying EU law may help resolve constitutional questions. At the same time, the Constitutional Court has emphasised that the power to request a preliminary ruling is discretionary rather than mandatory. In its ruling of 3 April 2015,[53] the Court expressly stated that it retains discretion to decide whether a reference is necessary in a particular case, thereby preserving its institutional autonomy while remaining open to judicial cooperation with the CJEU.

5 EU LAW AS A SOURCE OF CONSTITUTIONAL INTERPRETATION: FROM ALTMARK TO COMAN

The Constitutional Court has consistently recognised CJEU jurisprudence as an important source for the interpretation of Lithuanian law. Already in its ruling of 21 December 2006[54] on the financing of the national broadcaster, the Court relied on the CJEU judgement in Altmark[55] when analysing issues related to state aid and public service obligations. In the same ruling, the Constitutional Court expressly stated that, as in the case law of the European Court of Human Rights, the jurisprudence of the Court of Justice is an important source for the interpretation and application of Lithuanian law.

This position was subsequently reaffirmed in later rulings, including those of 27 March 2009,[56] 21 June 2011[57], and 22 December 2011.[58] Over time, references to CJEU case law became a regular feature of constitutional adjudication. The Constitutional Court increasingly relied on Luxembourg jurisprudence when addressing questions concerning economic regulation, public administration, fundamental rights, and other constitutionally relevant matters.[59] According to the Constitutional Court's annual reports, between 2020 and 2025 alone, CJEU jurisprudence was cited in ten rulings.[60] The practical significance of this development should not, however, be assessed solely in quantitative terms. More important is the qualitative expansion of the contexts in which the Constitutional Court has used CJEU jurisprudence. While the Court's earlier engagement with CJEU case law largely

53 Case 15/2014 (Constitutional Court of the Republic of Lithuania, 3 April 2015) [2015] TAR 5118.

54 Case 30/03 (n 34).

55 Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (CJEU, 24 July 2003) ECLI:EU:C:2003:415.

56 Case 33/06 (Constitutional Court of the Republic of Lithuania, 27 March 2009) [2009] Žin 36-1388.

57 Case 76/09-55/10 (Constitutional Court of the Republic of Lithuania, 21 June 2011) [2011] Žin 76-3672.

58 Case 13/2010-140/2010 (Constitutional Court of the Republic of Lithuania, 22 December 2011) [2011] Žin 160-7591.

59 Kūris (n 10) 390-6.

60 Constitutional Court of the Republic of Lithuania, *Annual Report 2020* (2021); *Annual Report 2021* (2022); *Annual Report 2022* (2023); *Annual Report 2023* (2024); *Annual Report 2024* (2025); *Annual Report 2025* (2026). See 'Annual Reports, 2020–2025' (*Constitutional Court of the Republic of Lithuania*, 2026) <https://lrkt.lt/en/about-the-court/activity/annual-reports/183> accessed 2 July 2026.

concerned questions arising directly from EU economic and regulatory law, its subsequent jurisprudence shows that references to CJEU case law have extended to constitutional questions concerning fundamental rights, equality, human dignity, and family life. CJEU jurisprudence has thus gradually gained relevance not only for determining requirements under EU law, but also for the interpretation and application of constitutional standards.

The significance attributed to CJEU jurisprudence is also reflected in its procedural approach. In certain cases, the Court has deliberately slowed the examination of its rulings while awaiting CJEU guidance on closely related legal questions.[61] A notable example is the case concerning the prohibition of right-hand-drive vehicles, where the Constitutional Court waited for the CJEU's judgement in Commission v Lithuania before completing its constitutional review and subsequently declaring the relevant national regulation unconstitutional.[62] Similarly, in its landmark ruling of 11 January 2019 concerning same-sex family reunification, the Constitutional Court relied extensively on the reasoning developed by the CJEU in Coman.[63] Notably, the Constitutional Court refrained from deciding the case until the CJEU had delivered its judgement, indicating the importance it attached to Luxembourg's interpretation of EU law. This practice shows that the Constitutional Court regards CJEU jurisprudence not merely as persuasive authority, but as an important reference point that can shape constitutional review itself.

In many respects, the Constitutional Court's approach to CJEU jurisprudence followed a path previously established in relation to the European Court of Human Rights' case law. Having long regarded Strasbourg jurisprudence as an important interpretative reference point in constitutional adjudication, the Court gradually came to attribute a similar role to CJEU jurisprudence.[64] This development reflected the Court's broader understanding of Lithuania's constitutional order as open to European legal influences and embedded within a wider European legal space.

As mentioned before, the importance attributed to CJEU case law reached a new level in the Constitutional Court's decision of 20 December 2017,[65] where the Court held that "European Union law is a source for the interpretation of the law of the Republic of Lithuania, *inter alia*, the Constitution, in areas where the Republic of Lithuania shares or

61 Kūris (n 10) 395.

62 Case C-61/12 *European Commission v Republic of Lithuania* (CJEU, 20 March 2014) ECLI:EU:C:2014:172; Case 18/2012 (Constitutional Court of the Republic of Lithuania, 6 February 2015) [2015] TAR 1844.

63 Case 16/2016 (Constitutional Court of the Republic of Lithuania, 11 January 2019) [2019] TAR 364; Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (CJEU, 5 June 2018) ECLI:EU:C:2018:385.

64 Case 22/94 (Constitutional Court of Republic of Lithuania, 24 January 1995) [1995] Žin 9-199; Case 8/2009-49/2009-36/2011-69/2011-74/2011 (Constitutional Court of the Republic of Lithuania, 5 September 2012) [2012] TAR 10504.

65 Case 11/2016 (n 3).

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confers competences upon the European Union". This formulation represented an important doctrinal development. What had previously been treated primarily as a persuasive interpretative authority was now expressly recognised as a source for constitutional interpretation itself in areas falling within the scope of EU competences.

The practical significance of this approach is evident in several subsequent cases. For example, in its landmark ruling of 11 January 2019[66] concerning same-sex family reunification, the Constitutional Court drew extensively upon the reasoning developed by the CJEU in Coman. Notably, references to CJEU jurisprudence have gradually expanded beyond traditionally EU-centred fields such as economic regulation and the internal market into areas connected with constitutional identity, family life, equality, human dignity, and fundamental rights. The Coman case showed how EU law can influence constitutional interpretation even in politically and socially sensitive areas traditionally regarded as within the core of national constitutional autonomy.

What began as occasional references to Luxembourg case law as persuasive interpretative authorities has evolved into a much more systematic engagement with EU law. The Constitutional Court increasingly relies on CJEU jurisprudence not merely to clarify the meaning of EU legal provisions but also to support and develop constitutional reasoning. As a result, EU law has gradually evolved from being an external legal framework applicable within the Lithuanian legal order into an increasingly important source of constitutional interpretation.

At the same time, the Constitutional Court has consistently maintained that reliance on EU law and CJEU jurisprudence does not alter the Constitution's constitutional status. The Court has never suggested that EU law replaces constitutional law or diminishes the Constitution's position as the state's supreme law. Rather, EU law and CJEU jurisprudence have become important instruments for interpreting and developing Lithuanian constitutional doctrine within a constitutional framework that remains founded on the supremacy of the Constitution.

Thus, while the Constitutional Court has not accepted the supremacy of EU law over the Constitution, it has increasingly integrated CJEU jurisprudence into its constitutional reasoning. As a result, Luxembourg has become not merely an external judicial authority interpreting EU law, but an important participant in the ongoing development of Lithuanian constitutional doctrine.

66 Case 16/2016 (n 63).

6 CONCLUSIONS

Lithuania's constitutional experience shows a comparatively cooperative, integration-friendly model of constitutionalism within the European Union. Unlike constitutional courts in several other Member States, the Lithuanian Constitutional Court has generally avoided framing its relationship with EU law as constitutional resistance or open conflict. Instead, it has sought to reconcile constitutional supremacy and European integration through constitutional accommodation, judicial dialogue, and interpretative openness towards EU law. This conclusion follows from the cumulative development identified in the analysis. First, the Constitutional Court established a constitutional framework that recognises the priority of EU law over ordinary national legislation while preserving the Constitution's supremacy. Second, its two preliminary references demonstrate an institutional willingness to engage directly with the CJEU where the interpretation of EU law is relevant to constitutional review. Third, the increasing use of CJEU jurisprudence, including in cases concerning fundamental rights and family life, demonstrates that EU law has gradually acquired significance not only as applicable supranational law but also as an interpretative source within constitutional review. Considered together, these developments support the characterisation of the Lithuanian approach as one of constitutional accommodation rather than constitutional resistance.

The evolution of this approach can be traced through a series of landmark cases. Sabatauskas marked the Constitutional Court's first direct engagement with Luxembourg through the preliminary ruling procedure. A decade later, the milk market case demonstrated both the possibilities and the constitutional sensitivities of deeper judicial cooperation. Cases such as Commission v Lithuania and Coman further illustrate how CJEU jurisprudence has influenced constitutional reasoning in areas ranging from economic regulation to family life and fundamental rights. Equally significant is that the Constitutional Court has slowed the examination of its own rulings to await guidance from the CJEU, highlighting the practical importance of judicial dialogue in the development of Lithuanian constitutional doctrine.

At the same time, the Lithuanian experience shows that cooperation does not eliminate constitutional tensions. The academic debate surrounding the Constitutional Court's 2017 decision demonstrates that questions concerning the limits of EU influence and the preservation of constitutional supremacy remain contested. Nevertheless, these debates have unfolded within a constitutional framework fundamentally characterised by openness towards European integration rather than resistance to it.

Viewed from the perspective of the Court's first visit to Luxembourg in 2007, the Lithuanian story is ultimately not one of constitutional conflict. It is a story about the gradual construction of a constitutional dialogue between Vilnius and Luxembourg. Through preliminary references, the reception of CJEU jurisprudence, and the development of an increasingly EU-friendly constitutional doctrine, the Constitutional Court has sought to

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ensure that Lithuania remains both a constitutional state and a fully integrated Member State of the European Union. In this sense, Lithuania's experience illustrates how constitutional supremacy and European integration can coexist not through confrontation, but through dialogue, accommodation, and mutual respect between courts.

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Summary: 1. Introduction. – 2. From European Choice to Constitutional Commitment. – 3. "Save the Constitution Itself": Lithuania's Version of EU Primacy. – 4. Preliminary Rulings, Judicial Dialogue, and the Limits of Cooperation: From *Sabatauskas* to the Milk Case. – 5. EU Law as a Source of Constitutional Interpretation: From *Altmark to Coman*. – 6. Conclusions.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КОНСТИТУЦІЙНЕ ВЕРХОВЕНСТВО БЕЗ КОНФЛІКТУ: КОНСТИТУЦІЙНИЙ СУД ЛИТВИ ТА ПРАВО ЄВРОПЕЙСЬКОГО СОЮЗУ

Довіле Пурайте-Андрікієне

АНОТАЦІЯ

Передумови. *З моменту вступу Литви до Європейського Союзу у 2004 році Конституційний Суд Литовської Республіки поступово виробив особливий підхід до права Європейського Союзу. На відміну від низки європейських конституційних судів, які обґрунтовували конституційні межі європейської інтеграції через концепції конституційної ідентичності, доктрину ultra vires чи конституційного опору, Конституційний Суд Литви послідовно дотримується підходу співпраці, що ґрунтується на судовому діалозі та взаємній конституційній адаптації (constitutional accommodation). Хоча ця практика привертає дедалі більше уваги науковців, вона досі не отримала всебічного дослідження як цілісна модель конституційної взаємодії між національним конституційним правом та правом ЄС. Метою цієї статті є аналіз еволюції підходу Конституційного Суду до права ЄС, а також визначення основних механізмів інтеграції права ЄС у литовське конституційне судочинство. Для досягнення зазначеної мети окреслено три дослідницькі завдання: (1) дослідити конституційні засади, що визначають співвідношення між Конституцією та правом ЄС; (2) проаналізувати судовий діалог Конституційного Суду із Судом справедливості Європейського Союзу в межах процедури попереднього рішення; (3) оцінити роль права ЄС та практики Суду справедливості ЄС як джерел тлумачення конституційних норм.*

Методи. *Дослідження ґрунтується на доктринальному правовому аналізі Конституції Литовської Республіки, практики Конституційного Суду Литви та Суду справедливості Європейського Союзу, відповідних законодавчих актів і фахової наукової літератури. У статті застосовано системний, логічний, порівняльно-правовий, лінгвістичний і телеологічний методи тлумачення права. Порівняльний аналіз використано для вивчення практики литовського конституційного судочинства в ширшому європейському конституційному контексті, з особливою увагою до підходів Федерального конституційного суду Німеччини, Конституційного суду Італії та Конституційного трибуналу Польщі.*

Результати та висновки. *У статті доведено, що Литва сформувала особливу модель конституційної адаптації, покликану узгодити верховенство Конституції з вимогами європейської інтеграції. Ця модель спирається на три взаємопов'язані елементи: конституційну доктрину щодо співвідношення права ЄС і Конституції; активний*

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судовий діалог у межах процедури попереднього рішення; послідовне розширення використання права ЄС та практики Суду справедливості ЄС як джерел конституційного тлумачення. Аналіз свідчить, що попри академічну критику після рішення Конституційного Суду 2017 року у справі щодо ринку молока, Суд незмінно утверджує Конституцію як найвищий закон держави, водночас залишаючись відданим принципу ефективного застосування права ЄС. Досвід Литви засвідчує, що верховенство Конституції та примат права ЄС не обов'язково призводять до конституційного конфлікту, а можуть гармонійно співіснувати у форматі судової співпраці, конституційної адаптації та взаємної поваги між національними органами конституційної юрисдикції та Судом справедливості Європейського Союзу.

Ключові слова: *Конституційний Суд Литви; право Європейського Союзу; Суд справедливості Європейського Союзу; процедура попереднього рішення; конституційна адаптація; верховенство Конституції; судовий діалог; примат права ЄС.*

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RIGHTS-BASED CONSTITUTIONAL JURISPRUDENCE AND THE LIMITS OF PLANNING THEORY: THE ASYMMETRIC PARADIGMATIC TRANSFORMATION OF THE TURKISH CONSTITUTIONAL COURT, THE INTERPRETATIVE GROUND OF PROPORTIONALITY AND A COMPARISON WITH GERMAN CONSTITUTIONAL LAW

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ABSTRACT

Background: *In a January 2023 symposium speech, Zühtü Arslan, President of the Turkish Constitutional Court, stated that Turkish constitutional adjudication had moved from an 'ideology-based approach to a rights-based approach'. This institutional self-description names a thirty-year evolution in the case law, from the 1989 headscarf annulment ruling to the 2019 Zübeyde Füsun Üstel and Wikipedia rulings. It does not, however, account for that transformation at the level of legal theory. How does institutional history shape the law, and what grounding mechanism can explain a shift in constitutional case law? This study asks which theoretical model best*

explains the transformation in question within the 'grounding' debate in contemporary legal theory. It links this question to broader discussions of judicial reform in post-authoritarian and transitional legal systems.

Method: *The study combines doctrinal (dogmatic) legal analysis with a comparative approach. Eight decisions of the Turkish Constitutional Court (the 1989 headscarf ruling, Zübeyde Füsun Üstel, Wikipedia, Şahin Alpay, Mehmet Hasan Altan (2) and (3), Kavala (1) and (2), and Ahmet Şık (2)) were analysed on an 'extreme case' selection logic; six canonical judgements of the European Court of Human Rights (ECtHR) served as a benchmark for comparison. The theoretical framework rests on Scott Shapiro's planning theory, Nicos Stavropoulos's reframing thesis, and Mark Greenberg's moral impact theory. The study examined Turkish constitutional doctrine through eight standard works and German constitutional law through Kommers and Miller's reference work.*

Results and Conclusions: *The study presents four findings. First, the study empirically demonstrates the paradigmatic shift by comparing contrasting extreme cases. Second, the transformation is not homogeneous: the state-of-emergency rulings preserve the paradigm, the Kavala rulings mark a regression, and the 2025 Ahmet Şık (2) ruling shows continued resistance at the Section level. We conceptualised this pattern as 'asymmetric heterogeneity'. Third, the transformation cannot be explained with the conceptual tools of Shapiro's planning theory; the 'constitutional delegation' defence also falls short. Fourth, the concrete structure of proportionality review can be understood as the institutional expression of an interpretivist grounding model converging with Greenberg's moral impact theory and Berman's 'principled positivism'. This conclusion offers a theoretical basis for a more transparent style of reasoning in Turkish constitutional adjudication, suggests that openly acknowledging the moral dimension of proportionality review would strengthen judicial accountability, and proposes a generalisable conceptual framework (asymmetric heterogeneity) for analysing paradigmatic shifts in constitutional courts in transitional contexts.*

1 INTRODUCTION

Zühtü Arslan, President of the Turkish Constitutional Court, described the transformation of Turkish constitutional adjudication in his opening address at the 'Interpretation in Constitutional Adjudication' symposium held at Istanbul Medipol University on 3 January 2023: 'The Constitutional Court has moved from an ideology-based approach to a rights-based approach.'[1] This is not merely a personal observation; it is an institutional self-description offered by the Court's most authoritative representative. Arslan defines the rights-based approach through three components taken together: a priority dimension,

1 '"Anayasa Yargısında Yorum" Sempozyumu gerçekleştirildi' (*İstanbul Medipol Üniversitesi*, 3 January 2023) <https://www.medipol.edu.tr/haberler/anayasa-yargisinda-yorum-sempozyumu-gerceklestirildi> accessed 13 July 2026.

which places freedoms above other social interests; a methodological dimension, which requires interpretation in favour of freedoms; and a structural dimension, which treats the protection of rights as the rule and their restriction as the exception.[2] The philosophical origins of this formulation within Turkish constitutional doctrine are documented in Mustafa Erdoğan's *Anayasal Demokrasi* (Constitutional Democracy): Erdoğan presents Dworkin's 'rights-based' conception of the rule of law with reference to Arslan's 2001 article 'Devletin Hukuku, Hukuk Devleti ve Özgürlük Sarkacı' ('The Law of the State, the Rule of Law and the Pendulum of Liberty').[3] In that article, Arslan argues, within the framework of Dworkin's rights-based conception of the rule of law, that judges should ground their decisions in the protection of rights and freedoms rather than in utilitarian considerations.[4] The intellectual background to the institutional statement of 2023 is thus documented as a doctrinal trajectory stretching back some twenty years. What is still missing is a theoretical account of the transformation itself.

This question can be addressed productively through the reframing offered by Nicos Stavropoulos's 2017 article 'The Debate That Never Was'. Stavropoulos shows that the most familiar label in contemporary jurisprudence, the idea of a 'Hart-Dworkin debate', refers to a debate that never actually took place. His deeper contribution is showing that Dworkin's real question is not about the boundaries of law but about the nature of the grounding mechanism: how institutional history shapes the law. This reframing provides fertile ground for assessing both contemporary debates in legal theory and the paradigmatic shift in Turkish constitutional adjudication.[5]

The study's thesis rests on four pillars. First, a structured doctrinal comparison of opposing rulings can document the paradigmatic shift embodied in Arslan's institutional statement. The 1989 headscarf annulment ruling[6] represents the ideal type of the categorical-doctrinal model of interpretation, whilst the 2019 Zübeyde Füsun Üstel and Wikipedia rulings are concrete manifestations of the rights-based, proportionality-centred model.[7] Second, the transformation is not homogeneous. The Şahin Alpay and Mehmet Hasan Altan (2) rulings show the rights-based line holding even under the state of emergency,[8] whereas the Kavala rulings mark a regression from the paradigm; the 2025 Ahmet Şık (2) ruling, in turn, shows

2 ibid

3 Mustafa Erdoğan, *Anayasal Demokrasi* (11th edn, Siyasal Kitabevi, 2014) 120–1.

4 Zühtü Arslan, 'Devletin Hukuku, Hukuk Devleti ve Özgürlük Sarkacı' (2001) 13 Doğu Batı 80–1.

5 Nicos Stavropoulos, 'The Debate That Never Was' (2017) 130(8) Harvard Law Review 2082 <https://www.jstor.org/stable/44865646> accessed 13 July 2026.

6 Case E.1989/1, K.1989/12 (Turkish Constitutional Court, 7 March 1989) [1989] Official Gazette 20216 (Headscarf Annulment Ruling).

7 *Zübeyde Füsun Üstel and Others* App no 2018/17635 (Turkish Constitutional Court, 26 July 2019) [2019] Official Gazette 30893.

8 *Şahin Alpay* App No. 2016/16092 (Turkish Constitutional Court, 11 January 2018) [2018] Official Gazette 30306; *Mehmet Hasan Altan (2)* App no 2016/23672 (Turkish Constitutional Court, 11 January 2018) [2018] Official Gazette 30306.

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that resistance persists at the Section level.[9] Thirdly, it is difficult to account for this transformation using the conceptual tools of Scott Shapiro's theory of planning.[10] Fourthly, according to the interpretation advocated here, transformation is best explained within the interpretivist grounding model as reframed by Stavropoulos. The concrete structure of the proportionality test can reasonably be interpreted as the institutional expression of a grounding model that converges with Mark Greenberg's moral impact theory[11] and Mitchell Berman's formulation of 'principled positivism'.[12]

The article proceeds as follows. Part 2 sets out the study's aim, research questions and methodology, rationale for case selection, and the approach's limitations. Part 3 examines Stavropoulos's reframing thesis. Part 4 presents Shapiro's theory of planning at its strongest; it addresses and responds to the argument for 'constitutional delegation' and assesses the main lines of criticism. Part 5, which forms the article's core, examines the transformation of the Turkish Constitutional Court; it traces the origins of the rights-based approach in Turkish constitutional doctrine and formulates the thesis of 'asymmetric heterogeneity'. Part 6 analyses the Wikipedia ruling using the conceptual tools of Barak, Möller, Rivers, and Petersen; it compares different interpretations of the principle of proportionality in Turkish constitutional doctrine. Part 7 makes a targeted comparison with German constitutional law. Part 8 formulates the constructive thesis, acknowledges alternative explanations, and discusses the practical implications.

2 METHODOLOGY

This study aims to explain the transformation of the Turkish Constitutional Court's interpretative paradigm during the individual application period, within the context of the 'grounding' debate in contemporary legal theory. This aim is broken down into four research questions. First, can doctrinal analysis demonstrate that the interpretative paradigm in Turkish constitutional jurisprudence changed between 1989 and 2025? Second, is this transformation homogeneous, or does it vary by institution? Third, can Scott Shapiro's conceptual tools of planning account for this transformation? Fourth, if not, which grounding model best accounts for the structure of the transformation?

The study combines a doctrinal (dogmatic) legal analysis with a comparative approach. In the case law analysis, the study adopts the logic of selecting 'extreme examples'; this choice

9 *Ahmet Şık (2)* App No. 2022/55481 (Turkish Constitutional Court, 5 November 2025).

10 Scott J Shapiro, *Legality* (Belknap Press 2011) 269-81, 307-52.

11 Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 Yale Law Journal 1288 <https://ssrn.com/abstract=2309689> accessed 13 July 2026.

12 Mitchell N Berman, 'Our Principled Constitution' (2018) 166 University of Pennsylvania Law Review 1326 ('social facts determine constitutional principles, and constitutional principles determine constitutional rules') <https://dx.doi.org/10.2139/ssrn.2935085> accessed 13 July 2026.

requires justification. The study selects the 1989 headscarf annulment ruling and the 2019 Zübeyde Füsun Üstel and Wikipedia rulings as ideal types of two competing paradigms: they mark the doctrinal extremes within which any explanation of transformation must operate, and each is regarded as emblematic of its own era in Turkish legal doctrine. Five state-of-emergency rulings (Şahin Alpay, Mehmet Hasan Altan (2) and (3), and Kavala (1) and (2)) serve as the 'least likely case': a rights-based paradigm faces the greatest institutional pressure precisely where claims of national security are strongest. If the paradigm holds firm there, its durability is strongly confirmed; if it falters there, the limits of transformation become apparent. The 2025 decision on Ahmet Şık (2) extends the observation window to the present day and to the Section level. Taken together, the eight judgements cover all three decision configurations (normative review, Plenary Session, Chamber), both possible outcomes (violation and no violation) and a thirty-six-year span. This selection supports a doctrinal claim about the Court's reasoning structure, not a statistical claim about the frequency of outcomes. No selection of eight judgements could support the latter claim; the article makes no such attempt.

When the article refers to the 'documentation' or 'demonstration' of a paradigm shift, it is doctrinal and interpretative: it relies on an analysis of the structure of reasoning in authentic judgement texts rather than quantitative measurement. The texts of the decisions were read from their authentic versions in the Official Gazette and the Constitutional Court Decisions Database; direct quotations are documented with page or paragraph numbers.

The selection of theoretical sources is based on three criteria. First, the primary text of planning theory (Shapiro's *Legality*) and the literature of systematic criticism directed at this theory (the Canale-Tuzet anthology, Bratman, Toh, Hershovitz, Alexy, and Plunkett) have been thoroughly reviewed; the argument for constitutional delegation, which constitutes the strongest defence of the theory within the Turkish context, is set out and examined in its own terms in Part 4. Second, Stavropoulos's 2017 contribution, Greenberg's moral impact theory, and Berman's formulation of principled positivism establish the contemporary framework of the grounding debate. Third, the four leading theorists of the theory of proportionality (Barak, Möller, Rivers, and Petersen) have been selected because of their differing responses to the question of the moral nature of judicial weighing; in particular, Petersen's empirical-realist scepticism serves as a counterbalance to the interpretation of moral weighing advocated by Barak. Turkish constitutional doctrine has been examined through the field's eight standard works (Kubalı, Tanör-Yüzbaşıoğlu, Teziç, Özbudun, Gözler's two works, Erdoğan, and Eren); these works were selected because they represent a diversity of generations, methodologies and theoretical positions; amongst them is Gözler's formalist position, which is opposed to the argument put forward in this article and is directly discussed in Part 6.

Part 7's methodological aim in comparing German constitutional law is deliberately narrow. It is not a symmetrical comparative analysis of the two systems; rather, it is a

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targeted review of the reasonableness of two specific doctrinal imports evident in the Turkish case law examined here: the argument regarding the duty of loyalty in Zübeyde Füsun Üstel's dissenting opinion (the closest parallel being the German case law on the loyalty of public officials) and the methodology of weighing up interests in the individual application phase (the accepted source being the Lüth-Alexy tradition). This is why the comparison is confined to Kommers and Miller's standard reference work; the 2017 second NPD decision is added to this work. At the national level, the analysis focuses on Articles 13, 15, 26, 27, 90, 130, and 148 of the Constitution, as well as the provisions on individual applications in Law 6216. At the international level, Article 10 of the ECHR and six landmark ECtHR judgements (Handyside, Ahmet Yıldırım, Gündüz, Erbakan, Kula, and Kavala) have served as a reference framework.

3 THE REAL QUESTION: THE GROUNDING MECHANISM AND A REINTERPRETATION OF DWORKIN'S ARGUMENT

Stavropoulos's 2017 contribution is central to reframing debates in contemporary legal theory. The twenty-seven-year period from Dworkin's 1967 article 'The Model of Rules'[13] to Hart's 1994 *Postscript* did not, historically speaking, constitute the 'Hart-Dworkin debate' as it is commonly labelled in contemporary jurisprudence. As Stavropoulos clearly states, Hart 'was not a participant, and for the most part the debate did not directly engage his work'.[14] The only genuine round of the Hart-Dworkin dialogue took place between the *Postscript* and Dworkin's 'Hart's Posthumous Reply', presented at the NYU Colloquium in 1994.

Behind Stavropoulos's historical observation lies a far more significant theoretical claim. The standard positivist reading interprets Dworkin's question as one of boundaries. Yet Dworkin's real question concerns the nature of the grounding mechanism. Both sides postulate 'a single mechanism' leading from institutional history to law but offer rival explanations of how this mechanism operates. Dworkin's thesis has been consistent since Hard Cases: legal rights are 'a subset of political rights', and the enforcement of legal rights is legitimate only when it satisfies the requirement of 'principled consistency'.[15]

Stavropoulos's interpretation draws significant parallels with Greenberg's moral impact theory but does not equate with it. In a footnote, Stavropoulos explicitly cites Greenberg's interpretation of Dworkin and does not object to it; however, in the same footnote, he notes

13 Ronald M Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14 <https://chicagounbound.uchicago.edu/uclrev/vol35/iss1/3/> accessed 13 July 2026.

14 Stavropoulos (n 5) 2092 ('Hart was not a participant, and for the most part the debate did not directly engage his work').

15 ibid 2086–7, 2091.

that it 'may remain controversial' whether Dworkin is committed to this radical ontological thesis.[16] This nuance demonstrates that whilst the two authors agree on the moral nature of the grounding mechanism, they differ regarding the radical nature of the ontological claim.

4 PLANNING THEORY: ITS STRONGEST FORM, THE DEFENCE OF CONSTITUTIONAL DELEGATION AND STRUCTURAL TENSIONS

Scott Shapiro's theory of planning developed in *Legality* (2011) is one of the most ambitious formulations of post-Hart positivism. The theory draws its inspiration from the inadequacy of the soft conventionalist response to Dworkin's criticisms in Hart's *Postscript*.[17] As Stephen Perry has shown, Hart's claim of descriptive jurisprudence contains normative premises within itself.[18] To overcome this structural problem, Shapiro, drawing on Bratman's philosophy of intention and plan, redefines legal systems as 'planning organisations'.[19]

Planning theory's conceptual backbone rests on Raz's theory of authority. Raz's 'sources thesis' offers the most precise formulation of the positivist thesis: 'A law has a source if its contents and existence can be determined without using moral arguments.' Raz's critical passage clarifies how rules prevent renegotiation.[20]

Shapiro's most original contributions are the Simple Logic of Planning (SLOP), the General Logic of Planning (GLOP), and the economy of trust. According to SLOP, the facts a plan aims to resolve cannot determine the plan's existence or content. GLOP extends this principle to the systemic level.[21] The moral aim thesis states that the law exists to remedy the moral inadequacies of the conditions of legality.[22] The answer to the meta-interpretation question is the 'economy of trust'.[23]

16 ibid 2090, note 32 ('It may remain controversial whether he is thereby committed to the view that legal rights and obligations are (a certain subset of) the moral consequences of institutional history'; the same footnote cites Greenberg's reading of Dworkin).

17 HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 238–76 <https://doi.org/10.1093/he/9780199644704.001.0001> accessed 13 July 2026

18 Stephen R Perry, 'Hart's Methodological Positivism' (1998) 4(4) Legal Theory 438 <https://doi.org/10.1017/S1352325200001105> accessed 13 July 2026.

19 Shapiro (n 10) 118-54; Scott J Shapiro, 'On Hart's Way Out' (1998) 4 Legal Theory 469 <https://doi.org/10.1017/s1352325200001117> accessed 13 July 2026.

20 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 33 ('It is the essential exclusionary character of a rule that it resists permanent revision'), 47 ('A law has a source if its contents and existence can be determined without using moral arguments').

21 Shapiro (n 10) 274–5, 311.

22 ibid 213, 391–2 ('the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality').

23 ibid 331-52.

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4.1. The Defence of Constitutional Delegation and the Response

A hypothetical advocate of Shapiro's theory could mount a serious response to the claim that the transformation in Turkish constitutional jurisprudence is incompatible with planning theory, centring on the concept of 'constitutional delegation'. This defence rests on three pillars. First, Article 13 of the Constitution explicitly incorporates the proportionality test into the constitutional text, thereby giving judges a discretionary scope; this does not violate GLOP but instead fulfils the discretionary scope envisaged by the plan. Second, Article 90 of the Constitution grants primacy to international case law, thereby embedding alignment with the ECtHR's approach within the plan. Third, the moral aim thesis is a condition of identity, not realisation, allowing the structure set out in paragraphs 125–126 of the Zübeyde Füsun Üstel ruling: 'providing protection even in the absence of moral participation'.

On closer inspection, each of these three defences faces serious objections. Pino argues that Shapiro is wrong to draw a sharp distinction between legal interpretation and moral judgement, because judges inevitably resort to value judgements even in straightforward cases. At the same time, positive law continues to constrain and guide interpretation in complex cases.[24] The Article 90 argument aligns more closely with Dworkin's coherence theory than with Shapiro's theory, as international case law is not a 'plan' but a constantly evolving interpretative practice. However, Plunkett's 2013 critique focuses on the distinction between identity and self-realisation.[25] None of this renders defence insignificant. It suggests this: defence can succeed only if the concept of 'plan' is stretched to the point where the distinctive explanatory content of planning theory begins to lose substance.

4.2. The Critical Landscape and Post-Hartian Alternatives

The broader critical literature reinforces this diagnosis along four axes: normativity, content determination, the boundary between positivism and ethics, and methodological consistency. On the normative axis, as Bratman himself observes, Shapiro's normative claim for law requires a foundation beyond the norms of planning rationality.[26] The distinction between Toh's 'plan-attitudes' and 'plan-contents' shows that the undisputed aspect of 'plan positivism' relates to plan-attitudes, whilst the aspect required by Shapiro relates to plan-

24 Giorgio Pino, ''What's the Plan?' On Interpretation and Meta-interpretation in Scott Shapiro's Legality' in Damiano Canale and Giovanni Tuzet (eds), *The Planning Theory of Law: A Critical Reading* (Springer 2013) 194–7 <https://doi.org/10.1007/978-94-007-4593-3_9> accessed 13 July 2026.

25 David Plunkett, 'Legal Positivism and the Moral Aim Thesis' (2013) 33(3) Oxford Journal of Legal Studies 586–603 <https://doi.org/10.1093/ojls/gqt009> accessed 13 July 2026.

26 Michael E Bratman, 'Reflections on Law, Normativity and Plans' in Stefano Bertea and George Pavlakos (eds), *New Essays on the Normativity of Law* (Hart 2011) 82 ('this normative claim goes beyond the norms of plan rationality that Shapiro sees as essential to law').

contents.[27] Hershovitz's conclusion regarding the determination of content carries particular weight for the argument of this article: if the choice between competing interpretative methodologies is governed by judgements concerning the purpose of law, then the theory's positivist character remains merely nominal; the English quotation reads: 'That is a kind of positivism, but it is normative, not conceptual.'[28] Davis emphasises the same point as a regression: the 'economy of trust' was supposed to resolve meta-interpretative disagreement by pointing to the planners' distribution of trust; yet the very act of determining that distribution gives rise once again to the very kind of disagreement it was meant to resolve, and so on; in Davis's words, 'It is turtles all the way down.'[29]

The post-Hartian landscape offers both allies and alternatives. Coleman, who openly acknowledges his intellectual dialogue with Shapiro, defends inclusive positivism and, in a footnote, concedes that his own line of defence regarding the 'practical difference' thesis cannot be applied to Hart.[30] In *Law as a Leap of Faith*, John Gardner formulates the sole thesis of positivism as LP* and positions Shapiro on the hard positivist line.[31] Along the positivism-morality axis, Alexy's critique shows that Shapiro's statement that 'an unjust law is a defective law' shifts him into a 'super-inclusive non-positivist' position.[32] Greenberg's moral impact theory offers a comprehensive contemporary alternative along these lines: the content of the law is that part of the moral profile created by the actions carried out by legal institutions in a legally appropriate manner.[33] Berman, who states that Greenberg developed his criticisms in a separate study, proposes an intermediate position under the heading of 'principled positivism': social phenomena determine constitutional principles, and constitutional principles determine constitutional rules; thus, whilst Hart posits 'too little law', Dworkin assumes 'too much morality'.[34] Finally, concerning to methodological

27 Kevin Toh, 'Plan-Attitudes, Plan-Contents, and Bootstrapping: Some Thoughts on the Planning Theory of Law' in John Gardner, Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 3 (OUP 2018) 4–9 <https://dx.doi.org/10.2139/ssrn.2307318> accessed 13 July 2026.

28 Scott Hershovitz, 'The Model of Plans and the Prospects for Positivism' (2014) 125(1) Ethics 163 <https://doi.org/10.1086/677069> accessed 13 July 2026.

29 Joshua P Davis, 'Legality, Morality, Duality' (2014) 1 Utah Law Review 73-5, 105 <https://doi.org/10.63140/iz-z67twkw> accessed 13 July 2026.

30 Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2001) VII, 143 ("this line of defence does not hold for Hart; for the target of Shapiro's criticism is Hart's conception of positivism").

31 John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 21–2 <https://dx.doi.org/10.1093/acprof:oso/9780199695553.001.0001> accessed 13 July 2026.

32 Robert Alexy, 'Scott J Shapiro between Positivism and Non-Positivism' (2016) 7(2) Jurisprudence 300–5 <https://doi.org/10.1080/20403313.2016.1190149> accessed 13 July 2026.

33 Greenberg (n 11) 1323 ('the content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way').

34 Berman (n 12) 1348-53 ('where Hart leaves us with too little law, Dworkin assumes too much morality').

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consistency, Canale draws attention to the 'recursive' nature of Shapiro's strategy, whilst Chiassoni diagnoses it as 'quasi-positivism'.[35]

What Parts 5 and 6 add to this literature is a test that has hitherto been lacking: a continuous confrontation between the theory and the thirty-six-year record of interpretations by a single constitutional court. There, the theory's two predictions are tested. If constitutional adjudication implements a plan within an economy of trust, then a paradigm shift of the kind Arslan announces should trace to a change in the plan; and the system's distribution of trust should resolve, rather than perpetuate, intra-institutional meta-interpretative disagreement. As we will argue later, the Turkish record refutes both predictions.

5 THE ASYMMETRICAL PARADIGMATIC TRANSFORMATION OF THE TURKISH CONSTITUTIONAL COURT AND ITS DOCTRINAL ORIGINS

5.1. The Origins of the Rights-Centred Approach in Turkish Constitutional Doctrine

Turkish constitutional doctrine has shown marked diversity over the past century, centred on the balance between rights and the state. Kubalı's classic 1971 work, *Anayasa Hukuku Dersleri* (Lectures on Constitutional Law), presents the principle of individualism and the guarantee of the essence of rights as central concepts of the 1961 Constitution: the 1961 Constitution's prohibition on infringing the essence of rights and freedoms 'laid the cornerstone of individualism'.[36] The most striking conclusion drawn by Kubalı is: 'The limits of the public interest, which must be protected and ensured, cannot encroach upon the limits of individual rights and freedoms.'[37] This formulation is the doctrinal precursor to the structural dimension articulated by Arslan in his 2023 symposium address, which regards the protection of rights as the rule and their restriction as the exception. However, Kubalı's position is not strictly rights-based; the author's defence of the 1961 Constitution as safeguarding both liberal individual rights and the ideological protection of the Atatürk reforms constitutes the doctrinal precursor to the Constitutional Court's subsequent ideology-based case law.

35 Damiano Canale, 'Looking for the Nature of Law: On Shapiro's Challenge' in Damiano Canale and Giovanni Tuzet (eds), *The Planning Theory of Law: A Critical Reading* (Springer 2013) 17 <https://doi.org/10.1007/978-94-007-4593-3_1> accessed 13 July 2026; Pierluigi Chiassoni, 'Ruling Platitudes, Old Metaphysics, and a Few Misunderstandings About Legal Positivism' in Damiano Canale and Giovanni Tuzet (eds), *The Planning Theory of Law: A Critical Reading* (Springer 2013) 161 <https://doi.org/10.1007/978-94-007-4593-3_7> accessed 13 July 2026.

36 Hüseyin Nail Kubalı, *Anayasa Hukuku Dersleri: Genel Esaslar ve Siyasi Rejimler* (Istanbul Universitesi, Hukuk Fakültesi 1971) 239–40.

37 ibid 166.

In assessing the fundamental rights regime under the 1982 Constitution, Tanör and Yüzbaşıoğlu's analysis is decisive. The authors interpret the 1961-1982 contrast through the difference between the formulas 'a state based on human rights' and 'a state respectful of human rights'; and, according to the interpretation they adopt with reference to Soysal, in the 1982 text 'priority lies with the state; human rights and freedoms come second'.[38] In this interpretation, the 1982 Constitution embodies an order in which the state takes precedence over rights; removing the guarantee of the essence of rights and replacing it with the criterion of 'the requirements of the democratic social order' concretely expresses this regression.

Erdoğan's *Anayasal Demokrasi*, however, contains the clearest liberal, rights-based formulation in Turkish constitutional doctrine. Erdoğan directly criticises the Turkish Constitutional Court: the legitimacy of constitutional adjudication can only be ensured if it serves to protect individual rights against the state; a constitutional judiciary that strays from this function, or, as in the case of the Turkish Constitutional Court, operates in exactly the opposite manner or exceeds its protective role to become an instrument of political intervention, cannot be defended.[39] Erdoğan's diagnosis, specific to Turkey, is as follows: in modernising countries where bureaucratic governance has become an official ideology, the activism of constitutional justice 'may serve to bolster the ideological state to the detriment of citizens'.[40] This criticism by Erdoğan, first published in 1996, lays the philosophical and critical foundations for the shift that Arslan formulated in 2023 as a transition from an ideology-based approach to a rights-based approach.

Özbudun's assessment of the post-2010 transformation, another leading figure in Turkish legal doctrine, is central here. Özbudun's observation, included in the 25th edition of his *Türk Anayasa Hukuku*, is clear: 'The adoption of the right to individual application through the 2010 amendment has facilitated the Court's move away from an ideology-based approach towards prioritising a rights-based approach.'[41] In the same work, Özbudun criticises the 1989 headscarf annulment ruling as an extreme example in which the Turkish Constitutional Court defined secularism as an 'absolutist ideology'.[42] However, Özbudun does not hesitate to add that a trend towards 'judicial self-restraint' has become evident in the period following 2016.[43]

38 Bülent Tanör and Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku* (17th edn, Beta 2018) 86–7 (an interpretation adopted with reference to M Soysal).

39 Erdoğan (n 3) 88–9.

40 ibid 27.

41 Ergun Özbudun, *Türk Anayasa Hukuku* (25th edn, Yetkin 2025) 573 (quoting his own essay in the Festschrift for Zühtü Arslan: 'The adoption of the right to individual application through the 2010 amendment has facilitated the Court's move away from an ideology-based approach towards prioritising a rights-based approach').

42 ibid 97–9.

43 ibid 572–3.

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Eren's conceptual formulation in the 2024 edition aligns directly with Arslan's institutional statement: 'Through individual applications, the Constitutional Court has gained the ability to conduct rights-based review, and the level of protection of fundamental rights has been raised.'[44] In the same work, Eren criticises the 1989 headscarf ruling as a product of the 'rigid secularism' approach and documents that, with the 2012 ruling on elective religious education, the Constitutional Court shifted to a 'libertarian secularism' understanding.[45] The Erdoğan-Arslan-Özbudun-Eren line thus traces the intellectual lineage of the rights-based approach within Turkish doctrine as a thirty-year continuum.

5.2. The 1989 Headscarf Annulment Ruling: The Ideal Type of the Categorical-Doctrinal Paradigm

The annulment case brought by President Kenan Evren over Additional Article 16, added to the Higher Education Act 2547 by Article 2 of Act 3511, concluded with a ruling dated 7 March 1989. A defining feature of the ruling is its absence of a proportionality test; the proportionality criterion was incorporated into Article 13 only after the 2001 constitutional amendment.[46]

From a legal theory perspective, the most fruitful part of the decision is its examination of the rule of law in relation to Article 2. Here, the Constitutional Court explicitly defines the source of law: 'Laws cannot be based on or bound by religion...The source of religious rules is God... The source of law, however, is the will of the nation itself, as the will that creates the law.'[47] This formulation is a concrete application of a Kelsenian understanding of the 'grundnorm' within the Turkish constitutional order. Özbudun characterises this approach not as a normative interpretation but as a political-ideological one and demonstrates that the formulation 'a civilised way of life' in the ruling has no basis in either the 1961 or the 1982 Constitutions.[48] Eren also emphasises that this judicial precedent lacks historical, sociological, and constitutional foundations.[49]

Mehmet Çınarlı's sole dissenting vote foreshadowed the rights-based approach Zühtü Arslan would formulate thirty years later. Çınarlı explicitly advocates an interpretative

44 Abdurrahman Eren, *Anayasa Hukuku Dersleri* (6th edn, Seçkin 2024) 1203 ('through individual applications, the Constitutional Court has gained the ability to conduct rights-based review, and the level of protection of fundamental rights has been raised').

45 ibid 428–30.

46 Article 13 of the Constitution was amended by Article 2 of Law No 4709 of 3 October 2001, which explicitly incorporated the proportionality criterion into the constitutional text. See Constitution of the Republic of Turkey (adopted 7 November 1982, rev 2019) <https://www.anayasa.gov.tr/en/legislation/turkish-constitution> accessed 13 July 2026.

47 Case E.1989/1 (n 6) 11.

48 Özbudun (n 41) 97–9.

49 Eren (n 44) 297–9.

framework that treats rights as the rule and restrictions as the exception: 'It is the rule that an individual may exercise these freedoms as they see fit; the restriction of these freedoms due to certain necessities is the exception.'[50] He limits the state's right to intervene in individual clothing choices: 'Clothing is not a matter for the state, but a matter for the individual.'[51] Çınarlı's dissenting opinion aligns with Möller's global model theory centred on personal autonomy and Kubalı's doctrine of individualism.[52]

5.3. The Zübeyde Füsun Üstel Ruling: The Doctrinal Application of the Rights-Based Approach

The transition from an ideology-based approach to a rights-based approach cannot readily be interpreted, in Shapiro's classification, as a shift from an 'authority system' to an 'opportunistic system'; for the difference between these two types lies in the degree of trust placed in claims to legitimate authority, rather than in the interpretative paradigm applied to rights.[53] The Zübeyde Füsun Üstel and Others ruling demonstrates the new paradigm in action. The Plenary delivered that ruling by a majority vote, with Zühtü Arslan presiding. Of the sixteen members who participated in the decision, eight voted against it; the violation finding carried under the rule that, when votes are tied, the side on which the President sits prevails. This arithmetic is the first indication of just how contentious the decision was at an institutional level.

The most theoretically striking paragraphs of the decision are § 125 and § 126. In § 125, the Court first admits: 'In the application under consideration, the statement signed by the applicants does indeed contain content that is unacceptable to the vast majority of society.'[54] However, in § 126, this admission is framed by a theoretical principle: 'Even statements with which the Constitutional Court in no way concurs may fall within the scope of freedom of expression.'[55]

Academic freedom receives two tiers of protection. § 100 emphasises the broad scope of freedom of expression.[56] Under § 111, academics' views are subject to strict protection, even if they do not relate to their own field of expertise, are controversial or are not widely

50 Case E.1989/1 (n 6) 17, Dissenting Opinion of Mehmet Çınarlı ('it is the rule that an individual may exercise these freedoms as they see fit; the restriction of these freedoms due to certain necessities is the exception').

51 ibid 19, Dissenting Opinion of Mehmet Çınarlı ('clothing is not a matter for the State, but a matter for the individual').

52 Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 44–72 (two conceptions of personal autonomy).

53 Shapiro (n 10) 350–1 ('authority' and 'opportunistic' systems as two ideal types of legal systems).

54 *Zübeyde Füsun Üstel and Others* (n 7) § 125.

55 ibid, § 126.

56 ibid, § 100.

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accepted.[57] § 112 links this protection to the foundations of a democratic society.[58] The emphasis on self-censorship is a critical instrument of a rights-based approach.[59]

The two dissenting opinions in the ruling constitute one of the strongest examples in Turkish legal practice of the purely theoretical disagreement Dworkin describes. The second dissenting opinion invokes the distinction between concrete and potential danger.[60] The first dissenting opinion, relying on Article 130(4) of the Constitution, establishes a separate 'duty of loyalty to the state' for academic staff.[61] From the perspective of doctrinal background, it should be noted that Article 130(4) is not treated as an autonomous subject of doctrinal analysis in the standard works of Turkish constitutional law. This silence suggests that the dissenting vote's interpretation of loyalty rests on very little established doctrinal tradition; conversely, it shows how closely the majority's approach to academic freedom aligns with Erdoğan's vision of constitutional democracy.

5.4. Post-State of Emergency Decisions: Asymmetric Heterogeneity

The paradigmatic shift is not homogeneous. This heterogeneity is clearest in the post-state-of-emergency decisions. The decisions in the cases of Şahin Alpay and Mehmet Hasan Altan (2) were handed down on the same day (11 January 2018), by the same seventeen-member Plenary, and with the same 11-6 majority. Both decisions embed the prohibition of arbitrariness within Article 15 as an internal limit. The critical passage reads: 'Regardless of the grounds on which they are adopted, during periods in which extraordinary administrative procedures are applied, the detention of individuals without any indication that they have committed a crime cannot be accepted as a measure proportionate to the circumstances.'[62] Concerning freedom of expression, the objective observer test is applied.[63] Paragraph 145 of the Altan (2) judgement is particularly striking: 'For views that differ from the assessments of public authorities and the majority opinion to be treated as a criminal offence based on the intent of the person expressing them, that intent must be demonstrated by concrete facts.'[64]

57 ibid, § 111 ('the views expressed by academics remain under the strict protection of freedom of expression, even if they do not relate to their own research, professional expertise or areas of competence, or are controversial or unpopular').

58 ibid, § 112.

59 ibid, § 137.

60 ibid, Second Dissenting Opinion (Özkaya, Akyel, Seferinoğlu, Menteş), §§ 15, 25–28, 33–35.

61 ibid, First Dissenting Opinion (Özgüldür, Üstün, Topal, Güleç), §§ 1–3 (a duty of loyalty to the State based on Art 130(4) of the Constitution).

62 *Şahin Alpay* (n 8) § 109; *Mehmet Hasan Altan (2)* (n 8) § 156.

63 *Şahin Alpay* (n 8) § 130; *Mehmet Hasan Altan (2)* (n 8) § 224.

64 *Mehmet Hasan Altan (2)* (n 8) § 145.

However, the Kavala rulings present a different trajectory. The Plenary decision in Mehmet Osman Kavala (1) found no violation by a 10 - 5 majority vote. President Zühtü Arslan and two Vice-Presidents led the dissenting bloc.[65] The decision in the case of Mehmet Osman Kavala (2), meanwhile, found no violation on the merits by a narrow majority of 8 to 7. Vice-President Engin Yıldırım's dissenting opinion, which drew a parallel with Kafka's *The Trial*, is exceptional in the history of the Constitutional Court: 'The fact that the applicant was released twice and detained three times on charges based on virtually the same facts, without any significant new evidence being presented to raise strong suspicion, also resembles a Kafkaesque legal spiral.'[66]

Resistance at the Section level is evident in the decisions concerning Mehmet Hasan Altan (3) and Ahmet Şık (2). The Altan (3) ruling deemed the lower courts' continued detention of the applicant, despite the Constitutional Court's ruling of a violation, to constitute a new violation.[67] The Ahmet Şık (2) ruling, dated 5 November 2025 and delivered unanimously by the First Section, deemed it a violation that the lower court had listed theoretical principles without applying them to the specific case.[68]

This heterogeneous trajectory can be formulated as 'asymmetric heterogeneity'. The transformation is real but not monolithic; it reflects an institutional division. At the Plenary level, the rights-based line in the Kavala rulings has lost its majority and retreated into dissent. At the Section level, however, the Altan (3) and Ahmet Şık (2) rulings continue the paradigm. Arslan consistently wrote dissenting opinions in the Kavala rulings but could not hold the majority together. Özbudun's identification of a post-2016 trend towards 'judicial self-restraint' provides the doctrinal counterpart to this asymmetry.[69]

Viewed through the lens of planning theory, this pattern speaks not only to the Court but also to the theory itself. Nothing has changed in the master plan between the Şahin Alpay and Kavala (2) cases: the text of the Constitution, the individual application mechanism and the formal interpretative framework have remained the same; yet the same institution has reached conflicting outcomes at the level of the General Assembly and the Chambers on closely related issues. A theory in which the content of the law is fixed by plans and a designed economy of trust has two options here, neither of which is comfortable. Either one of the two lines of reasoning constitutes a simple misapplication of the plan, which would presume the interpretative question, the issue dividing the judges, to have been answered in advance; or the plan does not determine the answer, in which case the real

65 *Mehmet Osman Kavala* App no 2018/1073 Dissenting Opinion (Arslan, Yıldırım, Gökcan, Kuz, Hakyemez) (Turkish Constitutional Court, 22 May 2019).

66 *Mehmet Osman Kavala (2)* App no 2020/13893 Dissenting Opinion of Yıldırım (Turkish Constitutional Court, 29 December 2020) § 43.

67 *Mehmet Hasan Altan (3)* App no 2018/2620 (Turkish Constitutional Court, 9 January 2020) §§ 47–49.

68 *Ahmet Şık (2)* (n 9) §§ 16, 22.

69 Özbudun (n 41) 572–3.

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work is being done by something other than the plan. In Shapiro's account, the 'settlement' function that gives plans their raison d'être is precisely what demonstrates the absence of asymmetry; the economy of trust, designed to resolve meta-interpretative disputes, is here the very stage for that dispute.[70]

6 PROPORTIONALITY REVIEW: DOCTRINAL POSITIONS AND AN ANALYSIS OF THE WIKIPEDIA DECISION

6.1. Two Interpretations of the Principle of Proportionality in Turkish Doctrine

Turkish constitutional doctrine has developed two distinct lines of thought about the principle of proportionality. The dominant line is a German-origin consensus formulated by Fazıl Sağlam and Özbudun, divided into three sub-principles (suitability, necessity, and proportionality in the narrow sense). Özbudun argues that the 2001 amendment transformed proportionality into a constitutional rule the legislature must observe; courts have applied it more consistently and systematically in individual cases. Tanör and Yüzbaşıoğlu systematically position the principle within the 'limits of restriction': whilst the requirements of a democratic social order and the guarantee of the essence of rights lie at the outer limits of restriction, the criterion of proportionality comes into play at an earlier stage.[71]

Gözler's opposing argument is polemical, emphasising that the principle of proportionality did not feature in Turkish positive law before 2001. He criticises the doctrine and the Constitutional Court's interpretation of the former Article 13(2) as proportionality, stating that it was 'nothing more than a principle invented by the doctrine and the Constitutional Court, which did not in fact exist in Article 13'.[72] Gözler also contends that the concept of 'the essence of a right' is not functional and considers the Constitutional Court's equating of this concept with 'the requirements of a democratic social order' to be incorrect.[73] Gözler's more comprehensive theoretical stance, however, is his critique of supra-constitutionality as expressed in *Anayasa Hukukunun Genel Esasları*: if constitutional courts use principles such as 'justice' or 'modern civilisation', which lack a positive foundation, as criteria instead of constitutional norms, they lose their legitimacy.[74]

Gözler's polemical stance shows an unexpected affinity with Shapiro's theory of planning. Both theories argue that constitutional adjudication must remain within the boundaries defined by the 'plan' (Shapiro) or the 'constitutional text' (Gözler), and that it loses its

70 Shapiro (n 10) 274–5 (the settlement function of plans), 331–352 (the economy of trust as the answer to meta-interpretive disagreement).

71 Özbudun (n 41) 135-7. See also Tanör and Yüzbaşıoğlu (n 38) 162–4.

72 Kemal Gözler, *Türk Anayasa Hukuku Dersleri* (22nd edn, Ekin 2018) 133.

73 ibid 131.

74 Kemal Gözler, *Anayasa Hukukunun Genel Esasları Ders Kitabı* (7th edn, Ekin 2015) 439–40.

legitimacy when it steps outside these boundaries. However, whilst Gözler, as a Turkish constitutional lawyer, developed this formalist stance within the specific textual framework of the 1982 Constitution, Shapiro presents it as a general theory of law. The Court's case law on individual applications since 2010 does not fit comfortably within either formalist framework; neither the GLOP restriction of planning theory nor Gözler's critique of supra-constitutionalism can readily explain, from a legal-formalist perspective, the evaluative reasoning in the Zübeyde Füsun Üstel and Wikipedia judgements. Teziç's warning of a 'government of judges' in this context clarifies the issue along a different axis: the Constitutional Court's exercise of review by defining for itself what constitutes the 'requirements of a democratic society' carries the risk of a 'government of judges' from the perspective of a multi-party system.[75]

6.2. The Wikipedia Ruling in the Light of the Theory of Proportionality

The Constitutional Court's decision in Wikimedia Foundation Inc. and Others was handed down about five months after the Zübeyde Füsun Üstel decision and followed the same doctrinal framework. The decision applies the four-component proportionality framework.[76]

In Aharon Barak's model, the balancing stage is directly moral in character. Barak's precise wording is: 'This comparison is of a value-laden nature.'[77] The canonical example cited by Barak from Dieter Grimm concretises the essence of the test.[78] Barak's 'marginal social importance' formula structures the balancing between the two interests.[79] The Constitutional Court's Wikipedia ruling exemplifies this structure precisely. The Court characterises Wikipedia as a 'universal source of knowledge'; it establishes that the freedom to receive and impart information is a cornerstone of a democratic society; and it determines that the individual's right to personal development is inextricably linked to access to information. Within Barak's framework, these findings constitute judgements of marginal social importance; they are not merely sociological descriptions.

In Kai Möller's global model, constitutional rights centre on autonomy interests crucial to an individual's self-conception. Möller's anti-perfectionism test at the legitimate-purpose stage yields a particularly significant implication: it excludes justifications based on moral disapproval of specific lifestyles. In the Constitutional Court's Wikipedia ruling, whilst

75 Erdoğan Teziç, *Anayasa Hukuku (Genel Esaslar)* (23rd edn, Beta 2019) 235, 238–9.

76 *Wikimedia Foundation Inc and Others,* App No. 2017/22355 (Turkish Constitutional Court, 26 December 2019).

77 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (D Kalir tr, CUP, 2012) 342.

78 ibid 342–3.
Grimm's example shows that even a measure pursuing a legitimate aim through necessary and suitable means fails the proportionality balancing stage when protecting private property comes at the unacceptable cost of human life.

79 ibid 345–65 (the term 'marginal social importance' from 351 onwards).

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'genuine grounds' such as 'damage to the state's reputation' were set aside, the formal justification of 'national security and public order' was accepted; however, at the proportionality stage, it was found that this formal justification failed to strike a sufficient balance within the context of the specific case. Möller's reasonableness test, in contrast, delineates the limits of judicial review in the narrow sense of the proportionality test. Julian Rivers' distinction between the 'optimising' and 'state-limiting' conceptions clarifies the theoretical position of the Wikipedia ruling. In the state-limiting conception, the court acts as a gatekeeper; proportionality review focuses on the 'necessity' stage, and the 'fair balance' test is suppressed. In the 'optimising' conception, however, the court conducts a full balancing exercise. The Constitutional Court's Wikipedia ruling exemplifies the 'optimising' conception. Rivers' 'variable intensity' theory, meanwhile, proposes linking the intensity of scrutiny to the severity of the restriction on the right.[80]

Niels Petersen's empirical findings shed light on the Wikipedia ruling from a different angle. According to Petersen's coding study, the German Federal Constitutional Court relied on balancing in roughly one-third of its decisions to annul laws; the Supreme Court of Canada uses balancing far less frequently, and the Constitutional Court of South Africa is reluctant to rely on it. Petersen's most striking observation is this: courts seeking to conceal their political intentions rely not on proportionality, but on less transparent modes of reasoning, such as categorical argumentation or deductive reasoning. Petersen's reminds us that the interpretation of moral weighing advocated here is not the only possible reading of practice. That practice can also be examined as a judicial strategy. However, the conclusion of this sub-section is correct from the perspective of planning theory: if Barak is right that the decisive comparison at the weighing stage is 'value-laden', then the content of the Court's proportionality findings cannot be determined without a moral argument; and this is precisely what the sources thesis, the backbone of the planning model, necessitates.[81]

6.3. The ECtHR Standard and the Deviation from the 2014 Interpretation Methodology

The Constitutional Court's Wikipedia ruling directly follows the ECtHR's case law in Ahmet Yıldırım and Cengiz. For a comparative analysis, the ECtHR's canonical judgements must be examined. The Handyside v United Kingdom judgement provides a pluralistic definition of freedom of expression: protection applies not only to information and ideas that are favourably received, but also to those that offend, shock, or disturb the state or any section

80 Möller (n 52) 183–93, 199–204; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) Cambridge Law Journal 176, 205 <https://www.jstor.org/stable/4509179> accessed 13 July 2026.

81 Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa (CUP 2017)* 83–113, 156 ('if they want to hide political intentions, courts rather resort to modes of reasoning that are less transparent than proportionality, such as categorical argumentation or deductive reasoning'). See also: Raz (n 20) 47.

of society. The Gündüz v Turkey and Erbakan v Turkey judgements, meanwhile, reflect the ECtHR's concrete-versus-potential-danger distinction, set out in the dissenting opinion in the Zübeyde Füsun Üstel judgement. According to the Gündüz judgement, defending sharia without inciting violence cannot, in itself, be regarded as hate speech. The Erbakan judgement, meanwhile, considers the period of four-year, five-month period between the speech and the prosecution as a factor in assessing current risk and imminent danger. The Kula v Turkey judgement provides a precedent on academic freedom parallel to the Zübeyde Füsun Üstel judgement; it finds that even the mildest administrative sanction may have a 'chilling effect'. In contrast, the Kavala v Turkey judgement clearly diverges from the Constitutional Court's Kavala rulings: the ECtHR found a violation of Article 18, establishing that the measures aimed at silencing the applicant.[82]

According to Teziç's analysis, in its 2014 judgement (App No. 2014/256), the Constitutional Court did not recognise the 1989 and 1991 judgements as rules meeting the legality requirement, because a statutory basis is necessary for the restriction of fundamental rights.[83] This constitutes a doctrinally documented statement that the interpretative methodology underwent a fundamental change during the individual application period. The fact that the Constitutional Court, having indirectly accepted the dress code ban in higher education institutions through its 'interpretative rejection' decision in 1991, subsequently declared the same ban invalid in 2014 on the grounds of the legality requirement, is a textbook example of what Dworkin describes as a theoretical disagreement: two entirely different interpretative frameworks applied to the same legal material.[84]

82 *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) <https://hudoc.echr.coe.int/fre?i=001-115705> accessed 13 July 2026; *Cengiz and Others v Turkey* App Nos. 48226/10 and 14027/11 (ECtHR, 1 December 2015) <https://hudoc.echr.coe.int/eng?i=001-159188> accessed 13 July 2026; *Erbakan v Turkey* App No. 59405/00 (ECtHR, 6 July 2006) § 68 (the 'current risk' and 'imminent danger' criteria; the four years and five months between the speech and the prosecution) <https://hudoc.echr.coe.int/eng?i=001-76232> accessed 13 July 2026; *Gündüz v Turkey* App No. 35071/97 (ECtHR, 4 December 2003) § 51 ('the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as 'hate speech'') <https://hudoc.echr.coe.int/eng?i=001-61522> accessed 13 July 2026; *Handyside v United Kingdom* App No. 5493/72 (ECtHR, 7 December 1976) § 49 ('applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population') <https://hudoc.echr.coe.int/eng?i=001-57499> accessed 13 July 2026; *Kavala v Turkey* App No. 28749/18 (ECtHR, 10 December 2019) §§ 221-232 (violation of Art 18) <https://hudoc.echr.coe.int/eng?i=001-199515> accessed 13 July 2026; *Kavala v Turkey* App No. 28749/18, proceedings under Art 46 § 4 (ECtHR, 11 July 2022) § 142 (reproducing §§ 221-232 of the principal judgment) <https://hudoc.echr.coe.int/eng?i=001-218516> accessed 13 July 2026; *Kula v Turkey* App No. 20233/06 (ECtHR, 19 June 2018) §§ 38, 39 <https://hudoc.echr.coe.int/eng?i=001-184289> accessed 13 July 2026.

83 Teziç (n 75) 273.

84 ibid 271–3.

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7 A COMPARATIVE PERSPECTIVE: GERMAN CONSTITUTIONAL LAW AND THE TURKISH CONSTITUTIONAL COURT

As stated in Part 2, this part has a narrow aim: to test two doctrinal imports evident in Turkish case law against German sources. The first concerns the duty of loyalty in the Üstel dissenting opinion; its closest counterpart is German case law on the constitutional loyalty of public officials. The second is the methodology of weighing up the merits during the individual application phase; the accepted line of reasoning derives from Lüth and Alexy. A third strand, the fate of militant democracy, provides a counterpoint that links the two systems' recent trajectories. Kommers and Miller's reference work provides the framework.

7.1. Verfassungstreue and the Dissenting Opinion in the Zübeyde Füsun Üstel Case

The first dissenting opinion in the Zübeyde Füsun Üstel judgement established a separate 'duty of loyalty to the state' for academic staff, based on Article 130(4) of the Constitution. The closest equivalent in German constitutional law is case law on the constitutional duty of loyalty of public servants. The Civil Servant Loyalty Case (2 BvL 13/73, 1975), as cited by Kommers and Miller, held that excluding 'disloyal' individuals from public service does not constitute discrimination based on political opinion.[85] However, two significant differences should be noted. First, whilst German case law links the duty to the status of a public servant, the Turkish dissenting opinion treats Article 130(4) as a content-based restriction on academic freedom of expression. Second, the fact that standard works of Turkish legal doctrine have not treated Article 130(4) as the source of such a duty of loyalty suggests that the dissenting opinion's interpretation rests on little established doctrinal tradition. Tanör and Yüzbaşıoğlu's observation regarding the post-2010 shift, a 'departure from established case law', identifies the trajectory of the majority opinion's jurisprudence.[86]

7.2. The Lüth Judgement, the Objective Order of Values, and the Limits of Balancing

The Lüth Case (1 BvR 400/51, 1958) presents the first dogmatic formulation of the balancing methodology in German constitutional law.[87]

85 Case 2 BvL 13/73 *Civil Servant Loyalty Case* (Bundesverfassungsgericht, 22 May 1975) BVerfGE 39/334 <https://www.fallrecht.de/bv039334.html> accessed 13 July 2026; Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke UP 2012) 434 (Civil Servant Loyalty Case, a brief reference noting that the exclusion of 'disloyal' persons from public service does not constitute discrimination on grounds of political opinion).

86 Tanör and Yüzbaşıoğlu (n 38) 109–10, 183.

87 Case 1 BvR 400/51 *Lüth Case* (Bundesverfassungsgericht, 15 January 1958) BVerfGE 7/198 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1958/01/rs19580115_1bvr040051en.html> accessed 13 July 2026.

Alexy also plays a central role in German doctrine. Kommers and Miller present Alexy as Germany's leading theorist of constitutional balancing; Alexy treats constitutional rights as 'optimisation requirements'. Since 2012, the Turkish Constitutional Court has followed this three-stage German model in its proportionality framework for decisions on individual applications. However, the Turkish Constitutional Court applies its balancing analysis within a doctrinal and institutional context that differs from German doctrine. The Aviation Security Act case (1 BvR 357/05, 2006) is an important example illustrating the limits of proportionality review.[88]

The judgement reaffirmed the absolute nature of the principle of human dignity; it categorically prohibited the instrumentalisation of helpless individuals on a hijacked aircraft for the purpose of protecting others. In other words, the balance is the standard grammar of the German model, yet it rests on absolute limits. Both of these features reappear in the Turkish Court's case law on individual applications: the four-part framework is applied in conjunction with the inviolable essence of the right under Article 13.[89]

7.3. The Decline of Militant Democracy: From the 2003 Rejection to the 2017 NPD Decision

Kommers and Miller's analysis shows that the German Federal Constitutional Court has recently pushed the doctrine of militant democracy into the background. The NPD Party Ban Dismissal Case (2 BvB 1, 2, 3/01, 2003) is a concrete example of this.[90] Kommers and Miller's finding is as follows: in recent years, the Court has adopted a more tolerant stance towards so-called anti-democratic parties, defending their institutional rights with the same rigour with which it protects other electoral groups.[91]

The second NPD ruling (2 BvB 1/13), dated 17 January 2017, essentially confirmed and further clarified this line of reasoning. The Second Senate unanimously rejected the Federal Council's request to declare the NPD unconstitutional. The Court found that the party pursued objectives directed against the free democratic basic order, that its concept of an ethnically defined 'people's community' (Volksgemeinschaft) was incompatible with human dignity, and that it acted systematically in pursuit of its objectives; however, it ruled that a

88 Case 1 BvR 357/05 *Aviation Security Act Case* (Bundesverfassungsgericht, 15 February 2006) BVerfGE 115/118 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html> accessed 13 July 2026.

89 Kommers and Miller (n 85) 66–7 ('Germany's leading theorist of constitutional balancing'; optimisation requirements), 396-8 (Aviation Security Act Case), 442-50 (Lüth case).

90 ibid., 295–300; Case 2 BvB 1, 2, 3/01 *NPD Party Ban Dismissal Case* (Bundesverfassungsgericht, 18 March 2003) BVerfGE 107/339 <https://www.servat.unibe.ch/dfr/bv107339.html> accessed 13 July 2026.

91 Kommers and Miller (n 85) 292–3, 300–1 ('in recent years, however, the Court has exhibited a more tolerant attitude toward so-called antidemocratic parties, defending their institutional rights with the same vigour with which it safeguards other electoral groups').

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ban required concrete and substantial indications ('potential') that the party's efforts could succeed, and that the NPD, with its marginal electoral success and limited access to society, had not crossed this threshold. With this ruling, the Senate explicitly rejected the stricter standard set out in the 1956 KPD decision, which held that the absence of any prospect of success would not preclude a ban.[92] Within a matter of months, the framers of the Constitution amended Article 21 of the Basic Law, thereby providing for the exclusion of parties deemed unconstitutional from state funding, a measure less severe than a ban.[93] The 2017 ruling thus completes the pattern described by Kommers and Miller: an anti-democratic party can be condemned in the harshest doctrinal terms and yet be protected in its institutional existence, because the danger it poses is speculative rather than concrete. The structural similarity with the Turkish court's ruling in the case of Zübeyde Füsun Üstel is clear: in both courts, the decisive move is the same; condemnation of the content is distinguished from the silencing of the speaker, and silencing is linked not to the offensiveness of the message but to a concrete and demonstrable threat. From a comparative perspective, the distinction between concrete and potential danger on which the case against Üstel is based is precisely the line along which the German court resolved its own most challenging case concerning militant democracy.

8 CONCLUSION: PROPORTIONALITY AS THE INSTITUTIONAL EXPRESSION OF INTERPRETATIVE GROUNDING

This study presents four interrelated arguments. First, a structured doctrinal comparison documents the paradigmatic shift in the Turkish Constitutional Court during the post-2012 era of individual applications. The gulf between the categorical-doctrinal approach of the 1989 headscarf ruling and the rights-based approach in the 2019 Zübeyde Füsun Üstel and Wikipedia rulings provides the clearest evidence of this transformation.

This transformation addresses a conceptual need long articulated in Turkish constitutional doctrine. Erdoğan's criticism of the Turkish Constitutional Court, Arslan's rights-based rule of law concept (2000-01) drawing on Dworkin, Özbudun's identification of the post-2010 transition, and Eren's formulation of the shift from rigid secularism to libertarian secularism all demonstrate the continuity of this trajectory within Turkish legal doctrine. Second, this transformation is not homogeneous; it exhibits asymmetric heterogeneity. Whilst the Şahin Alpay and Altan (2) rulings upheld the paradigm even under a state of emergency, the

92 Case 2 BvB 1/13 *NPD Ban Proceedings II* (Bundesverfassungsgericht, 17 January 2017) BVerfGE 144/20 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html> accessed 13 July 2026.

93 Basic Law for the Federal Republic of Germany 'Grundgesetz' (amended 22 March 2025) art 21(3) <https://www.gesetze-im-internet.de/englisch_gg/> accessed 13 July 2026.

Kavala rulings signify a regression from the paradigm; the Ahmet Şık (2) ruling reveals that resistance persists at the Section level as of 2025. Third, Shapiro's theory of planning struggles to account for this transformation, even under the strongest interpretation of constitutional delegation. The record corroborates neither of the two predictions formulated at the end of Part 4: the paradigm shift cannot be traced to any change in the master plan, and the Court's meta-interpretative disagreement has become entrenched rather than resolved by the system's economy of trust. Gözler's polemical position within Turkish constitutional doctrine supports this observation from a different angle: Gözler's critique of supra-constitutionality and Shapiro's GLOP limitation share the same formalist logic; however, the evaluative reasoning in the 2014 constitutional ruling and the 2019 Zübeyde Füsun Üstel judgement does not fit comfortably within either of these formalist frameworks. Fourth, under the interpretation advocated here, Stavropoulos's reframed interpretivist grounding model best explains transformation; the concrete structure of the proportionality test aligns with Greenberg's formulation.[94]

The scope of these claims must be clearly stated. The argument is interpretative, and alternative explanations of the same trajectory exist. Changes in the composition of the Court, strategic alignment with the European Court of Human Rights (ECtHR) under the pressure of Article 46, and broader political dynamics may have contributed to the pattern documented here; a formalist reading, however, would characterise the same decisions not as an expression of a new grounding model, but as deviations from the text of the Constitution. This article's claim is one of best fit: among the theoretical models examined, the interpretivist grounding model most closely matches the structure of reasoning exhibited by the decisions. Testing this claim against rival explanations requires further research, including a systematic quantitative analysis of the Court's case law on individual applications.

This constructive thesis has practical implications. Proportionality review in Turkish constitutional jurisprudence requires deeper moral reasoning than practitioners generally acknowledge. This recognition supports more transparent reasoning. Oder's assessment of the first five years of individual application offers an important starting point: constitutional courts become trend-setting, as the German Federal Constitutional Court has, above all through the principle of proportionality, only when it transforms strict adherence to Strasbourg case law into original and progressive interpretation.[95] Recognising the different structural demands of constitutional law necessitates the development of a field-specific sensitivity within the field of legal theory; this is also consistent with the proposal put forward by Plunkett and Shapiro in their 2017 metanormative framework.[96] The

94 Greenberg (n 11) 1323.

95 Bertil Emrah Oder, 'Bireysel Başvuru Kararlarının Anayasa'nın Yorumuna Etkileri' (2018) 35 Anayasa Yargısı 17–8.

96 David Plunkett and Scott J Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (2017) 128(1) Ethics 64–7 <https://www.jstor.org/stable/26541822> accessed 13 July 2026.

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asymmetrical paradigmatic transformation of the Turkish Constitutional Court can be interpreted as the concrete expression, at the institutional level, of such a field-sensitivity. Turkish constitutional doctrine now has sufficient conceptual tools to account for this transformation: Erdoğan's *Anayasal Demokrasi*, Özbudun's identification of the transformation, Eren's formulation of rights-based review, and, finally, Arslan's institutional declaration are concrete products of this doctrinal line.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОЗАХИСНА КОНСТИТУЦІЙНА ЮРИСПРУДЕНЦІЯ ТА МЕЖІ ТЕОРІЇ ПЛАНУВАННЯ: АСИМЕТРИЧНА ПАРАДИГМАЛЬНА ТРАНСФОРМАЦІЯ КОНСТИТУЦІЙНОГО СУДУ ТУРЕЧЧИНИ, ІНТЕРПРЕТАТИВНІ ЗАСАДИ ПРИНЦИПУ ПРОПОРЦІЙНОСТІ ТА ПОРІВНЯННЯ З КОНСТИТУЦІЙНИМ ПРАВОМ НІМЕЧЧИНИ

Абдуллах Ер'їгіт

АНОТАЦІЯ

Передумови. *У січні 2023 року Голова Конституційного суду Туреччини Зюхтю Арслан під час виступу на симпозіумі заявив, що турецьке конституційне судочинство здійснило перехід від «ідеологічно орієнтованого підходу до підходу, заснованого на правах людини». Така інституційна самоідентифікація позначає тридцятирічну еволюцію судової практики — від рішення 1989 року щодо конституційності законодавчого регулювання носіння хустки (хіджабу) до рішень 2019 року в справах «Зюбейде Фюсун Юстель» та «Вікіпедія». Утім, вона не розкриває сутності цієї трансформації на рівні теорії права. Яким чином інституційна історія впливає на право і який механізм обґрунтування права дає змогу пояснити зміни в конституційній судовій практиці? У межах сучасної теоретико-правової дискусії щодо обґрунтування права це дослідження з'ясовує, яка*

теоретична модель здатна пояснити зазначену трансформацію, та пов'язує це питання з ширшим дискурсом щодо судової реформи в поставторитарних правових системах і правових системах перехідного типу.

Методи. *У дослідженні поєднано доктринальний (догматичний) юридичний аналіз із порівняльно-правовим підходом. За логікою відбору граничних випадків (extreme case) проаналізовано вісім рішень Конституційного суду Туреччини (рішення 1989 року щодо хустки (хіджабу), справи «Зюбейде Фюсун Юстель», «Вікіпедія», «Шахін Алпай», «Мехмет Хасан Алтан (2) і (3)», «Кавала (1) і (2)» та «Ахмет Шик (2)»); для порівняння використано шість знакових рішень Європейського суду з прав людини (ЄСПЛ). Теоретичну основу дослідження становлять теорія планування (planning theory) Скотта Шапіро, теза про переосмислення (reframing thesis) Нікоса Ставропулоса та теорія морального впливу (Moral Impact Theory) Марка Грінберга. Конституційно-правову доктрину Туреччини проаналізовано на підставі восьми фундаментальних наукових праць, а конституційне право Німеччини — на підставі праці Коммерса та Міллера.*

Результати та висновки. *У статті сформульовано чотири висновки. По-перше, парадигмальний зсув емпірично підтверджується за допомогою порівняння контрастних граничних випадків. По-друге, ця трансформація не є однорідною: рішення у справах, пов'язаних з режимом надзвичайного стану, засвідчують збереження попередньої парадигми, рішення у справах Кавали свідчать про регрес, а рішення 2025 року у справі «Ахмет Шик (2)» свідчить про подальший опір змінам на рівні судової палати; зазначену закономірність тут концептуалізовано як «асиметричну гетерогенність». По-третє, зазначену трансформацію неможливо пояснити концептуальним інструментарієм теорії планування Шапіро; аргумент щодо «конституційного делегування» також виявляється неспроможним. По-четверте, структура перевірки дотримання принципу пропорційності може розглядатися як інституційне вираження інтерпретативістської моделі обґрунтування, що збігається з теорією морального впливу Грінберга та концепцією «принципового позитивізму» (principled positivism) Бермана. Отримані результати створюють теоретичне підґрунтя для більш прозорого стилю юридичної аргументації в конституційному судочинстві Туреччини. Автор також обґрунтовує, що відкрите визнання морального виміру судової перевірки дотримання принципу пропорційності посилить підзвітність судової влади. Крім того, стаття пропонує узагальнювану концептуальну модель — «асиметричну гетерогенність» — для аналізу парадигмальних змін у практиці конституційних судів держав із правовими системами перехідного типу.*

Ключові слова: *орієнтований на права підхід; перевірка дотримання пропорційності; теорія планування; конституційне судочинство; теоретичні розбіжності; теорія морального впливу; асиметрична гетерогенність.*

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ABSTRACT IN TURKISH*

Araştırma Makalesi

HAK TEMELLI ANAYASA YARGISI VE PLANLAMA TEORİSİNİN SINIRLARI: TÜRK ANAYASA MAHKEMESİNİN ASİMETRİK PARADİGMATİK DÖNÜŞÜMÜ, ORANTILILIĞIN YORUMSAL TEMELI VE ALMAN ANAYASA HUKUKUYLA KARŞILAŞTIRMA

Abdullah Eryiğit

ÖZET

Arka Plan: Dönemin *Türkiye Anayasa Mahkemesi Başkanı Zühtü Arslan, Ocak 2023'te düzenlenen bir sempozyumda yaptığı konuşmada, Türk anayasa yargısının "ideoloji temelli bir yaklaşımdan hak temelli bir yaklaşıma" geçtiğini ifade etmiştir. Bu kurumsal öz-tanımlama, 1989 tarihli Başörtüsü İptal Kararı'ndan 2019 tarihli Zübeyde Füsun Üstel ve Wikipedia kararlarına uzanan otuz yıllık bir içtihat gelişimini ifade etmektedir; ancak söz konusu dönüşümü hukuk teorisi düzeyinde açıklamamaktadır. Kurumsal tarih hukuku nasıl şekillendirir ve anayasal içtihattaki bir değişim hangi temellendirme mekanizması aracılığıyla açıklanabilir? Bu çalışma, söz konusu dönüşümü çağdaş hukuk teorisindeki "temellendirme" tartışması çerçevesinde hangi teorik modelin açıklayabileceğini araştırmakta ve bu soruyu otoriterlik sonrası ve geçiş dönemi hukuk sistemlerinde yargısal reform konusundaki daha geniş tartışmalarla ilişkilendirmektedir.*

Metodoloji: *Çalışma, doktriner (dogmatik) hukuk analizini karşılaştırmalı bir yaklaşımla birleştirmektedir. Türkiye Anayasa Mahkemesinin sekiz kararı (1989 tarihli Başörtüsü kararı, Zübeyde Füsun Üstel, Wikipedia, Şahin Alpay, Mehmet Hasan Altan (2) ve (3), Kavala (1) ve (2) ile Ahmet Şık (2)) "uç örnek" seçim mantığı çerçevesinde incelenmiş; Avrupa İnsan Hakları Mahkemesinin (AİHM) altı kanonik kararı ise karşılaştırma ölçütü olarak kullanılmıştır. Teorik çerçeve, Scott Shapiro'nun planlama teorisi, Nicos Stavropoulos'un yeniden çerçeveleme tezi ve Mark Greenberg'in Ahlaki Etki Teorisi üzerine kurulmuştur. Türk anayasa hukuku doktrini sekiz temel eser üzerinden, Alman anayasa hukuku ise Kommers ve Miller'ın başvuru eseri üzerinden incelenmiştir.*

Bulgular ve Sonuçlar: *Çalışma dört temel bulgu ortaya koymaktadır. Birincisi, paradigmatik değişim, birbirinden farklı uç örneklerin karşılaştırılması yoluyla ampirik olarak ortaya konulabilir. İkincisi, dönüşüm homojen değildir: olağanüstü hâl kararları paradigmanın korunduğunu gösterirken, Kavala kararları bir gerilemeye işaret etmekte;*

* The publication metadata in Turkish is presented as submitted by the authors.

2025 tarihli Ahmet Şık (2) kararı ise Bölüm düzeyinde devam eden direnci göstermektedir. Bu örüntü, burada "asimetrik heterojenlik" (asymmetric heterogeneity) kavramıyla ifade edilmektedir. Üçüncüsü, dönüşüm Shapiro'nun planlama teorisinin kavramsal araçlarıyla açıklanamamaktadır; "anayasal yetkilendirme" (constitutional delegation) savunması da yeterli değildir. Dördüncüsü, orantılılık denetiminin somut yapısı, Greenberg'in Ahlaki Etki Teorisi ve Berman'ın "ilke pozitivizmi" (principled positivism) ile örtüşen yorumcu bir temellendirme modelinin kurumsal tezahürü olarak anlaşılabilir.

Bu sonuç, Türk anayasa yargısında daha şeffaf bir muhakeme tarzı için teorik bir temel sunmakta; orantılılık denetiminin ahlaki boyutunun açıkça kabul edilmesinin yargısal hesap verebilirliği güçlendireceğini ileri sürmekte ve geçiş dönemi bağlamlarında anayasa mahkemelerindeki paradigmatik değişimleri analiz etmek için genelleştirilebilir bir kavramsal çerçeve ("asimetrik heterojenlik") önermektedir.

Anahtar Kelimeler: *hak temelli yaklaşım; orantılılık denetimi; planlama teorisi; anayasa yargısı; teorik uyuşmazlık; Ahlaki Etki Teorisi; asimetrik heterojenlik.*

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Research Article

AUDIO-VIDEO RECORDING AS AN ETHICS-ENHANCING TOOL IN ALBANIAN COURTS

Dhurata Milori* and Nysjola Dhoga

ABSTRACT

Background: *This paper analyses the ethical impact and use of digital technology in court hearings, focusing on the new element added to Albania's audio recording system: video recording. While Albania has used a digital audio recording system in all courtrooms since 2015, it fully implemented video recording in December 2024. This paper assesses audio recording performance over the last ten years and the implications of video recording.*

Method: *The paper relies on a questionnaire as a primary source. It was distributed to court clerks, the main users of this system. The empirical data come from three of the courts in Tirana. The courts in Tirana have the highest number of courtrooms and court clerks compared with other courts in the country. Additionally, four lawyers were interviewed to assess the impact of audio-video recording from their perspective.*

Results and Conclusions: *Digital audio recording for over a decade and the more recent video recording system have a significant positive impact on increasing ethical standards in court hearings. They also contribute to access to justice because reliable documentation helps parties verify what occurred during court hearings and appeal court decisions more easily.*

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However, the paper finds that inadequate infrastructure in Albanian courts remains an obstacle to achieving the full benefits of the digital audio-video recording system on the ethical standards of court hearings. Continuous training and awareness campaigns on its use are still needed for all parties involved in court hearings.

1 INTRODUCTION

Judicial ethics contributes to enhance professional discipline while safeguarding public trust in the judiciary. For a judge, it is not only important to be competent when appointed to the position. It is also important to be ethical.[1] Good ethics, together with professional values, become an important part of their daily professional responsibilities.[2] On the other hand, well-documented court records are an important element of judicial transparency. They also reflect overall judicial efficiency.[3]

In Albania, The United States Agency for International Development (USAID) launched the Albanian Justice Sector Strengthening (JuST) project in 2010. It aimed, among other things, to improve the performance of the Albanian justice sector. As part of the project, digital audio recording was introduced and implemented in Albanian courts.[4] The installation of the system started in 2012 and was completed in all thirty-eight courts in the country in 2015.

To give digital recording legal force in Albania and integrate it into the judicial process as an official source of documentation, the legal framework needed to be adapted.

The Ministry of Justice approved Instruction 353 dated 3.9.2013 "On determining detailed rules for the maintenance, preservation, and archiving of the minutes of court hearings by audio means".[5] This Instruction clearly established that the audio recording constituted the official minutes of the court hearing and that the printed notes signed by the court clerk, together with any available transcripts, were to be attached to the court file as part of it.

A key element of the legal framework for implementing and using the audio recording system is Article 115 of the Code of Criminal Procedure. This Article, among others,

1 Lydia Achode, 'Judicial Ethics: A Key Tenet to Legal Ethics' (2022) 6(1) Strathmore Law Journal 259 <https://doi.org/10.52907/slj.v6i1.183> accessed 18 June 2026.

2 Anne Sanders, *Updated Report on the Individual Evaluation of Judges in Albania* (SEJ II Project, Council of Europe 2018) 21.

3 Jo Faafeng and others, *Towards Justice: Analysis of Civil Proceedings in the District Courts* (OSCE 2012) 81.

4 US Agency for International Development, *Audit of USAID's Albanian Justice Sector Strengthening Project: Audit Report no 9-182-13-004-P* (Office of Inspector General 2013) 1-2.

5 Instruction of the Minister of Justice of the Republic of Albania no 353 'On Determining Detailed Rules for the Maintenance, Preservation and Archiving of the Minutes of Court Hearings by Audio Means' (adopted 3 September 2013) arts 3(3), 4(3).
The authors translated the Albanian legislation and official documents.

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provides that "where possible, actions performed during the court hearing, as well as any other action performed outside it, shall be documented through audio or audiovisual recording. The recording begins and ends at the same time as the court hearing".[6] Also, according to Article 118 of the Code of Civil Procedure, it is stipulated that "…the single judge or the presiding judge must ensure that the minutes of the court hearing are kept through audio or audiovisual recording … ."[7]

The High Judicial Council of the Republic of Albania's Decision 353 of 11 July 2024, "On the Approval of the Instruction on the Use of Audio/Audiovisual Technology in the Judicial Process",[8] is the most recent act related to the use of audio/audiovisual recording in courtrooms. According to the Instruction approved by this Decision, digital recording tools are used for recording civil, administrative, and criminal court hearings in all courts within the Republic of Albania.[9] Pursuant to point 4, these audio-video recordings serve as the official record of each court hearing, in line with the provisions outlined in Article 118 of the Civil Procedure Code, Article 115 of the Criminal Procedure Code, and Article 34 of Law 49/2012 "On Administrative Courts and the Trial of Administrative Disputes", as amended.[10]

The audio/audiovisual recording of the court hearing is carried out by the court clerk under the instructions and supervision of the presiding judge.[11] The recording captures all verbal communications between parties, visual images, court orders, decisions, and other statements throughout the hearing.[12] Parties that want to obtain a certified copy of the audio recording can request it through the judicial secretariat. After payment, the court clerk provides the requested copy on a read-only CD. In certain cases, such as those related to minors, state secrets, or witness security, the presiding judge can limit or stop access to the recordings.[13]

Beyond these specific rules on audio-video recording, the broader legal framework also provides important safeguards.

6 Law of the Republic of Albania no 7905 'Code of Criminal Procedure of the Republic of Albania' of 21 March 1995 (amended Law No 41/2021, 23 March 2021) art 115(1) <https://qbz.gov.al/preview/b4819f4d-c246-49b3-87a9-2e6c8512c975> accessed 18 June 2026.

7 Law of the Republic of Albania no 8116 'Code of Civil Procedure of the Republic of Albania' of 29 March 1996 (amended Law no 44/2021, 23 March 2021) art 118 <https://qbz.gov.al/preview/63ca3bd6-ed1c-42d4-a44f-05c970f7714d> accessed 18 June 2026.

8 Decision of the High Judicial Council of the Republic of Albania no 353 'On the Approval of the Instruction on the Use of Audio/Audiovisual Technology in the Judicial Process' (adopted 11 July 2024).

9 ibid, point 2.

10 ibid, point 4.

11 ibid, point 6.

12 ibid, point 10.

13 ibid, points 27–29.

In the Constitution of the Republic of Albania, the right to a fair and public hearing within a reasonable time by an independent and impartial court established by law is guaranteed.[14] These are principles that guide a democratic society, where the good administration of justice is an important element of its functioning. The principle of the good administration of justice is also linked to procedural guarantees in the examination of issues by the court.[15]

According to Eric Alt, referring to the work of a European Commission for the Efficiency of Justice (CEPEJ) working group, the quality of justice may be understood as "a triangle whose summits may be efficiency, legitimacy and ethics".[16] In this context, audio-video recording can support these dimensions by providing an accurate and verifiable record of court hearings.

Inevitably, we think that audio-video recording in this context supports ethical standards and accountability, which are also reflected in the Albanian legal framework regulating the evaluation of judicial performance.

The evaluation criteria are defined in Law 96/2016 "On the Status of Judges and Prosecutors in the Republic of Albania," as amended.[17] According to Article 71, the criteria are based on professional capacity, organisational skills, ethics, commitment to judicial and prosecutorial professional values, personal qualities, and professional commitment.[18] Ethics and commitment to professional values, according to Article 75(1) of the same law, are assessed by the magistrate's work ethic, integrity, and impartiality.[19]

The relevance of audio-video recordings to the evaluation process is reflected in Article 77(c) of the same law: "Judicial files selected by lot for evaluation, pursuant to Article 91 of this Law, including audio or video recordings of the related hearings, shall ensure full representation of all types of cases adjudicated and investigated."[20] As a result, we can say that audio-video recording constitutes a formally recognised source of information in the judicial evaluation process.

14 Constitution of the Republic of Albania (adopted 21 October 1998) art 42 (2) <https://www.constituteproject.org/constitution/Albania_2012> accessed 18 June 2026.

15 Institute for Public and Legal Studies, *Access to Justice and FAIR TRIAL: Monitoring Guide for Civil Society* (ISPL 2023) 17 [in Albanian].

16 Eric Alt, 'Quality of Justice' (*MEDEL – Magistrats européens pour la démocratie et les libertés*, February 2012) 2 <https://medelnet.eu/wp-content/uploads/2012/02/Quality-of-justice-3.pdf> accessed 18 June 2026.

17 Law of the Republic of Albania no 96/2016 'On the Status of Judges and Prosecutors in the Republic of Albania' of 6 October 2016 (amended Law no 9/2026, 28 January 2026) <https://qbz.gov.al/eli/ligj/2016/10/06/96-2016> accessed 18 June 2026.

18 ibid, art 71.

19 ibid, art 75(1).

20 ibid, art 77(c).

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Regarding Albania, while the introduction of audio recording and later audio-video recording in courts has happened recently, studies show that this technology has enhanced courts' transparency, which represents a vital instrument in preventing corruption.[21]

In its 2025 Annual Report, the High Judicial Council of Albania highlights the importance of maintaining and updating the digital audio recording system and audio-video equipment in courts. This aims to improve the quality of court-hearing recordings and ensure the sustainable storage of audiovisual materials. It also aims to ensure compliance with applicable technological and information security standards.[22]

This study examines the benefits and challenges of implementing audio-video recording of court hearings in Albania and its impact on judicial ethics.

The study aims to answer the following research questions:

> *How has the digital audio-video recording system affected the ethics of court hearings?*
>
> *How can the impact of the digital audio-video recording system on judicial ethics be further enhanced by addressing the challenges associated with its implementation?*

For this purpose, the paper first analyses the state of play and reviews the literature. The next section presents the questionnaire and interview results, along with the findings. The paper concludes with conclusions and recommendations to further improve the impact of audio-video recording on judicial ethics.

2 LITERATURE REVIEW

Courts are adapting to the development of new technologies to achieve better, faster, and more efficient performance.[23] Reiling distinguishes three categories of technology used in courts: those that are used within courtrooms; those related to back-office functions, such as administration of cases or management; and those related to communication with external parties.[24] While technological progress has been rapid, the increasing use of technologies in courts has also raised concerns about their potential to affect the decision-making process by creating bias and to impact the authoritative power of courts by altering

21 Bojana Hajdini and Gentjan Skara, 'The Role of Information and Communication Technology in Fighting Corruption in the Judiciary System: The Case of 2016 Judicial Reform in Albania' (2022) 8(3) Journal of Liberty and International Affairs 115 <https://doi.org/10.47305/JLIA2283115h> accessed 18 June 2026.

22 High Judicial Council, *Annual Report 2025* (KLGJ 2026) 74 [in Albanian].

23 Catarina Frade, Paula Fernando and Ana Filipa Conceição, 'The Performance of the Courts in the Digital Era: The Case of Insolvency and Restructuring Proceedings' (2020) 29(3) International Insolvency Review 346 <https://doi.org/10.1002/iir.1390> accessed 18 June 2026.

24 Dory Reiling, *Technology for Justice: How Information Technology Can Support Judicial Reform* (Leiden UP 2009).

the solemnity of courtroom proceedings.[25] Nevertheless, these technologies have enhanced court efficiency by improving their document administration and reducing paper use, as well as providing timely access to transcripts of court proceedings.[26]

This paper focuses on one courtroom technology: audio-video recordings of court hearings. A court record is based on the conceptualisation of judicial justice, which "requires that a trial process should be just, and that justice should always be presented in a visible, transparent manner".[27] Court records show how trial procedures have been applied, and audio-video recording can be a useful tool for this assessment.

Audio recording of court proceedings has been used for decades in the United States.[28] However, audio, and later audio-video recording of court hearings is a recent tool in many countries and transitional democracies, such as Albania. Audio recording is more comprehensive and accurate than a written transcript since it provides other features such as tone, volume, and the emotions of the speaker, which cannot be reflected in text.[29] Video recording adds other benefits because it can be useful "to clarify facts, to improve judicial self-awareness, and to reveal a fuller context".[30] These records provide both picture and sound, which can give further context.[31] The video record provides not only verbal speech but also nonverbal features and other nonverbal acts, and eliminates possible conscious or nonconscious human errors or biases that can happen in the written transcript of proceedings.[32]

25 Isabella Giuffrida, 'Legal, Practical and Ethical Implications of the Use of Technology in European Courtrooms' (2004) 12(3) William & Mary Bill of Rights Journal 745 <https://scholarship.law.wm.edu/wmborj/vol12/iss3/10> accessed 18 June 2026.

26 Monika Zalnieriute and Felicity Bell, 'Technology and the Judicial Role' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (CUP 2020) 116.

27 Xingmei Zhang, 'China's Model of Electronic Reform for Court Records' (2022) 66(4) Pravovedenie 362 <https://doi.org/10.21638/spbu25.2022.401> accessed 18 June 2026.

28 Karen Klages, 'Court Reporters on Way Out? Courts Experiment with Audio-Video Machines' (1989) 75(2) ABA Journal 28; Akshay Baburao Yadav and Shivanjali Mane, 'Online Stream and Recording of Court Proceedings: A Constitutional Right' (2022) 13(2) Indian Journal of Law and Justice 171 <https://ir.nbu.ac.in/handle/123456789/4771> accessed 18 June 2026.

29 Caroline Cochran, 'Hear No Evil: How Permissive Rules on the Creation and Use of Courtroom Audio Recordings Can Increase Judicial Accountability' (2020) 33 Georgetown Journal of Legal Ethics 423 <https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2020/09/GT-GJLE200016.pdf> accessed 18 June 2026.

30 Sarah MR Cravens, 'Recording Judges: Filling Gaps to Improve Judicial Discipline' (2024) 24(1) Journal of Appellate Practice and Process 7 <https://dx.doi.org/10.2139/ssrn.4346952> accessed 18 June 2026.

31 Fredric I Lederer, 'The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High Technology Courtrooms' (1999) 50 South Carolina Law Review 799 <https://scholarship.law.wm.edu/facpubs/212> accessed 18 June 2026

32 Keith A Gorgos, 'Lost in Transcription: Why the Video Record Is Actually Verbatim' (2009) 57(3) Buffalo Law Review 1057 <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol57/iss3/13> accessed 18 June 2026.

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In this line, Zhang stresses that the audio-video record is superior to a hearing transcript because, first, a transcript relies on the capabilities and professionalism of the clerk and would be very difficult to correct *a posteriori* if a human error occurs; keeping an accurate transcript can be limited by the speed of the clerk and can cause external interference, because the clerk may request continuous interruptions of the trial process to keep the record complete if one of the parties speaks too fast; a written transcript can also undermine internal supervision, since the clerk's working position can be linked to that of the judge.[33] Meanwhile, audio-video recording has the advantage of diminishing possible disputes over the accuracy of court records.[34] High-quality audio-video recordings could also provide appellate courts with a more comprehensive basis for reviewing first instance proceedings, particularly where the recordings preserve aspects of testimony that cannot be fully captured through a written transcript.[35]

However, this does not mean that video recording is perfect. According to Donovan, the same errors that can happen in a trial may occur while making a transcript from a video record, and sometimes, by interacting and stopping the proceeding in cases of unclear speech, a more accurate record may be produced.[36] Also, reviewing an audio or audio-video file may be more time-consuming than a written document.[37] Thus, using both methods can serve as a mutual control mechanism. Nevertheless, most studies emphasise the benefit of introducing audio-video recording in courtrooms. This is because relying only on the traditional method can pose challenges for efficient and timely transcript production, access to justice, and transparency of court proceedings.[38] Meanwhile, the use of technologies for a comprehensive transcription of court proceedings boosts legal compliance.[39]

Audio-video recording is also linked to judicial ethics and accountability. Cravens highlights that audio-video recording is very important when there are alleged cases of

33 Zhang (n 27).

34 Tahney Lee, 'Court Recording Methods and Their Implication on Criminal Trial Procedure: Focusing on Digital Audio Recording Model's Potential to Facilitate Concentrated-Hearing in Korea' (2016) 15(2) Journal of Korean Law 355 <http://doi.org/10.23110/jkl.2016.15.2.003> accessed 18 June 2026.

35 Fredric I Lederer, 'The Evolving Technology-Augmented Courtroom: Before, During, and After the Pandemic' (2021) 23(2) Vanderbilt Journal of Entertainment and Technology Law 315 <https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss2/3> accessed 18 June 2026.

36 Bernadette M Donovan, 'Deference in a Digital Age: The Video Record and Appellate Review' (2010) 96(3) Virginia Law Review 643 <https://www.jstor.org/stable/20700380> accessed 18 June 2026.

37 Lee (n 34). See also, Judge Jack M Sabatino, 'The Appellate Digital Deluge: Addressing Challenges for Appellate Review Posed by the Rising Tide of Video and Audio Recording Evidence' (2023) 96(1) Temple Law Review 25.

38 Conference of State Court Administrators, *Digital Recording: Changing Times for Making the Record* (COSCA 2009) <https://cosca.ncsc.org/resources-courts/digital-recording-changing-times-making-record> accessed 18 June 2026.

39 Virginia Upegui Caro, 'Five Ways Digital Technologies Are Transforming Courts and Access to Justice' (*World Bank Blogs*, 20 March 2025) <https://blogs.worldbank.org/en/governance/five-ways-digital-technologies-are-transforming-courts-and-acces> accessed 18 June 2026.

judges' misconduct, because: first, the lack of such a record makes it difficult to determine objectively and credibly if such misconduct has occurred; second, it is less likely to forward a report of misconduct if a record is missing, thus making it strong evidence. Without a record, the misconduct case will rely on witnesses, who, as the court clerks, may tend to align with the judge's version due to their position of authority; third, it enhances public confidence in the judiciary system since it ensures that disciplinary measures against judges are based on strong evidence.[40] More broadly, the use of impersonal technological tools in courtrooms has been associated with a reduction of corruption[41] and increased public trust in the judicial process.[42]

While audio-video recording has been recognised to increase efficiency and transparency of court records, it may raise privacy concerns. "Striking the right balance between transparency and privacy protection is crucial for modernising the judiciary without compromising individual rights."[43] However, unlike covert information gathering, audio-video recording of court proceedings is an overt and procedurally regulated activity. Participants know the court hearing is being recorded to document the proceedings. In the context of operational search activities, the covert or overt nature of information gathering is important, although not in itself a determinative factor.[44] In the context of court proceedings, however, the overt and regulated nature of the recording, together with its specific procedural purpose, limited access to involved parties, and other secrecy restrictions, may significantly limit potential interference with privacy.

This study aims to contribute to the literature by analysing the benefits and challenges of implementing audio-video recording of court proceedings in Albania and its impact on judicial ethics. Although scholars have paid increasing attention to the use of technology in courtrooms, the literature specifically addressing audio-video recording of court hearings remains relatively limited. Existing studies mainly focus on the importance of audio-video recording for the accuracy and completeness of court records, efficiency, appellate review, transparency, and accountability. In contrast, fewer studies have examined its possible impact on judicial ethics. This literature is even more limited in transitional democracies such as Albania.

40 Cravens (n 30).

41 Reiling (n 24).

42 Esmeralda Kolaneci and Erida Pejo, 'Transitional Justice Research in the Digital Age: Western Balkans Results' (2023) 6(4) Social & Legal Studies 89 <https://doi.org/10.32518/sals4.2023.89> accessed 18 June 2026.

43 Katarina Knol Radoja and Dinka Šago, 'Transparency of Civil Proceedings in the Digital Age' (2025) 9 EU and Comparative Law Issues and Challenges Series 448 <https://doi.org/10.25234/eclic/38125> accessed 18 June 2026.

44 Iryna Hloviuk and others, 'The Use of Video and Audio Recordings Provided by Victims of Domestic Violence as Evidence' (2024) 7(1) Social & Legal Studios 150 <https://doi.org/10.32518/sals1.2024.145> accessed 18 June 2026.

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The study has some limitations. It relies on empirical data from court clerks and lawyers, two of the main users of the audio-video system. While the sample is exploratory, its findings may indicate broader institutional patterns in the country. They may also be beneficial for future comparisons in the Western Balkans and other post-transition contexts.

3 METHODOLOGY

This study uses a mixed-methods approach. It combines quantitative data collected from questionnaires with qualitative data from semi-structured interviews. The qualitative approach also includes doctrinal research. This research also analyses the relevant legal framework and literature on the use of audio-video recording in court hearings and judicial ethics.

The study was conducted from January 2025 to December 2025, covering approximately the last ten years of audio recording and following the full implementation of the video recording component in Albanian courts in 2024. The data, findings, and recommendations reflect the period in which the study was conducted.

At the national level, there are 138 courtrooms. They are distributed across twenty courts under the new judicial map implemented in 2023. The number of courtrooms can change throughout the year.

The three selected courts where we distributed the questionnaire comprise forty-one courtrooms, representing approximately 30% of the 138 courtrooms nationwide. In total, we distributed questionnaires to eighty-nine court clerks working in these courts. Four interviews were conducted with lawyers.

Specifically, the quantitative component consists of questionnaires distributed to court clerks in three courts in Tirana:

a) Tirana First Instance Court of General Jurisdiction. There are twenty-eight courtrooms in this court, of which twenty are civil, and eight are criminal.[45] The questionnaire was filled out by forty-eight court clerks who work in this court.

b) Court of Appeal of General Jurisdiction in Tirana, which has eight courtrooms.[46] Thirty court clerks filled out the questionnaire.

c) The Administrative Court of the First Instance in Tirana has five courtrooms.[47] In this court, eleven court clerks filled out the questionnaire.

Tirana, the capital of Albania, was chosen because it has the largest number of courtrooms, the highest volume of cases, and the largest number of judicial personnel nationwide. These

45 Statistics retrieved from the Tirana First Instance Court of General Jurisdiction, February 2025.
46 Statistics retrieved from the Court of Appeal of General Jurisdiction, February 2025.
47 Statistics retrieved from the Administrative Court of First Instance of Tirana, February 2025.

characteristics made Tirana a relevant setting for assessing the implementation and operation of the audio-video recording system.

The researchers administered the questionnaires on paper. The researchers distributed them directly to court clerks present at the selected courts on the day of the visit. Participation was voluntary.

The questionnaire consisted of multiple-choice questions. It was completed anonymously.

The researchers collected no personal identifiers or personal data. Court clerks were informed about the study's purpose and that the collected data would be used exclusively for academic research.

The authors drafted the questionnaire specifically for this study. It consisted of eighteen questions. The questionnaire contained two main groups of questions on the use of audio-video technology and its impact.

Four lawyers participated in the interviews. Two lawyers had experience both before and after implementing the digital audio recording system. The other two had worked as court clerks at the Tirana First Instance Court of General Jurisdiction before becoming lawyers. The selection of lawyers for interviews was based on their extensive experience, in-depth institutional knowledge, and practical knowledge. They were informed about the purpose of the research and voluntarily consented to participate. The paper anonymised the lawyers' identities. The interviews were exploratory and were not intended to be statistically representative.

The study followed the ethical principles of voluntary participation, informed consent, confidentiality, and anonymity. The questionnaire aimed to examine court clerks' perceptions of the use and ethical impact of the audio-video recording system. Interviews with lawyers provided an additional qualitative perspective from legal practitioners.

However, the study presents some limitations. The empirical data were collected only in Tirana, which limits full generalisation at the national level. However, the institutional significance and caseload of the selected courts provide relevant insights into the Albanian context. The number of interviews is limited; however, participants' in-depth experience strengthens the analytical value.

Another limitation is that judges were not included among the interview participants. Their perspective would have added another dimension to assessing the impact of audio-video recording on court hearings. Future research may consider this perspective.

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4 RESULTS OF THE QUESTIONNAIRE AND INTERVIEWS

The questionnaire results show that the audio-video recording system is widely perceived as functional and as having an important impact on the conduct of court hearings. According to Figure 1, most court clerks (71.9%) reported that they do not encounter difficulties using the system, while a smaller percentage reported moderate or high difficulties. However, 30.3% (Figure 2) estimated that they would need additional training to properly use the audio-video recording system. This shows that, despite the technical functionality, human capacity remains an important component for achieving the goal for which this digital audio-video recording system was put in place.

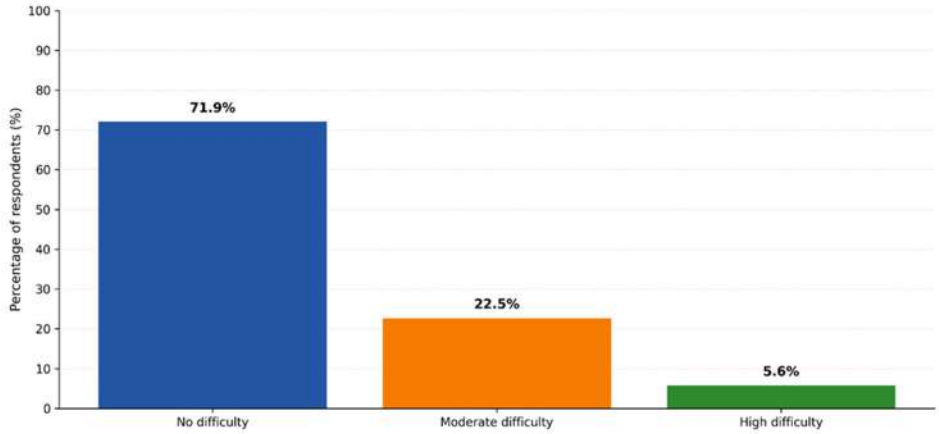


Figure 1. Court clerks' operational difficulties in conducting court hearings using the audio-video recording (AVR) system

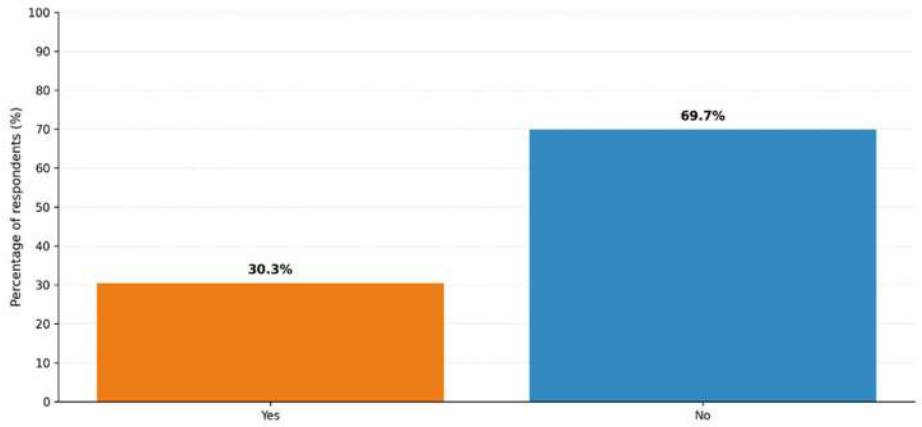


Figure 2. Need for additional training on the AVR system

Regarding the new video recording element, 43.8% of respondents consider it very useful for their work, while the rest find it partially useful or are neutral. This suggests that the impact of video recording is still consolidating, perhaps because it was implemented relatively recently. From an operational point of view, 64% of court clerks say they use playback of recorded court hearings very often, showing that the system is integrated into their daily professional practice. Furthermore, 96% of respondents say the audio recording quality is clear.

Another important dimension examined in the questionnaires is the parties' ability to use the digital audio-video recording system during court hearings. About 66.3% of court clerks report that parties need better guidance on using microphones during the hearing. Also, according to the court clerks who completed the questionnaire, a significant percentage of parties require assistance to listen to the recorded material (65.2%). Figure 3 shows that these difficulties mainly stem from a lack of computer skills and unfamiliarity with the playback program. These data suggest that the system's full impact depends not only on the technology implemented in the courtrooms but also on users' awareness and digital education.

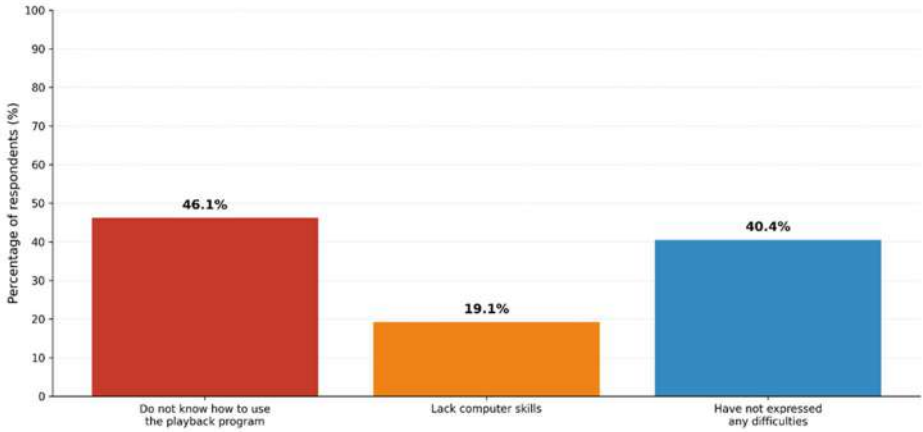


Figure 3. Difficulties of the parties in using the recording playback program

According to Figure 4, concerning the ethical dimension, a large majority of the court clerks (94.4%) assess that the system has significantly increased the transparency of court hearings. Credibility is perceived as significantly increased by 84.3% of respondents, while 74.2% report increased accountability.

Regarding the solemnity of the hearing, 64% of court clerks believe the system has significantly strengthened this element. In comparison, over half (56.2%) perceive a

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noticeable impact on the ethical behaviour of the parties in the courtroom. The discipline of the participants is also perceived as significantly improved by 48.3% of the court clerks in this questionnaire. These results show that the impact of the audio-video system is not limited to the technical aspect of documentation but extends to many important elements such as transparency, accountability, ethics, credibility, and solemnity.

As shown in Figure 4, the AVR system is perceived as having a significant impact across the aspects assessed in this paper. Overall, the Figure indicates that the audio-video system contributes to several interconnected ethical dimensions of court hearings. Transparency emerges as its strongest perceived impact.

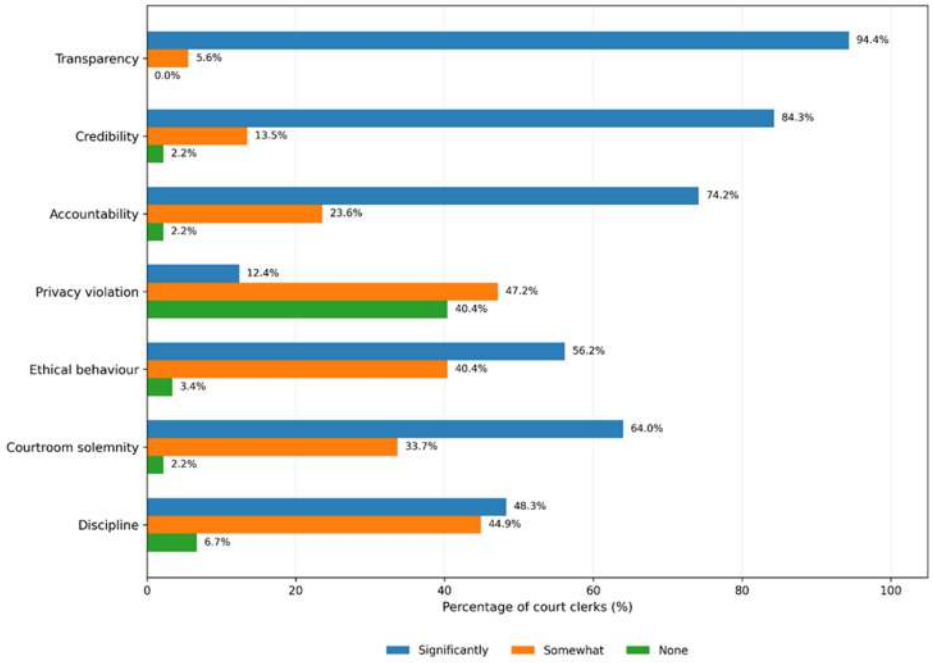


Figure 4. Impact of the use of the AVR system on court hearings according to court clerks

The privacy dimension presents nuanced responses. A significant percentage of court clerks (47.2%) believe it may somewhat influence privacy, while 12.4% believe it may significantly influence it. In contrast, 40% do not see any risk of privacy violation during video recording. Another finding is that 59.6% of court clerks reported that some parties attending court hearings feel uncomfortable speaking in front of a microphone during audio-video recording. Based on the questionnaire results, we can say that there is still a need for clarity and public awareness of the legal limits, privacy protections, and the use of the recording.

To analyse the digital audio-video recording system's impact on the ethical dimension of a court hearing, as well as its use, we have conducted four interviews with lawyers of various profiles and varying years of experience.

All interviewees agree that the audio-video recording system has positively influenced the ethics of court hearings. The awareness that every word and action is documented has brought more self-control in communication and greater respect for procedural rules by all parties involved in the judicial process, compared to the period when such technology was not applied. In their experience, the number of cases of unethical communication have also decreased.

The two lawyers with the most experience, who practised before and after the implementation of digital audio recording of court hearings and audio-video recording technology, have a similar approach. They believe the audio-video recording system has increased the solemnity of court hearings, respect for the order of speaking, control over the behaviour of the judge and the parties, and procedural accountability.

In D.H's. view, the recording system functions primarily as a preventive rather than a punitive mechanism. As he puts it, "Before the audio system, there was more room for procedural irregularities and unethical communication. Now everyone is more careful because everything is recorded". D. H. perceives audio-video recording as particularly useful for verifying allegations of procedural violations. Two former court clerks now working as lawyers (I.S. and E.H.) offer a more technical, institutional perspective on evaluating the audio-video system. E.H. stresses that the audio-video recording system of court hearings facilitates the work of the court clerk, especially in long hearings and processes. Former clerks see the system not only as an ethical guarantee but also as a tool that improves documentation quality. Both point out that the audio-video recording system increases the self-control of the judge and the parties during the hearing. It also helps in avoiding incidents (especially in criminal cases). E.H. adds the interesting element: "video encourages respect for the formal aspect of the hearing (e.g., obligation of wearing a toga)".

The interviewees largely agree that audio-video recording does not violate privacy. This is because access to recordings is limited only to interested parties. A. P. links it to transparency: "It is not about violating privacy, but about guaranteeing transparency and ethics".

However, for lawyers from before the introduction of audio-video technology in courts, audio remains the essential element; video is seen as an important addition to the audio recording.

A further issue raised by the interviewees concerned the holding of some court hearings in judges' offices. They attribute this to the still-existing lack of sufficient courtrooms in Albanian courts. In this framework, A.P. notes that "When the hearing is held in the office, the solemnity and transparency of the process are not respected". D. H. indicates that "Hearings held in the office limit publicity."

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Also, according to the interviewed lawyers, the audio-video recording system is perceived as a factor that increases the procedural trust of the parties in the judicial process. I. S. outlines that she perceives the system as impossible to manipulate since any intervention in the proceedings is traceable. From her experience, she describes the system as fully functional. In her work as a court clerk and now as a lawyer, she has benefited greatly from accurate documentation of the minutes. As E.H. summarises "When everything is recorded, the parties feel more protected because every element of the court hearing can be verified".

5 FINDINGS OF THE STUDY

This section highlights all the findings based on the results of the court clerk questionnaire, interviews with lawyers, and literature.

First, the questionnaire results show the significant perceived impact of the digital audio-video recording system on the ethical aspects of court hearings. Based on the court clerks' questionnaire, the element most affected by the digital audio-video recording system in courtrooms is transparency, followed by credibility, accountability, courtroom solemnity, behaviour of all parties involved in a court hearing, and participants' discipline. According to lawyers interviewed, implementing digital audio-video recording in courtrooms has significantly improved the ethics and standards of court hearings, starting with solemnity, behaviour of parties, transparency, and accountability. As a result, the system ensures that all parties involved are more careful and respectful of the legal process. On the other hand, lawyers argue it may prevent procedural irregularities and unethical interactions. The digital audio-video recording system offers greater security by visually capturing incidents, including any possible aggressive behaviour, usually in criminal cases. Thus, the paper's empirical data support the literature of Cravens, Reiling, Lee, and Zhang[48] linking audio-video recording to increased ethical control and procedural reliability.

Second, the lack of infrastructure, particularly sufficient courtrooms, significantly diminishes the impact that a digital audio-video recording system would have in an optimal court infrastructure.

The lawyers argue that the lack of accessibility for interested parties further undermines the publicity of court hearings held in the judge's office. These hearings lack the complete formality and solemnity required for a typical hearing. They are also shorter, which risks compromising the thoroughness of the defence's arguments and missing key elements of the case.

The High Judicial Council's annual reports repeatedly state that infrastructure remains a challenge for the courts in Albania. "The lack of land for construction and the outdated infrastructure of the Supreme Court, the Administrative Court of Appeal, the Court of

48 Cravens (n 30); Lee (n 34); Reiling (n 24); Zhang (n 27).

Appeal of General Jurisdiction, and the Tirana First Instance Court of General Jurisdiction not only fail to provide conditions for solemn court proceedings but also do not provide conditions for everyday work for human resources either."[49]

The annual report of the High Inspector of Justice (HIJ) also highlights that during the inspection of the Tirana First Instance Court of General Jurisdiction, which concluded in 2025, the lack of the necessary infrastructure for the recording of court hearings was identified.[50] Having more courtrooms is important to maximise the digital audio-video recording system's impact on court hearings.

Third, regarding the video recording component, the questionnaire results indicate a generally positive perception of its usefulness among court clerks, while some remain neutral. The neutrality may be related to the additional workload and time consumed to review the video recording, as has been stated by Lee and Sabatino.[51]

The questionnaires show that a significant proportion of court clerks perceive the inclusion of video as useful. However, their responses suggest a more nuanced picture regarding privacy. Meanwhile, the lawyers unanimously think that video recording does not violate privacy because the hearing is public. On the contrary, they think this new element brings more security and transparency and contributes to higher ethical standards during court hearings.

According to the interviews with lawyers, audio recording is mainly associated with the procedural dimension (appeals, verification of alleged procedural violations, evidence of language used and ethics). At the same time, video is perceived as an instrument that enhances formal solemnity. This difference aligns with the literature of Cravens, Gorgos, and Lederer,[52] which argues that video adds visual context, captures nonverbal behaviour, and supports disciplinary control.

Fourth, additional training or guidance may be useful for users of the audio-video system. Most court clerks reported no difficulties in using the system. However, the questionnaire indicates that some may benefit from additional training. From the court clerks' perspective, the parties involved need further guidance on using microphones while recording the hearing.

Based on the questionnaire data from court clerks, parties in court hearings often request help with the recording playback program. The main difficulty is that, according to court clerks, the parties lack computer skills and do not know how to use the playback program.

49 High Judicial Council, *Report on the State of the Judicial System and the Activity of the High Judicial Council for the Year 2023* (High Judicial Council 2023) 46 [in Albanian] <https://klgj.al/media/o4miakfi/raport-vjetor-2023.pdf> accessed 18 June 2026.

50 High Inspector of Justice, *Report on the Work of the Office of the High Inspector of Justice for the Period 01.01.2025–31.12.2025* (Office of the High Inspector of Justice 2026) 35 [in Albanian] <https://ild.al/sq/2026/04/30/raport-per-punen-e-zyres-se-inspektorit-te-larte-te-drejtesise-per-periudhen-01-01-2025-31-12-2025/> accessed 18 June 2026.

51 Lee (n 34); Sabatino (n 37).

52 Cravens (n 30); Gorgos (n 32); Lederer (n 31).

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We can conclude that interested parties who want to listen to recorded court hearing sessions need more guidance on using the recording playback program.

The interviews reinforce this finding: the system is perceived as technically simple and functional, but problems arise more from users' knowledge than from the technology itself. From interviews with lawyers, we understand that the digital audio-video recording system is generally easy to use. One lawyer observed that, depending on the client, some may need more training. Another lawyer emphasised that lawyers and all interested parties need further training and campaigns on using the digital audio-video recording system.

This shows that, to maximise the ethical and procedural impact of audio-video recording, it is necessary to have not only adequate technical resources but also support training and awareness raising.

Fifth, according to the results of the clerks' questionnaire, most parties involved in a court hearing have rarely experienced discomfort while the hearing was recorded. For those who experienced some discomfort, the main reason is usually that they feel uncomfortable speaking in front of a microphone.

Three interviews with lawyers revealed that the digital audio-video recording system is highly efficient and fulfils its intended purpose in nearly all cases. The system's high-quality recordings and simple functionality make it easy for legal professionals and clients to use. Access to the program is easy, and recordings can be listened to on various devices, such as computers and phones. They also say it can even be listened to while travelling in cars.

Sixth, the questionnaire results indicate that the audio-video system is perceived as contributing to greater credibility and accountability in court hearings. The interviews reinforce this dimension by emphasising that parties feel more protected when everything is recorded and can be verified. This is in line with the literature that links technology to increased trust and reduced perceptions of corruption.[53]

6 CONCLUSIONS AND RECOMMENDATIONS

The analysis and empirical findings of this study indicate that the digital audio-video recording system significantly contributes to the ethical standards of court hearings. Keeping recordings in digital format is an effective safeguard for long-term accessibility, and backup rules are easier to implement, reducing doubts about data alteration and enabling easy access when needed.

However, although the system is installed in all of the courts, the lack of sufficient courtrooms remains a structural obstacle. When hearings are held in judges' offices, the digital audio-video system cannot be used.

53 Kolaneci and Pejo (n 42); Reiling (n 24).

The paper further shows that the audio-video recording system has an impact beyond the technical function of documentation. Through interviews and questionnaires, it is perceived that this digital technology has, over the last ten years and more recently with the addition of video recording, functioned as a mechanism that strengthens transparency, accountability, credibility, and discipline in court hearings. The interviewed lawyers similarly associated audio-video documentation with greater awareness and self-control among judges, prosecutors, and all the participants in court hearings. They also said digital audio-video recording enables verification of procedural actions. Furthermore, it enables parties to protect their rights more effectively and exercise their right of appeal on more secure and objective grounds.

Nevertheless, the ethical and procedural benefits of audio-video recording of court hearings fully materialise when supported by an appropriate infrastructure. Although court conditions and infrastructure have improved in recent years, without sufficient courtrooms, the benefits of audio-video recording cannot be fully achieved in practice. In this sense, the effectiveness of the digital audio-video system depends not only on the technical quality but also on the physical and organisational infrastructure of the courts. Adequately trained court personnel, where needed, and informed users are also essential to these processes.

Based on the findings of the questionnaires and interviews, some of the recommendations for further improvement of the digital audio and video recording system operation and awareness raising in Albania are as follows:

- Participants need additional user guides on the proper use of microphones in courtrooms. These user guides, which could be shown to the parties before the trial as a short video or in printed materials, will provide clear instructions on how the speaker should speak in front of a microphone. Warnings and instructions on correct microphone use could also be printed near the microphone base in the courtroom. These measures are essential to avoid audio cracks and noises and could help improve audio quality.
- To help lawyers, parties, and prosecutors use of the digital audio-video recording system correctly, we recommend providing short videos with clear instructions on using the playback software, published on court websites and displayed on monitors in the courts' public areas. A demonstration computer for public access within court premises to help users access and use the software might also be useful.
- Additional training for court clerks who have difficulty using the system might be useful. Court technical staff or colleagues who are proficient users of the digital audio and video recording system could provide this training.
- To further improve the audio and video quality of the digital audio-video recording infrastructure in courtrooms, periodic technical assessments of the hardware, such as microphones, audio mixers, cameras, etc., are needed.

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- Expanding the implementation of the digital audio and video recording system in courts where its use is limited due to the lack of courtrooms. This problem needs to be addressed in the short- and long-term. If adding more courtrooms is not possible in the near future, we suggest implementing the digital audio and video recording system in judges' offices (only for court hearings held there). This would provide a useful tool for having accurate documentation of the court hearings on the current infrastructure as a short-term solution.
- The court's strategic approach should focus on raising public awareness and increasing visibility of the digital audio and video recording system's benefits for transparency, accountability, and efficiency. This approach would help enhance public confidence in the judiciary and strengthen standards of conduct during court hearings.

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AI technologies were used solely to improve language clarity and grammar. No AI tools were used to generate ideas, structure arguments, analyse data, or formulate conclusions.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

АУДІО- ТА ВІДЕОФІКСАЦІЯ ЯК ЗАСІБ ЗАБЕЗПЕЧЕННЯ ДОТРИМАННЯ ЕТИЧНИХ СТАНДАРТІВ У СУДАХ АЛБАНІЇ

Дурата Мілорі* та Нісьйола Дога

АНОТАЦІЯ

Передумови. *У статті проаналізовано використання цифрових технологій та їхній вплив на дотримання етичних стандартів під час судових засідань, з особливим наголосом на запровадженні відеофіксації як нового елемента системи аудіофіксації судових засідань в Албанії. Цифрову систему аудіофіксації використовують в усіх залах судових засідань Албанії з 2015 року, тоді як повноцінне впровадження відеофіксації завершилося в грудні 2024 року. У роботі оцінено результати функціонування системи аудіофіксації за останні десять років, а також проаналізовано наслідки запровадження відеофіксації.*

Методи. *Головним методом збору первинних даних було анкетування. Опитування проведено серед секретарів судових засідань, які є основними користувачами цієї системи. Емпіричні дані отримано в трьох судах Тирани, загалом у цьому місті зосереджена найбільша кількість залів судових засідань і працівників апарату суду порівняно з іншими судами країни. Крім того, з метою оцінки впливу аудіо- та відеофіксації з погляду адвокатів було проведено чотири інтерв'ю.*

Результати та висновки. *Використання системи цифрової аудіофіксації протягом понад десяти років, а також запровадження системи відеофіксації сприяють підвищенню рівня дотримання етичних стандартів під час судових засідань. Ці системи також сприяють забезпеченню доступу до правосуддя, оскільки достовірна фіксація перебігу судових засідань допомагає сторонам перевірити, що саме відбувалося під час розгляду справи, та полегшує оскарження судових рішень. Водночас у статті встановлено, що недостатній рівень розвитку інфраструктури судів Албанії залишається перешкодою для повноцінного використання можливостей системи цифрової аудіо- та відеофіксації з метою підвищення рівня дотримання етичних стандартів під час судових засідань. Необхідно й надалі забезпечувати систематичне навчання всіх учасників судового провадження та проводити інформаційно-роз'яснювальні заходи щодо використання цієї системи.*

Ключові слова: *система аудіо-та відеофіксації; етичні стандарти; судові засідання; секретарі судових засідань; адвокати.*

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Research Article

THE ROLE OF JUDICIAL TRANSLATION IN ACHIEVING JUSTICE: A COMPARATIVE ANALYTICAL STUDY

Mariam Ahmed Alsandal

ABSTRACT

Background: *The right of the parties to the dispute to understand the litigation procedures contributes to achieving a fair trial; accordingly, the use of interpreters before the judiciary is considered a guaranteed right for everyone worldwide in criminal cases, according to international instruments and local laws. It is a system aimed at achieving judicial justice. Some international instruments have stipulated the general rules regarding judicial translation in courts and left the details to domestic legislation. In Poland, as a European Union member state, to implement certain EU directives, the Sworn Translator Law was enacted, and in the United Arab Emirates, the Law Regulating the Profession of Translation was enacted. Both include important legal rules that help achieve justice in the courts.*

Method: *The study relied on an analytical method, analysing the content of general legal rules on judicial and private translation in the domestic laws of Poland and the UAE to interpret them and assess their sufficiency. Additionally, it used the comparative method to compare the legal rules governing judicial translation in Poland, as set out in the Sworn*

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Translator Law number 24 of 2004 and its 2019 amendments, with the rules on the same subject issued in the UAE under Federal Decree-Law number 22 of 2022. All of this aims to identify similarities and differences to determine the best rules and practices that achieve the overall goal of these regulations: ensuring justice in the courts.

Results and Conclusions: *The study concluded that translation in court is a guarantee of judicial fairness and identified some differences between the legal rules studied in Polish and Emirati law. Based on this, the study gave some preference between these rules and provided recommendations to improve judicial translation laws to ensure that parties have their right to a fair trial.*

1 INTRODUCTION

Judicial translation is one of the most important judicial guarantees for litigants in criminal and civil cases, as it enables them to perceive and understand everything that is happening around them. This has been affirmed by many international instruments, including the European Union. Some national legislation affiliated with the European Union and others have also included specific regulations governing the work of judicial translators, including the Polish Sworn Translator Law of 2004 and its amendments, and the UAE law, the Federal Decree-Law No. (22) of 2022.

This study presents a comparison of judicial translation in light of the European Union's general rules, the law governing sworn translators in Poland and the UAE, and judicial practice in both countries. This is done by determining whether the use of a translator is right or an obligation. Then we discuss the supervision of judicial translators and the responsibilities that arise from it to ensure a fair trial.

2 METHODOLOGY

This study adopts a multidisciplinary research approach focused on problem-solving, grounded in the concept of judicial translation as a guarantee of procedural justice and a fair trial. The study combines formal, institutional, and comparative legal methods to analyse the impact of the legal regulation of sworn translators in Poland and the regulation of the translation profession in the UAE on the accuracy of translation and its guarantees before the courts of both countries. It also evaluates their effectiveness as a tool for ensuring integrity and equality among litigants before the judiciary, regardless of language differences.

The comparative analytical approach constitutes the core of the study, allowing examination of the legislative frameworks governing the judicial translation profession in both countries, as well as the structures of the institutions overseeing it. The analytical method focuses on deconstructing and interpreting the legal texts related to the subject of the study in both

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countries, preceded by the deconstruction and interpretation of certain European directives relevant to the subject, considering them as general rules. The focus is on procedural rules related to the registration of translators, the oath-taking mechanism, and the translator's liability in Poland and the UAE in its three forms (disciplinary, civil, and criminal). This examination is complemented by evaluating the performance of the relevant institutions in both countries, such as the Ministry of Justice and the committees responsible for monitoring translators, to test their effectiveness in managing judicial translation work and their efficiency in providing oversight channels over translators' work, all aimed at achieving the primary objective of judicial translation.

The comparative approach in this study achieved its intended purpose by framing the legislative variation in the Polish sworn translator law as a European model and the UAE translation profession regulation law as an Arab model. This choice comes in line with what previous legal studies have demonstrated regarding its effectiveness in identifying legislative shortcomings and providing advanced drafting alternatives, such as the study by Ali & Algane[1] and the study by Byrne.[2] These studies confirmed that systematic legislative comparison is the best means to address legal gaps and understand the legislator's intent. The study relied on objective criteria that served the research goal, presenting the Polish system as a solid European example with a stable and precise framework for preparing and selecting sworn translators in accordance with common European standards of justice. Meanwhile, the UAE system reflects legislative responsiveness to the demands posed by economic growth and cultural diversity, without compromising the guarantees of justice. The methodological comparison between these two systems enables the identification of points of convergence and divergence in the philosophy of protecting defence rights and equality among litigants before the judiciary, and the determination of suitable legal and structural models to guide the development of the national system.

3 SEEKING THE HELP OF A TRANSLATOR: A RIGHT OR DUTY

While translation is of great importance across all fields, its significance within the judiciary is even greater.[3] A fair trial cannot be realised where there is ignorance of the language of the court, even if such ignorance is remedied only through the assistance of an interpreter.[4]

1 Siddig Ahmed Ali and Mohamed Abd Allah Abd Algane, 'The Role of Forensic Translation in Courtroom Contexts' (2013) 2(spec) Arab World English Journal 171180.

2 Jody Byrne, 'Caveat Translator: Understanding the Legal Consequences of Errors in Professional Translation' (2007) 7 The Journal of Specialised Translation 2, doi:10.26034/cm.jostrans.2007.714.

3 Roseann Duenas Gonzalez, Victoria F Vasquez, and Holly Mikkelson, *Fundamentals of Court Interpretation: Theory, Policy, and Practice* (Carolina Academic Press 1991).

4 Tarja Salmi-Tolonen, 'Interpersonality and Fundamental Rights' in Ruth Breeze, Maurizio Gotti and Carmen Sancho Guinda (eds), *Interpersonality in Legal Genres* (Linguistic Insights vol 191, Peter Lang 2014) 63.

The role of the interpreter in judicial proceedings is confined exclusively to translation; the interpreter may not assume the role of a judge or a lawyer. A judge is not authorised to perform the function of an interpreter,[5] nor may a lawyer act as an interpreter for their client or for the opposing party, given the evident conflict of interest inherent in such a situation.[6] Since the right to seek the assistance of an interpreter is guaranteed to all, not merely as a fundamental human right, but as an integral component of procedural justice,[7] the use of interpreters at all stages of litigation in the United Arab Emirates is of paramount importance, as it relates to matters of public order. Consequently, failure to engage an interpreter during litigation procedures may be invoked at all stages of the proceedings, including before the highest court, and the court may raise this issue proprio motu. Some international and national laws require the use of a translator in the judiciary, and these laws differ in the details of how a translator is used.

If judicial translation is this important, is it the responsibility of the translator, or of the state or the judicial authority? Does it differ between criminal and civil cases? Is it limited to oral translation, or does it also extend to written translation? And finally, what effect do all these differences have on the right to defence and a fair trial?

To answer these questions, we need to start with the international framework that forms the general basis for the right to use judicial translation, then explain how this is reflected in Polish and Emirati law and determine whether the use of translation is a right for individuals, a duty for the state or judicial authorities, or a combination of both. For European Union countries, there are several legislations that affirm the right to translation, including Article 47 of the EU Charter of Fundamental Rights,[8] which confirms the right to a fair trial, and Article 6.3e of the European Convention on Human Rights,[9] which requires all EU countries to provide judicial translation in criminal cases.

As stated in Article 1 of the European Directive EU/2010/64 regarding the scope of this directive,[10] it sets out the general rules concerning the right to oral and written translation in criminal proceedings and in the execution of a European arrest warrant. While the European framework set the general rules on using a translator, it is necessary to look at the legal nature of using a translator in national comparative laws (Polish and Emirati).

5 Ali and Abd Algane (n 1).

6 Ana Aliverti and Rachel Seoighe, 'Lost in Translation? Examining the Role of Court Interpreters in Cases Involving Foreign National Defendants in England and Wales' (2017) 20(1) New Criminal Law Review 130, doi:10.1525/nclr.2017.20.1.130.

7 Ran Yi, 'Manner Matters: Linguistic Equity Through a Court Interpreter in Australia' (2025) 38 International Journal for the Semiotics of Law 525, doi:10.1007/s11196-023-10090-3.

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

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

10 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings [2010] OJ L 280/1.

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On this basis, European Union countries have adopted judicial translation in their national laws for criminal cases and, in addition, for civil cases, with some differences in its use. In Polish national law, a translator must be used before the criminal and civil courts in accordance with the Code of Criminal Procedure and the Code of Civil Procedure, in addition to the general rules regarding translation in the Sworn Translator Profession Law.[11]

The national law in the UAE allows the use of judicial translation in criminal courts under the criminal law and in civil courts under the civil procedure law, in addition to the general rules for translators stated in Federal Decree-Law No. (22) of 2022,[12] which regulates the translation profession. It is clear from this that, in each system, the use of a translator is linked to its legal basis and framing, whether as an individual right or as a duty of the state or judicial authorities.

From the above, we can infer that the European Union directives consider the use of judicial translation both a right for individuals and a duty for states, but only in criminal cases. As for comparative legal systems, the Polish legal system tends to consider the use of a translator in criminal cases as an obligation for the authorities to protect individuals, enable their understanding, and guarantee the right of defence, whereas its scope is narrower in civil cases, where it is considered an obligation for the court only in specific situations. In contrast, the use of a translator in Emirati law is regarded as a duty of the relevant authorities rather than a right of individuals, even though translation here serves the interests of both the state and individuals.

If determining the legal nature of seeking the assistance of a translator reveals whether it is a right or a duty, this alone is not sufficient, as it is necessary to define the limits and controls of this right or duty in terms of the persons covered, the types of cases, and the type of translation, whether written, oral, or just one of them.

3.1. Limits and Regulations for Using Translators in Legal Cases: Immediate (Oral) Translation

We previously concluded that translation in the European Union is considered a right for individuals and an obligation for the EU. The specifics of this are outlined in Article 2 of the European Directive EU/2010/64, which obliges the member states of the European Union

11 Code of Criminal Procedure of the Republic of Poland of 6 June 1997 [1997] DzU 89/555 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19970890555> accessed 22 June 2026; Code of Civil Procedure of the Republic of Poland of 17 November 1964 [1964] DzU 43/296 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640430296> accessed 22 June 2026; Law of the Republic of Poland 'On the Profession of Sworn Translator' of 25 November 2004 [2004] DzU 273/2702 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20042732702> accessed 22 June 2026.

12 UAE Federal Decree-Law No (22) of 2022 'Regulating the Translation Profession' [2022] Official Gazette 736 <https://uaelegislation.gov.ae/en/legislations/1568> accessed 22 June 2026.

to ensure that suspects or defendants have access to an interpreter. An interpreter must be provided for any suspect or defendant who does not speak or understand the language of the criminal proceedings, as well as for those who have hearing or speech disabilities, and for anyone in need of interpreter assistance. This requirement applies during the interrogation stage, throughout the sessions, upon filing appeals, and, more generally, before investigative authorities and judicial authorities.

Under Polish law, Article 72 of the Code of Criminal Procedure requires the use of an interpreter for those who are not sufficiently proficient in the Polish language at all stages of criminal proceedings, and the defendant and their lawyer may request the use of an interpreter for communication between them. Article 265 of the Code of Civil Procedure requires the court to appoint an interpreter if the witness does not speak Polish. Polish jurisprudence holds that the use of oral translation during litigation, as an application of that text, serves as an essential tool through which the court simplifies its supervision of the proceedings, including the examination of the parties and the hearing of witnesses who do not speak Polish.[13]

The use of an interpreter in Emirati courts is addressed in Article 8 of the Code of Criminal Procedure, which limits the use of an interpreter to the immediate translation of the statements of the defendant, witnesses, and others in the event that any of them do not know Arabic, the language of litigation in the United Arab Emirates. The same concept is established in the Code of Civil Procedure under Article 5, which stipulates that if any of the parties, witnesses, or others do not know Arabic, the use of an interpreter is mandatory.

From this, we infer that the use of translators for simultaneous interpretation is similar in Polish and Emirati criminal law, whereas civil procedure law is broader in terms of simultaneous interpretation than in Polish law, as it includes everyone: the accused, the parties, the witnesses, and others, not just the witnesses as stated in the Polish c; this may be due to the diversity of nationalities in the United Arab Emirates.

3.2. Written Translations

As for written translations, EU member states also adhere to this requirement under the European Directive EU/2010/64, which applies only to essential documents related to criminal proceedings. This is done within a reasonable time for suspects or defendants who do not understand the language of the criminal proceedings, so they can exercise their right to defend themselves based on a clear understanding of the charges against them. This includes decisions that can deprive a person of their liberty, indictments, judgements, and other necessary documents.

13 Filip Manikowski, 'Pozycja tłumacza w postępowaniu cywilnym' (2022) 39(121) Zeszyty Naukowe Uniwersytetu Rzeszowskiego, Seria Prawnicza 169, doi:10.15584/actaires.2022.4.12.

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As stated in EU Regulation 2020/1784,[14] which is a regulation that governs the service of judicial and non-judicial documents in civil and commercial matters between the member states of the European Union, it indicates the right of the recipient of the documents to refuse receipt if the documents are in a language other than the one they understand or in a language other than the official language of the place of service.

In the third chapter of the Polish Certified Translator Act,[15] it is emphasised that the translator's license should include performing written translations, verifying the accuracy of translations prepared by others, and approving them. This is closer to regulating the profession than to providing procedural protection to the parties in a lawsuit, as is the case under the European directive. Therefore, the Polish courts and judicial authorities rely only on licensed translators, and judges are not allowed to accept any written translation unless it is stamped by a translator who has been previously licensed and registered with the Ministry of Justice. [16]

As for translating documents for submission to the UAE judiciary or other courts, this is done by the person submitting the document, whether the case is criminal or civil. Translation is made by licensed translators or authorised translation agencies in accordance with the specific rules set out in the Decree Regulating the Translation Profession.

Since Polish law considers written translation as an integral part of the work of a sworn translator, the Polish Sworn Translator Law obliges licensed translators to perform translations whenever requested by the competent authorities. A translator may only refuse to do so for justified reasons. Article (15) of Chapter Three of the Polish Translation Law stipulates that sworn translators are not allowed to refuse translation and or interpretation in proceedings conducted under the law, when requested by a court, the public prosecutor, the police, or public administrative authorities, unless there are very compelling reasons justifying such refusal.

The details of any refused translation are recorded in the translator's register in accordance with paragraph (7) of Article (17.1). This ensures the continuous provision of written translation whenever necessary to maintain the continuity of legal proceedings.

In contrast, written translation under the UAE law is conducted by licensed translators and translation offices, and the legislator did not address the notion of refusing written translation in the law regulating the translation profession.

14 Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (service of documents) [2020] OJ L 405/40.

15 Law of the Republic of Poland 'On the Profession of Sworn Translator' (n 11).

16 Mariusz Kaczocha and Mariusz Mazuryk, *Ustawa o zawodzie tłumacza przysięgłego: Komentarz* (Wydawnictwo LexisNexis 2011) 35.

From this, we can conclude the clear disparity between Polish law and its Emirati counterpart regarding the refusal to perform written translation tasks. Polish law demonstrates evident flexibility that helps maintain translation quality, as forcing a translator to produce written translations might compromise it due to time constraints. In contrast, Emirati law is strict, treating written translation as an obligation that the translator cannot refuse. Thus, Polish law is considered more consistent with the philosophy of protecting justice, given that Emirati law does not mandate a written translation in court but requires the parties to have their documents translated by a licensed translator outside the court.

Although the right to translation before the courts is of particular importance in criminal proceedings, as emphasised by all international instruments and domestic laws, translation is equally important in civil proceedings.[17] This is grounded in constitutional and domestic legal provisions that typically affirm the right of all persons to have access to the courts and to seek the assistance of an interpreter without restricting such a right to a specific type of case, that is, without confining it solely to criminal proceedings to the exclusion of civil cases.[18]

From the above, it can be concluded that the European Union's international legislation has recognised the issue of document translation, but only for essential documents and at all stages in criminal matters. Translation is a right for suspects and defendants, but not for the opposing parties in civil cases. This translation includes everything necessary to protect suspects or defendants from the risk of misunderstanding and failing to comprehend the contents of those documents and their implications for them. Meanwhile, the Polish legislator has moved towards establishing professional regulation of written translation by sworn translators and preventing them from refusing such translations except for valid reasons. On the other hand, the Emirati legislator has mandated the translation of all documents submitted to both the criminal and civil courts of the UAE and organised this in the Federal Decree regulating the translation profession. It is noteworthy that the purpose here is to ensure the judiciary's understanding of the documents' contents, not the other way around. Translation is carried out for what is submitted to the judiciary, not what is issued by it; thus, the state is not obliged to translate what it issues against individuals in both criminal and civil cases, even if any of them are unaware of the Arabic language in which those documents are issued.

This variation shows that the problem is not just recognising written translation in the judiciary but also extends to how it is done and the limits of relying on the tools used to achieve it. So, the question here is about leveraging technological advances in remote

17 Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (2nd edn, University of Chicago Press 2017).

18 Randall T Shepard, 'Access to Justice for People Who Do Not Speak English' (2007) 40 Indiana Law Review 643.

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translation and artificial intelligence to help countries meet their obligations regarding judicial translation?

Article 2(6) of EU/2010/64 provides for the possibility of using remote interpretation when necessary, allowing remote communication technologies such as video conferences, telephone, or the Internet, provided that the physical presence of the interpreter is not required to ensure the fairness of the proceedings. Accordingly, Article 151 of the Polish Code of Civil Procedure permits hearings to be held remotely via audiovisual means, and an interpreter may be employed in the same manner. Meanwhile, we did not find a clear provision in the Code of Criminal Procedure regarding the possibility of using a remote interpreter. However, Article 177(1)(a) provides for the use of technological means with the witness, yet this provision alone cannot be considered sufficient to indicate the use of an interpreter through technological means, as the interpretation serves the witness.

In the United Arab Emirates, Article (8) of the Code of Criminal Procedure[19] stipulates that the assistance of a translator, at any stage, may be provided by any technical means approved by the Ministry of Justice or the local judicial authority. As for the Code of Civil Procedure,[20] it includes a specific section on the use of remote communication technology in proceedings, without specifying the stage or type of proceedings. However, we did not find any provision in the law regulating the translation profession that confirms the permissibility of conducting translation by technical or remote means.

Can these provisions be considered as evidence of the possibility of using artificial intelligence in judicial translation?

The truth is that all of these texts emphasise the possibility of using electronic means and remote communication to interact with translators and carry out translation, and there is no mention of the possibility of utilizing artificial intelligence for translation, except for the text of Article (8) of the UAE Code of Criminal Procedure, which can be relied upon for the possibility of using artificial intelligence in translation as one of the technological means. As for the rest of the texts, they all relate to methods of communicating with the translator, enabling remote communication rather than traditional attendance. This indicates the need for international and national legislation to establish a legal framework for the use of artificial intelligence in translation, and even to require disclose of reliance on a human translator, whether in written or oral translation conducted remotely, to ensure accuracy, correctness, and compliance with legislation.

The risks arising from the use of artificial intelligence in judicial translation stem from the machine's lack of a full and accurate understanding of legal terminology, which some

19 UAE Federal Decree-Law no (38) of 2022 'Promulgating the Criminal Procedures Law' [2022] Official Gazette 737 <https://www.uaelegislation.gov.ae/en/legislations/1609> accessed 22 June 2026.

20 UAE Federal Decree-Law no (42) of 2022 'Promulgating the Civil Procedure Code' [2022] Official Gazette 737 <https://uaelegislation.gov.ae/en/legislations/1602> accessed 22 June 2026.

consider a high-risk application. Linguistic errors committed by intelligent systems can distort content and intended meaning, thereby undermining the foundations of the rule of law, affecting the right to a fair trial, and violating the professional confidentiality required in the judiciary.[21]

While human translation entails certain risks, including inaccuracy, lack of precision, and the potential influence of the translator's emotions or biases, among others,[22] AI-based translation is not free from some of these risks,[23] in addition to ethical and cultural risks.[24] The risks associated with AI-based translation before the judiciary are particularly significant due to their potential impact on procedural justice,[25] which serves as a guarantee of integrity.[26]

It should be noted that Polish jurisprudence is divided into two schools of thought regarding judicial translation using artificial intelligence. One school considers it necessary to prohibit the use of artificial intelligence in judicial translation, on the grounds that a trustworthy person must make the translation. Since artificial intelligence does not possess legal personality, it cannot be held legally responsible for perjury or incorrect translation. Additionally, documents translated by artificial intelligence are invalid as they are not subjected to human review and approval, thereby lacking official status.[27]

The second school of Polish jurisprudence permits the use of artificial intelligence in judicial translation solely for drafting purposes to expedite procedures, provided that this is done under human supervision and review of the translation. Nevertheless, Polish jurisprudence raises issues regarding the use of artificial intelligence in judicial translation, including the leakage of litigants' data and judicial deliberations, which constitutes a violation of the confidentiality of such data and information.[28]

21 Vicenta Tasa-Fuster, 'Democracy, Artificial Intelligence, and Machine Translation: Some Legal Challenges' in Esther Monzó-Nebot and Vicenta Tasa-Fuster (eds), *The Social Impact of Automating Translation: An Ethics of Care Perspective on Machine Translation* (Routledge 2024) 147, doi:10.4324/9781003465522-8.

22 Ray Worthy Campbell, 'Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning' (2020) 18 Colorado Technology Law Journal 323, doi:10.2139/ssrn.4425791

23 Carmen Canfora and Angelika Ottmann, 'Risks in Neural Machine Translation' (2020) 9(1) Translation Spaces 58, doi:10.1075/ts.00021.can.

24 Yorick Wilks, *Machine Translation: Its Scope and Limits* (Springer 2009), doi:10.1007/978-0-387-72774-5.

25 Francesco Contini, 'Artificial Intelligence and the Transformation of Humans, Law and Technology Interactions in Judicial Proceedings' (2020) 2(1) Law, Technology and Humans 4, doi:10.5204/lthj.v2i1.1478.

26 Adrián Vaško and Jaroslav Ivor, 'The Right to a Fair Trial and the Right to a Fair Decision in Slovak Criminal Law' (2022) 5(2) Access to Justice in Eastern Europe 146, doi:10.33327/AJEE-18-5.2-n000202.

27 Błażej Kaucz, *Wspomaganie sędziów przez sztuczną inteligencję* (Instytut Wymiaru Sprawiedliwości 2025) 22-5.

28 ibid 12-5.

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The general success of AI applications in expediting judicial procedures does not necessarily imply their independent success in producing accurate and reliable translations that effectively contribute to the realisation of justice.[29] The effectiveness of AI in case management varies depending on the field and the stage at which it is employed.[30] Consequently, the adoption of hybrid translation models becomes indispensable,[31] in which AI-based translation provides speed and a high degree of accuracy, followed by human review to verify and validate outputs, ensuring more precise results at lower cost. In other words, full reliance on AI for judicial translation is not yet feasible,[32] while it remains essential to provide comprehensive support to personnel through training and empowerment in the use of AI translation tools.[33]

Therefore, we see the necessity of having a solid and precise legal foundation for using the smart system in legal translation before the courts,[34] which should include legal rules defining the responsibility of this system and those in charge of it. The system should be used under human management and supervision, with professional translators verifying its outputs to ensure accuracy, correctness, and suitability. Professional translators should also rely on their own legal knowledge to avoid errors in smart translation.

3.3. The Role of the Translator in Achieving Judicial Justice

The quality of translation depends on many factors,[35] Integrity imposes upon the translator before the judiciary, legally, ethically, and professionally, the duty to perform translation work with accuracy and honesty, without distortion, addition, exaggeration, or omission of the meaning intended to be conveyed.[36] The quality of translation constitutes a fundamental

29 Yaohui Jin and Hao He, 'An Artificial-Intelligence-Based Semantic Assist Framework for Judicial Trials' (2020) 7(3) Asian Journal of Law and Society 531, doi:10.1017/als.2020.33.

30 Kalliopi Terzidou, 'The Use of Artificial Intelligence in the Judiciary and Its Compliance with the Right to a Fair Trial' (2022) 31 Journal of Judicial Administration 154.

31 Jennifer Vardaro, Moritz Schaeffer and Silvia Hansen-Schirra, 'Translation Quality and Error Recognition in Professional Neural Machine Translation Post-Editing' (2019) 6(3) Informatics 41, doi:10.3390/informatics6030041.

32 Fernando Prieto Ramos, 'Revisiting Translator Competence in the Age of Artificial Intelligence: The Case of Legal and Institutional Translation' (2024) 18(2) The Interpreter and Translator Trainer 148, doi:10.1080/1750399X.2024.2344942.

33 Susan Wright, 'Artificial Intelligence in Legal Translation at the Court of Justice of the European Union' (2025) 14 International Journal of Language & Law 120, doi:10.14762/jll.2025.120.

34 Karolina Kenich-Krok, 'Lost in Translation: Applying the Right to an Interpreter Through the Use of Machine Translators in Light of EU and Polish Law' (2024) 86(1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 61, doi:10.14746/rpeis.2024.86.1.04.

35 Aleksandra Matulewska, 'Jakość przekładu prawniczego a cechy języka prawa' (2008) 3 Język, Komunikacja, Informacja 53.

36 Holly Mikkelson, *Introduction to Court Interpreting* (2nd edn, Routledge 2016), doi:10.4324/9781315689586.

requirement for court translators,[37] and judicial translation requires a high degree of precision in conveying terminology and content, which in turn necessitates specialised training.[38] This does not preclude benefiting from modern technologies that contribute to performing translation tasks in a more effective and accurate manner.[39]

This obligation is considered one of the most important duties of the translator, particularly when engaged before the judiciary and required to translate into a language unfamiliar to the court. In such cases, the translator may be the sole person capable of assessing the accuracy and correctness of the translation, and it is certain that the court will base its decision or judgement on the content of the translation provided.

In this regard, the Federal Supreme Court of the United Arab Emirates affirmed that the translator, being a public employee, had taken the oath prior to assuming their duties, and that the presumption is that procedural requirements have been duly observed. Consequently, the burden of proving otherwise lies with the party alleging non-compliance. Likewise, the burden of proving that the translator did not perform their duties with honesty and integrity rests upon the party making such an allegation.[40]

So, the purpose of having a translator in legal cases is to achieve justice, since the translator is considered one of the judiciary's aides. This happens through the understanding and awareness of the people and the court of what is going on and of the documents presented and issued. This will not be possible unless various laws establish rules governing the use of translators in court. Therefore, our discussion of the translator's role in achieving justice will not be limited to the concept as an abstract idea, but rather to the legal obligations imposed by comparative law, with reference to the European framework.

For that reason, European Union legislation has recognised the right of suspects and defendants to have necessary documents interpreted and translated. It is also a responsibility of the EU member states to ensure it happens. To ensure this is implemented, Directive EU/2010/64 requires member states, in Article 4, to establish a mechanism or procedure to determine whether suspects or defendants need assistance from a translator and to ensure they understand the language of criminal the proceedings.

To ensure that the translator contributes to achieving judicial justice, the aforementioned directive emphasised in Article 2(8) and 3(9) the necessity for translations to be of

37 Mollie M Pawlosky, 'When Justice Is Lost in the "Translation": Gonzalez v United States and "Interpretation" of the Court Interpreters Act of 1978' (2014) 45(2) DePaul Law Review 435.

38 Xin Liu and Sandra Hale, 'Achieving Accuracy in a Bilingual Courtroom: The Effectiveness of Specialised Legal Interpreter Training' (2018) 12(3) The Interpreter and Translator Trainer 299, doi:10.1080/1750399X.2018.1501649.

39 Katarzyna Kruk-Junger, *Developing Professional Expertise in Translation and Interpreting: A Pragmatic Approach to Occupational Challenges* (Routledge 2025).

40 Cases 912 and 913 of 2020 Penal (UAE Federal Supreme Court, 27 October 2020) <https://www.moj.gov.ae/> accessed 18 May 2026.

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sufficient quality to guarantee the right of suspects or defendants to understand the charges against them, enabling them to exercise their right to defend themselves. To this end, national laws have established a set of legal rules that help achieve judicial justice regarding translation, including taking an oath, maintaining confidentiality, and committing to continuous professional development.

3.4. Taking the Oath

Accordingly, translators in Poland are required to take an oath. Article 7.1 states that certified translators must take the following oath in front of the Minister of Justice: 'Recognizing the importance of my words and my responsibility before the law, I hereby confirm that I will perform the duties of the certified translator assigned to me with the utmost care and impartiality, while keeping state secrets and other legally protected secrets, and also adhering, in my conduct, to the rules of honesty and professional ethics.' The same law also emphasises confidentiality as part of the translator's obligations in Article 14.2.

In this way, the Polish translator takes the legal oath once before the Polish Minister of Justice, after which they are registered. Legal scholars emphasise that this legal oath is what confers legal validity on judicial acts, without the need to repeat it.

Skipping this step can result in the loss of the legal value of the translations they provide in court, including the nullification of rulings based on that translation.[41]

As a result of this right, the UAE legislator has mandated that translators take a legal oath as one of their most important general obligations after registering in the translators' register and before commencing their professional practice. The oath is taken before one of the competent chambers of the Court of Appeal, and the legislator has specified the wording of the oath as follows:

> *"I swear by Almighty God that I will perform the work of my profession with accuracy, honesty and sincerity, and in a manner that preserves its dignity and consideration, taking into account the principles and traditions of the profession." A minute of the oath shall be drawn up, and this minute shall be kept in the translator's file at the competent department.*

In this way, Polish law focuses on oath-taking on the translator's neutrality, confidentiality, and professional ethics, while UAE law focuses on accuracy, honesty, loyalty, and the dignity of the profession.

41 Jerzy Skorupka (ed), *Kodeks postępowania karnego: Komentarz* (CH Beck 2026) arts 197 and 204.

3.5. Confidentiality

It is noted that the oath taken by a certified translator in Poland includes the obligation to keep state secrets and other confidential information confidential. This is also part of the translator's obligations in the text of duties. In contrast, the legal oath in UAE law does not include this. The translator's obligation in UAE law falls outside the oath, meaning it is stated in the texts related to the translator's responsibilities; in this case, the translator must keep the information they have accessed confidential.

Thus, both Polish and Emirati laws affirm the principle of confidentiality in judicial translation, albeit in different ways. The Polish law granted confidentiality a clearer status by including it in the oath and in the translator's obligations, whereas the Emirati law recognised it within the translator's obligations outside the form of the oath.

3.6. Language

A sworn translator under the Polish Sworn Translator Law obtains a license to translate from Polish into a foreign language and vice versa, according to Article 13 of the law. Regarding the sworn translator's obligation to the language they are licensed to translate from and to, under Article 18 of the same law, the sworn translator is required to use a stamp with their name and the licensed language on the translations they do. They get this stamp from the Ministry of Justice at their own expense, and they must document the translations they have made in their personal register.

Since a translator's registration in the translators' register under UAE law and their license are specific to certain language(s), they must translate only from and into those languages. Their seal must include the language for which they are licensed, along with their name and registration number. They also need to include their name, registration number, and the name of the translation office they work for on all publications, correspondence, certificates, and reports they sign. If they change offices, they must inform the relevant authority within one month of the change. Additionally, they should keep a personal record of all the translation work they complete.

Thus, both Polish and Emirati laws impose a restriction on translators by requiring them to translate in the language or languages for which they are licensed. While Polish law highlights this through the stamp and registry, Emirati law adds the concept of registration data, the name of the translation office, and administrative obligations, thereby reinforcing closer monitoring of translation work. Additionally, Polish is considered in Polish law as one of the original languages from and into which translations are made, whereas UAE law does not specify Arabic as the original language, the language from which and into which translations are made, even though it is the language of the courts. This is because the UAE's Translation Profession Law is not limited to judicial authorities in the UAE, but is a general law for all fields, covering all translators and translation offices in the country.

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3.7. Professional Development

As joining a new position or continuing in an existing one over a prolonged period both require diligence on the part of individuals and the institutions for which they work, continuous professional development is regarded as an essential requirement of translation practice,[42] whether initiated by the employer or driven by personal motivation. Such development enhances existing skills and contributes to the acquisition of new ones,[43] through the improvement of various competencies, including communication skills, error management, and the use of modern technologies, in order to address common challenges in the field of translation in general.[44] Given that professional development opportunities are now more accessible than ever before due to the availability of the internet and various social media platforms.

Accordingly, the translator is obligated under Article 14.3 of the Polish Sworn Translator Law to improve their professional qualifications, and the law provides no further details on this.

On the other hand, the UAE law includes the same obligation, with more detail and a register that records details of completed translation assignments.

Every translator, pursuant to the Decree-Law under study, is obliged, throughout the duration of his registration in the list, to exercise due diligence in updating his translation skills by attending specialised courses and training programmes organised by the Ministry of Justice. The translator must also keep pace with developments in the field of translation in general, and in the specific language(s) licensed for translation in particular. Attendance at least one course per year constitutes the minimum requirement for updating the skills of a translator registered in the List of Translators. As the legislator did not specify whether attendance at such courses must be in person, there is no impediment to virtual attendance, notwithstanding the risk of limited benefit, particularly regarding the practical application components of translation during courses or workshops.

There is no doubt that oral interpretation before judicial authorities requires advanced skills in cognitive processing, interactive management, and a high level of translation competence and linguistic knowledge.[45] Accordingly, if the purpose of attending training courses and programmes is to develop skills and capabilities and to acquire new competencies, the translator must be keen to attend them not merely to fulfil a registration requirement, but to achieve the objective intended by the legislator in imposing such a condition.

42 Erik-Jan Kuipers, 'Obstacles in Translating Legal Texts and the Didactics of Legal Translation' (2025) 73(10) Roczniki Humanistyczne 89, doi:10.18290/rh257310.5s.

43 Hilary Lindsay, 'More than "Continuing Professional Development": A Proposed New Learning Framework for Professional Accountants' (2016) 25(1) Accounting Education 1, doi:10.1080/09639284.2015.1104641.

44 Kruk-Junger (n 39).

45 Miranda Lai and Erika Gonzalez, 'Mentoring Interpreters of New and Emerging Languages for Australian Courts and Tribunals' (2025) 44(3) Multilingua 315, doi:10.1515/multi-2024-0062.

We can conclude that Polish law establishes a general obligation for professional development and assumes it remains in effect once the required exam is completed and throughout the licensing period. On the other hand, UAE law details this obligation specifically for translators in the UAE and ties it to clear training requirements. This reflects the administrative regulation in the UAE and its adherence to proactive quality standards, while showing legislative flexibility in Poland. This necessitates intervention by the Polish legislator to legally require sworn translators to engage in professional development rather than leave it to a personal commitment, and to establish a form of continuous oversight to ensure the ongoing updating of Polish translators' knowledge.

3.8. Stopping Work

We did not find in the Polish Sworn Translator Law a provision authorising the temporary suspension of a translator's work at their request, even though the sworn translator has the option to be removed from the register. As for stopping work in the UAE, the law concerning the practice of the translation profession, temporary or permanent suspension of work is permissible. In such a case, the translator must submit their translation card and seal to the competent authority, which is the organisational unit responsible for translators' affairs within the Ministry. The translator is also required to submit their card and translation seal to the same authority in the event of the cancellation of their registration and removal from the translators' register. This ensures that the translator does not engage in translation activities during the suspension period, especially given the ongoing technical inspection introduced by the decree, as we will see later.

From what we have mentioned, it can be inferred that UAE law includes more detailed provisions regarding a translator temporarily or permanently ceasing work; this reinforces the concept of oversight over the use of the translator's title and powers, whereas such clarity does not appear in Polish law.

4 JUDICIAL TRANSLATION TO ENSURE A FAIR TRIAL: OVERSIGHT AND ACCOUNTABILITY

Both Polish and Emirati judicial scholars agree that a judge's personal proficiency in a foreign language does not entitle them to forgo requesting a sworn translator in a case. Comparative law aims to uphold the concept of justice by separating judicial authority from technical expertise and protecting trial procedures by maintaining the judge's neutrality, a key principle of litigation.

While translation is, in general, a complex process, it becomes significantly more intricate when it is legal in nature, as its impact extends beyond the translator and the client to the administration and realisation of justice. A notable example is the translation of the

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Warsaw Convention, which was rendered from French into English in a manner that distorted the meaning between the two versions. This flawed translation produced outcomes inconsistent with the provisions of the Convention, making reliance on the English version alone untenable in practice. Consequently, practitioners and authorities applying the Convention were compelled to refer to the French version to resolve ambiguities and verify the translated text's conformity with the original. Such translation breaches the legal rules enshrined in the Convention and adversely affects the attainment of justice in judicial applications related thereto.[46]

Given that translation is a complex process requiring a meticulous methodological approach and presupposing a high degree of integrity and honesty,[47] The Polish sworn translator law imposed a simple type of oversight on the work of sworn translators and expanded the legal rules related to the translator's responsibility, while it introduced the UAE legislator, under the Decree-Law under consideration, introduced a system for the oversight of translators registered in the List of Translators at the Ministry of Justice. This system subjects translators to technical inspections and an annual evaluation process. Moreover, translators, like practitioners of any other profession, are subject to disciplinary and criminal accountability for errors or offences committed in the course of their professional activities. They may also, as a matter of course, be held civilly liable in accordance with the general rules governing civil liability in its various forms.

It is certain that ensuring judicial justice is achieved not solely by carefully selecting the translator, but also by monitoring their work and holding them accountable for any breach of their professional duties.

4.1. Supervision of Translators to Ensure the Quality of Legal Translation

To ensure oversight of translators, the EU Directive EU/2010/64 required member states of the European Union, in Article 26 of the preamble, to change the translator if the quality of the translation is not sufficient, and to emphasise the importance of translation quality in Articles 2.8, 3.9, and 5.1. It also requires national laws to guarantee defendants the right to complain about the quality of both oral and written translation, and to challenge the decision if oral or written translation is deemed unnecessary, in Articles 2.5 and 3.5.

To activate the role of monitoring translators, the EU Directive EU/2010/64, in Article 5.2, requires EU member states to establish a register or registers of translators through which the work of translators can be monitored.

46 Byrne (n 2).

47 Ahmed Essam Al-Din, *The Translation Movement in Egypt in the Twentieth Century* (General Egyptian Book Organization 1986) [in Arabic].

4.2. Supervision of Translators in the Polish Sworn Translator Law

Based on those general rules for supervising translators, the Polish sworn translator law requires translators, in Article 17, to keep a record of their translation work. This record should include the date the translation request was received and the date it was delivered, the identity of the person requesting the translation, a description of the translated document (issuing authority, language, date, nature, description), the work done by the translator, the language of the translation, the number of pages and copies. If the translation is done on the spot, it should describe the translation and specify its location, date, the time taken, and the fee the translator received. If the translation is refused within the limits allowed by law under Article 15, the translator must specify the date of refusal, the name of the authority requesting the translation, and the reason for refusal.

The oversight of the translator's work, recorded in that register and elsewhere, is authorised by the Polish Sworn Translators Law in Article 20, where the governors responsible for the translators in their area of residence ensure the reliability of their record-keeping and that they receive the set translation fees as legally determined. The oversight of a sworn translator's work in Poland is conducted according to the Sworn Translator Law in Poland in the three steps outlined in Table 1.[48]

***Table* 1. Stages of translator evaluation according to the Polish Sworn Translators Act**

Stages	Type of Oversight	Supervised Work
First stage	Self-Regulation	• The translator must immediately register their work in the official record prepared for that purpose.
Second stage	Administrative Oversight	• The governor's representative checks the translator's record to make sure the numbers on the translations match the record.
Third stage	Judicial Oversight	• The governor or the Minister of Justice refers any observed violations to the professional responsibility committee.

It is worth noting that the supervision of the work of the sworn Polish translator is considered a formal administrative oversight, represented in verifying the existence of records and the registration of translation work in them with its details. It does not include

48 Law of the Republic of Poland 'On the Profession of Sworn Translator' (n 11).

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technical supervision of the translator's work by technical inspectors who verify the accuracy and correctness of the translation, whether oral or written.

Additionally, there is the concept of monitoring the translator's performance in oral interpretation, as Polish jurisprudence emphasises the necessity for the judge to respond immediately to any procedural objection raised by the parties or the defence regarding the accuracy of the translation provided by the sworn translator. Accordingly, the court may refer the audio and video recording of the session in which the translation occurred to another expert translator to provide an assessment of the quality and fidelity of the interpretation. If a significant deficiency is confirmed, this leads to the annulment of the translation procedures conducted and the initiation of disciplinary measures against that translator.[49]

4.3. Oversight of Translators in the UAE Translation Profession Regulation Law

In view of the significant role played by translators within the judiciary and the impact of translation on the achievement of judicial justice,[50] the UAE legislator has established a graduated system for the oversight of translators registered in the List of Translators at the Ministry of Justice. The first stage is periodic and conducted by technical inspectors; the second stage is annual and conducted by the organisational unit responsible for translator affairs; and the final stage is conducted by the Translators' Affairs Committee at the Ministry of Justice. It is noteworthy that this oversight process is conducted primarily by translators themselves, ensuring that supervision is exercised by specialists in the field.[51] Oversight is conducted in stages, as detailed in the following table (Table 2).[52]

***Table* 2. Stages of evaluating the translators registered in the translators' list at the Ministry of Justice**

Stage	Supervisory Authority	Work Subject to Oversight
First Stage	Technical Inspectors	• Monitoring the work of translators. • Conducting unannounced inspections. • Addressing issues related to the translator's work.

49 Mirosław Moczulski, 'Kodeks zawodowy tłumacza przysięgłego' (2018) 26 Lingua Legis 27.

50 Ran Yi, *Linguistic Equity and Procedural Justice Through an Interpreter in Court* (Routledge 2025), doi:10.4324/9781003564188.

51 Madison Elizabeth Wahler, 'A Word Is Worth a Thousand Words: Legal Implications of Relying on Machine Translation Technology' (2018) 48 Stetson Law Review 109.

52 UAE Federal Decree-Law no (22) of 2022 (n 12).

Stage	Supervisory Authority	Work Subject to Oversight
Second Stage	The organisational unit concerned with the affairs of translators	• Preparing the annual report on the translator's work, comprising several criteria. • Assigning the translator's overall rating based on the professional inspection report.
Third Stage	Translators' Affairs Committee	• Reviewing the annual reports of translators registered in the List of Translators. • Considering translators' grievances against the annual report. • Taking appropriate decisions based on the annual evaluation reports.

First Stage: Periodic Evaluation: A translator must possess extensive skills that enable the effective fulfilment of the entrusted translation's purpose.[53] To achieve the objectives of the first stage, the UAE legislator has authorised the Minister of Justice to appoint translators within the Ministry of Justice who possess expertise and proficiency in the field of translation to carry out periodic technical inspections, in accordance with the standards and technical requirements established by the Translators' Affairs Committee. Technical inspectors perform their duties by examining samples of work produced by translators and translation houses, on the basis of which they assess the quality and accuracy of performance . They also conduct unannounced and urgent inspections of translators and translation houses to verify specific facts, conduct, or any violations that may be attributed to either.

Technical inspectors are responsible for reviewing complaints made against translators or against translation agencies. They are expected to provide advice and guidance on unintentional errors and prepare reports on those complaints, which are presented to the Translators' Affairs Department and then to the Translators' Committee. This reflects the wisdom behind requiring them to be experienced translators themselves, knowledgeable in the field of translation.

Second Stage: Annual Evaluation: At the second stage of oversight of translators registered in the List of Translators at the Ministry of Justice, the annual evaluation is conducted by the organisational unit responsible for translator affairs at the Ministry of Justice. The UAE

53 Cornelia Griebel and Ivana Havelka, 'Interpreting, Translating or Investigating? Framing the Competences of a Hybrid Translational Field: Intercept Interpreting' (2025) 33(3) Perspectives 615, doi:10.1080/0907676X.2024.2305376.

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legislator has specified criteria for assessing translators and preparing the annual report. These criteria include determining the overall technical level of the translation work completed by the translator, as well as the complaints registered against the translator or the translation house. Given the legislator's emphasis on the necessity of continuous professional development, the annual report must also address the extent of the translator's compliance with such development requirements, in addition to their adherence to and application of the Code of Ethics for Professional Translators. Furthermore, the report must include the translator's overall rating based on the technical inspectors' assessments.

To safeguard the confidentiality of reports pertaining to translators, the legislator has prohibited access to such reports by any person other than the translator concerned, the organisational unit concerned with the affairs of translators, and the Translators' Affairs Committee. Accordingly, no person, regardless of capacity, is entitled to review translators' reports unless they fall within the categories expressly authorised by law.

Third Stage: Decisions Based on the Evaluation of Translators: Pursuant to the Decree-Law under consideration, a committee affiliated with the Ministry of Justice, known as the Translators' Affairs Committee, is established to undertake the functions stipulated therein and in its executive regulations. The Committee is vested with several competencies, including the evaluation of translators and translation houses. This section focuses exclusively on these competencies and does not address other powers that fall outside the scope of this study.

The Translators' Affairs Committee is responsible for handling complaints filed against a translator or translation agencies. In such cases, the committee has the authority either to dismiss the complaint or refer it to the public prosecutor to initiate disciplinary proceedings before the Disciplinary Council, as we will see later.

The committee also oversees grievances, deciding whether to reject them or modify the evaluation results being challenged, and must do so within thirty days of the grievance's submission. The committee's decision on the grievance, whether to reject it or make changes, is final and cannot be appealed to any authority.

As for the committee's authority over annual evaluation reports on translators and translation agencies, the legislator cited motivations such as sending a thank-you message to the translator, addressing issues, and ensuring accountability based on the annual reports' results.

From the above, we can conclude that there are differences in the strictness and oversight mechanisms between the two legal systems. Polish law tends to focus on control through administrative documentation, record-keeping, and data review, while UAE law leans towards multi-stage, tiered institutional oversight.

4.4. The Responsibility of Translators to Ensure Judicial Fairness

The translator, in practising the profession of translation, bears disciplinary, civil, and criminal responsibility. However, since European guidelines focus on the necessity and quality of judicial translation to protect human rights and achieve a fair trial without imposing any type of responsibility on the translator, leaving that to the national laws of the member states, Polish legislation has defined the responsibility of the translator, just as Emirati legislation has defined the responsibility of the translator in the United Arab Emirates. Accordingly, we will address below the types of responsibilities (criminal, civil, and disciplinary) imposed on the translator in Poland under Polish legislation, as well as the corresponding responsibilities imposed on the translator in the United Arab Emirates under Emirati legislation.

4.5. Disciplinary Responsibility of the Translator

The Polish Sworn Translator Law outlines the translator's responsibilities in Article 21, stating that a translator may face disciplinary action if they fail to perform their duties in accordance with the law or do so improperly or dishonestly. In such cases, the translator may face the following disciplinary measures: 1. Reprimand, 2. Blame, 3. A financial penalty of at least one-tenth of the average wage in the national economy is legally mandated, 4. Suspension of the right to practice as a sworn translator for a period ranging from 3 months to a year, 5. Deprivation of the right to work as a sworn translator. In this case, they can apply for re-licensing after at least two years of deprivation and after passing the exam again.

In application of this, a Polish court fined a sworn translator 1,000 zlotys for delaying the delivery of a translation and for refusing to answer the court's phone calls. The court did not accept her argument of heavy workload and limited time in the appeal, and the appellate court upheld the penalty on the grounds that the translator violated her duty of cooperation and loyalty to the judiciary. [54]

A disciplinary case can be initiated by the Minister of Justice or the governor against the Professional Responsibility Committee. The affected translation-requesting party can also submit a request to the Minister of Justice or the governor to initiate a disciplinary case against the sworn translator. The procedures proceed whether the violating translator attends or not, without an acceptable excuse. The translator has the right to be assisted by another translator, a lawyer, or a legal consultant. The committee issues its decision of punishment, acquittal, or dismissal, and both the translator and the complaining party have the right to appeal that decision. The appeal ruling is considered final and cannot be challenged further.

54 Case VIII Gz 294/17 (District Court in Szczecin, 8th Commercial Division, 24 October 2017) <https://orzeczenia.ms.gov.pl/content/$N/155515000004027_VIII_Gz_000294_2017_Uz_2017-10-24_001> accessed 22 June 2026.

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It should be noted that Article 22 of the Polish law sets a three-year limitation period for bringing disciplinary proceedings against a sworn translator. If a disciplinary case is initiated within that period, the penalty limitation period is extended by an additional two years after the first period expires. However, if the translator's conduct constitutes a criminal or financial offence, the disciplinary responsibility only expires once the criminal offence itself is no longer prosecutable under Polish criminal law.

Under the UAE translation profession law, a translator is subject to disciplinary action if a complaint is filed against them for violating their professional duties. This complaint goes to the Translators' Affairs Committee, which can either keep it or refer it to the Public Prosecution to bring a disciplinary case against the translator before the Translators' Disciplinary Board, all in accordance with the prescribed procedures. Naturally, the law allows the board to conduct any investigations it deems appropriate or appoint one of its members for this task. The board also has the authority to temporarily suspend the translator or the translation office until the case is resolved.

The disciplinary hearings against the translator are held in private, with the translator themselves or the legal representative of the translation company present. The council must inform the offending translator or the translation company of the violation and the supporting evidence, and summon them to attend, giving them the chance to prepare their defence. Either of them can submit their defence in writing or through a lawyer.

Accordingly, the Disciplinary Council issues its ruling either in the parties' presence or in their absence, after verifying the notification's correctness. Since reasoning is a prerequisite for the validity of disciplinary sanctions, as derived from statutory provisions,[55] The legislator decided that rulings must be reasoned and granted the right to appeal this ruling before the Court of Appeal to the Public Prosecution, the translator, and the translation office. Disciplinary penalties range from a warning to a suspension of registration for up to one year, culminating in removal from the register.

It should be noted that the UAE legislator did not specify in the Translation Profession Regulation Law and its e the procedures for notification or appealing rulings, other than what we mentioned, related to the translator's disciplinary case, nor did it refer to any general rules regarding this or to any other procedures found in the Civil Procedures Law, which should have been taken into account to avoid any shortcomings in the procedures necessary to implement what is stated in that law and its executive regulations.

From the above, we can deduce that Polish law follows an administrative accounting system for disciplining translators, granting the committee the authority to admonish or remove them, while imposing a re-examination requirement to return to the profession. In contrast,

55 Mohamed Majed Yaqout, *Commentary on Disciplinary Procedures in Public Employment, Liberal Professions and Private Work* (Dar al-Maʿarif 2004) [in Arabic].

UAE law is considered a strict system in which the translator is held accountable before a judicial authority, and substantial financial fines may be imposed, as well as suspension or removal from the register.

4.6. Civil Liability of the Translator

The Polish law on sworn translators and the UAE law regulating the translation profession do not explicitly address the translator's civil liability, which is governed by the general rules on this matter set out in the civil law of both countries. However, obtaining a civil liability insurance policy remains optional for the Polish sworn translator, whereas it is mandatory for translators in the UAE. UAE law requires translators to obtain professional liability insurance, with an exception only for translators working within translation offices, provided that the translation office's insurance policy covers professional errors of the translators employed there. Translators working in government entities are also exempt, as their translation work is limited exclusively to those entities.

It is noteworthy that the Court of Appeal in Katowice decided that the translator is considered an official assistant of the court and not a party to the case, and it rejected a compensation claim filed directly against the translator, emphasising that responsibility for the translator's mistakes falls within the scope of the public treasury's liability. In this way, according to Polish courts, a sworn translator's civil liability is removed and transferred to the state's responsibility for judicial actions.[56]

This difference between Polish law and UAE law regarding the civil liability of translators highlights a proactive feature of the UAE system: significant financial safeguards to protect litigants, while Polish law relies on traditional judicial rules and personal compensation, which delays the recovery of rights.

4.7. Criminal Liability of the Translator

The Polish Code for Sworn Translators does not specify criminal penalties based on the translator's criminal liability. However, Article 22 refers to the Polish Penal Code, and Article 233 of the Penal Code stipulates that the Polish legislator imposes a prison sentence of between one and ten years if the translator provides false testimony or a false translation. If the false translation is unintentional and results from gross negligence, the prison sentence can be up to three years. For an incorrect fact of legal significance in an official document, the sentence ranges from three months to five years.

As for the UAE Translation Profession Regulation Law, it includes provisions that impose criminal penalties and refer cases under the UAE Crimes and Punishments Law, applying

56 Case I ACa 836/19 (Court of Appeal in Katowice, 5 March 2020) <https://orzeczenia.ms.gov.pl/content/$N/151500000000503_I_ACa_000836_2019_Uz_2020-03-05_002> accessed 22 June 2026.

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the severest penalty if it exists. Accordingly, the UAE legislator decided in Article 30 of the Translation Profession Regulation Law that the penalty would be imprisonment for no less than one year and no more than two years, and a fine ranging between 50,000 and 100,000 dirhams, or one of these penalties, if: the translator practices the profession without being registered in the schedule, or after being removed from it, or while suspended from work, or in the case of deliberately changing the truth, damaging documents, gross negligence, or disclosing professional secrets.

The difference between the two laws regarding the criminal liability of the translator is that the Polish Sworn Translator Law contains no criminal penalties and refers to the general rules of the country's Penal Code. In contrast, the UAE law regulating the translation profession, in addition to referring to the general provisions of the Penal Code, contains specific provisions on the translator's criminal liability, imposing penalties such as imprisonment and fines.

5 CONCLUSION

This study has proven that employing translators in court is indispensable, as it constitutes one of the legal rights guaranteed to all individuals engaging with the judiciary, regardless of their language. The European Union has organised this through general rules, and EU countries, including Poland, have structured translation practices within their national laws under the Sworn Translator Act No. 24 of 2004 and its 2019 amendments. Similarly, the UAE legislator has regulated the translation profession in various respects under Federal Decree-Law No. 22 of 2022 and its executive regulations. However, achieving the objective of regulating the translation profession in national laws requires consideration of the following:

- To ensure procedural justice and a fair trial, the general legal rules in UAE legislation must include provisions recognising the right of litigants who are not fluent in Arabic to judicial translation.
- To ensure the confidentiality of information accessed by the translator in the UAE, the stipulated legal section must include confidentiality provisions.
- The Polish Sworn Translator Law should include legal provisions requiring the Ministry of Justice to prioritise translators' professional development by mandating that they attend workshops and courses related to their profession, rather than relying solely on the results of the initial exam for their appointment.
- Additionally, it is necessary not to limit oversight to formal administrative control, but to move towards continuous technical supervision concerning the Polish sworn translator. The law should include legal provisions for the monitoring of translation work by technical inspectors, matching translation outputs to the original documents using randomly selected samples.

- The directives of the European Union and the comparative laws of Poland and the UAE do not include legal rules regulating translation using artificial intelligence, which requires legislative intervention, at least at the level of national legal rules, to regulate this type of translation. It is necessary for the cyber framework to be closed to maintain confidentiality, and for a certified translator to supervise the intelligent system's outputs (translations) to ensure precise legal terminology, which the intelligent system must adhere to.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЛЬ СУДОВОГО ПЕРЕКЛАДУ У ДОСЯГНЕННІ СПРАВЕДЛИВОСТІ: ПОРІВНЯЛЬНЕ АНАЛІТИЧНЕ ДОСЛІДЖЕННЯ

Маріам Ахмед Алсандал

АНОТАЦІЯ

Передумови. *Право сторін спору розуміти судові процедури сприяє досягненню справедливого судового розгляду; відповідно, право користуватися послугами перекладача під час судового провадження у кримінальних справах гарантується міжнародними документами та національним законодавством більшості держав світу. Таке правове регулювання спрямоване на забезпечення справедливості судового розгляду. Деякі міжнародні документи встановлюють загальні засади здійснення судового перекладу, залишаючи деталізацію на розсуд внутрішнього законодавства. У Польщі, як державі-члені Європейського Союзу, для імплементації окремих директив ЄС було ухвалено Закон «Про присяжного перекладача», а в Об'єднаних Арабських Еміратах – Закон «Про регулювання професії перекладача». Обидва нормативно-правові акти містять положення, спрямовані на забезпечення справедливого судочинства.*

Методи. *У дослідженні застосовано аналітичний метод, який передбачав аналіз змісту загальних правових норм, що регулюють судовий і приватний переклад у національному законодавстві Польщі та Об'єднаних Арабських Еміратів, з метою їх тлумачення та оцінки достатності. Крім того, використано порівняльно-правовий метод для зіставлення правових норм, що регулюють судовий переклад у Польщі, закріплених у Законі «Про присяжного перекладача» № 24 від 2004 року (зі змінами 2019 року), з нормами, що регулюють це саме питання в Об'єднаних Арабських Еміратах відповідно до Федерального декрету-закону № 22 від 2022 року. Такий підхід дав змогу виявити спільні та відмінні риси зазначених правових режимів і визначити найбільш ефективні законодавчі підходи та правові механізми, спрямовані на досягнення основної мети цього регулювання — забезпечення правосуддя в судах.*

Результати та висновки. *У дослідженні зроблено висновок, що судовий переклад є однією з ключових гарантій права на справедливий суд, та виявлено деякі відмінності між правовими нормами, дослідженими в польському та еміратському законодавстві. За результатами проведеного аналізу визначено правові рішення, які видаються більш ефективними, та сформульовано рекомендації щодо вдосконалення законодавства у сфері судового перекладу, з метою забезпечення права сторін на справедливий судовий розгляд.*

Ключові слова. *Правосуддя, судовий переклад, Закон Польщі «Про присяжного перекладача», Закон ОАЕ «Про регулювання професії перекладача», нагляд та відповідальність.*

ABSTRACT IN ARABIC*

مقال بحثي

دور الترجمة القضائية في تحقيق العدالة – دراسة تحليلية مقارنة

الملخص

الخلفية:

حق أطراف النزاع في فهم إجراءات التقاضي يساهم في تحقيق محاكمة عادلة، وبناءً عليه تعتبر الإستعانة المترجمين أمام القضاء حقاً مكفولاً للجميع على مستوى العالم في القضايا الجنائية وفقاً للمواثيق الدولية والقوانين المحلية، ويهدف هذا النظام إلى تحقيق العدالة القضائية. وقد اشترطت بعض الصكوك الدولية القواعد العامة المتعلقة بالترجمة القضائية في المحاكم وتركت التفاصيل للتشريعات الوطنية. ففي بولندا - كإحدى دول الاتحاد الأوروبي - تم إصدار قانون المترجمين المحلفين تطبيقاً لبعض توجيهات الاتحاد الأوروبي، وفي دولة الإمارات العربية المتحدة تم إصدار قانون تنظيم مهنة الترجمة، وكلاهما يتضمنان قواعد قانونية مهمة تسهم بشكل فعّال في تحقيق العدالة القضائية في جميع أنواع الدعاوى الجنائية والمدنية.

المنهجية:

اعتمدت الدراسة على المنهج التحليلي من خلال تحليل القواعد القانونية العامة المتعلقة بالترجمة القضائية والخاصة المدرجة في القوانين المحلية لكل من بولندا ودولة الإمارات العربية المتحدة، من أجل تفسيرها وتقييم كفايتها في الدعاوى المدنية. بالإضافة إلى ذلك، استخدمت الدراسة المنهج المقارن من خلال مقارنة القواعد القانونية المتعلقة بالترجمة القضائية في بولندا، كما وردت في قانون المترجم المحلف رقم 24 لسنة 2004 وتعديلاته في 2019، مع القواعد المتعلقة بنفس الموضوع الصادرة في دولة الإمارات العربية المتحدة بموجب المرسوم بقانون اتحادي رقم 22 لسنة 2022. كل ذلك بهدف تحديد أوجه التشابه والاختلاف لتحديد أفضل القواعد والممارسات التي تحقق الهدف العام لهذه اللوائح، وهو ضمان العدالة القضائية:.

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النتائج والاستنتاجات:

خلصت الدراسة إلى أن الترجمة أمام القضاء تُعتبر ضمانًا للعدالة القضائية، ووجدت بعض الاختلافات بين القواعد القانونية التي دُرست في القانون البولندي والإماراتي؛ بناءً على ذلك أعطت الدراسة بعض التفضيلات بين هذه القواعد وقدمت توصيات لتحسين قوانين الترجمة القضائية ولضمان حصول الأطراف على حقهم في المحاكمة العادلة.

الكلمات المفتاحية:

العدالة القضائية، الترجمة القضائية، قانون المترجمين المحلفين في بولندا، قانون الإمارات العربية المتحدة لتنظيم مهنة الترجمة، الرقابة والمسؤولية

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Research Article

INSTITUTIONAL CONFIGURATION AND THE EFFECTIVENESS OF PAROLE: COMPARATIVE EVIDENCE FROM COUNCIL OF EUROPE MEMBER STATES

Zhanna Shayakhmetova, Kakimzhan Bishmanov, Solidat Kairzhanova, Assel Bekbauova* and Nurgul Urbissinova

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ABSTRACT

Background: *Parole research across Council of Europe member states has long debated which model to adopt: discretionary, mandatory, or mixed. Yet, this framing misses a more consequential variable: how deeply any model is institutionally embedded. In terms of justice, insufficiently institutionalized parole risks reducing early release to a formal entitlement detached from fair decision-making, whereas robust institutional design enables it to function as a corrective mechanism against disproportionate punishment and as a practical expression of fairness in the execution of sentences.*

Method: *The study employs a multi-method comparative legal approach combining documentary analysis, index construction, and non-parametric statistical testing. Standardized data for 2010–2024 were drawn from the World Prison Brief and SPACE I (Annual Prison Statistics of the Council of Europe — Statistiques Pénales Annuelles du Conseil de l'Europe) reports. We selected eight jurisdictions to maximise*

institutional variance: Kazakhstan, France, England and Wales, Sweden, Germany, the Netherlands, Poland, and Georgia. The IIP was constructed as a five-criterion composite instrument: standardized risk assessment tools, formalized decision-making body, court–probation coordination, mandatory post-release supervision, and institutionalized reintegration programmes, each scored 0–2 (composite range 0–10). Cohen's kappa (a statistical measure of agreement among independent appraisers) was used to assess inter-rater reliability. The Spearman rank correlation was used to test the association between IIP scores and average prison population rates. Formal model type (discretionary, mandatory, or mixed) served as an independent variable for comparative benchmarking.

Results and Conclusions: *A comparative analysis of eight Council of Europe jurisdictions for the period 2010–2024 shows that IIP indicators exhibit an inverse association ($r_s = -0.76$, $n = 8$), exceeding the critical threshold at $\alpha = 0.05$; given the small sample size, this result is considered preliminary. A robustness check on a core subgroup of four jurisdictions (France, England and Wales, Sweden, and Kazakhstan) yielded a weaker inverse association ($r_s = -0.63$).*

These preliminary findings are consistent with an institutional model of parole effectiveness in which outcomes may be more closely associated with the organization of procedures than with the legal framework for release. For Council of Europe member states and the ongoing discussion within the CEPEJ (European Commission for the Efficiency of Justice – Commission européenne pour l'efficacité de la justice), these findings suggest that the question of reform may concern not only which model to adopt, but also the depth of its procedural implementation.

1 INTRODUCTION

Comparative research on parole in Council of Europe member states has produced a rich body of knowledge on normative model typologies such as the distinction between discretionary, mandatory, and mixed systems (the discretionary model refers to a system in which the parole decision is made by a specialized body, a court or a commission, based on an individual assessment of the convict; the mandatory model provides for release by operation of law upon reaching a specified threshold of time served, without conducting a substantive assessment; the mixed model combines automatic release for certain categories of convicts with discretionary review of the remaining cases), yet a fundamental measurement gap persists: no validated, cross-nationally applicable instrument exists for capturing the degree to which parole governance is institutionally embedded at the procedural level. This absence matters because the same formal model can operate through radically different institutional architectures depending on whether standardised risk assessment tools are in place, whether courts and probation services exchange information through formalized procedures, and whether post-release supervision is integrated into a coherent social reintegration framework.

Without a measure of these procedural dimensions, comparative analysis of parole effectiveness remains incomplete.

This study contributes to the comparative literature on parole in three interrelated ways. Conceptually, it shifts the analytical focus from formal parole typologies to the degree of procedural institutionalization. Methodologically, it introduces the Index of Institutionalization of Parole (IIP), the first cross-national composite measure of procedural institutionalization in parole governance. Empirically, it provides the first systematic examination of the association between IIP scores and long-term prison population trends.

To address this measurement gap, the study develops the Institutionalization Index of Parole (IIP), designed to capture the degree of procedural embeddedness across jurisdictions. The IIP is a five-criterion composite instrument that operationalises the degree of procedural embeddedness of parole governance across eight jurisdictions: Kazakhstan, France, England and Wales, Sweden, Germany, the Netherlands, Poland, and Georgia, over the period 2010–2024. Each criterion (standardized risk assessment instruments; formalized decision-making body; court–probation coordination; mandatory post-release supervision; institutionalized reintegration programmes) is scored on a 0–2 scale, yielding a composite index from 0 to 10. The four main jurisdictions scored as follows: France—7, England and Wales—9, Sweden—9, and Kazakhstan—4; four additional jurisdictions: Germany – 9, the Netherlands – 9, Poland – 5, and Georgia – 3 (complete data for all eight jurisdictions are presented in Table 1).

In contemporary European criminological and penitentiary literature, research on parole has developed along three relatively independent lines. The first concentrates on the normative typology of models and addresses the legal framework of release, eligibility thresholds, and the allocation of authority between courts and specialized agencies.[1] The second strand is shaped by risk-based governance research and emphasizes risk assessment procedures, decision standardization, and the institutionalization of discretion.[2] The third strand draws on evidence-based probation and desistance research, shifting attention from formal release criteria to the quality of post-release support and the intensity of supervision.[3] A growing body of work additionally examines the

1 Martine Herzog-Evans, 'Conclusion: What Should the Ideal Release Process Look Like?' in Martine Herzog-Evans (ed), *Offender Release and Supervision: The Role of Courts and the Use of Discretion* (Wolf Legal Publishers 2015) 465; Nicola Padfield, Dirk van Zyl Smit and Frieder Dünkel, *Release from Prison: European Policy and Practice* (Routledge 2012).

2 Hazel Kemshall, 'Risk, Desistance and Engagement: Working with Adult Service Users in Probation' in Brian Taylor, Brian Whittaker and Clive McColgan (eds), *The SAGE Handbook of Decision Making, Assessment and Risk in Social Work* (SAGE 2022) 269, doi:10.4135/9781529614657.n36; Gwen Robinson, 'Exploring Risk Management in Probation Practice: Contemporary Developments in England and Wales' (2002) 4(1) Punishment & Society 5, doi:10.1177/14624740222228446.

3 José Cid, 'Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions' (2009) 6(6) European Journal of Criminology 459, doi:10.1177/1477370809341128; Fergus McNeill, *Pervasive Punishment: Making Sense of Mass*

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institutional control mechanisms that govern compliance with release conditions.[4] What these three strands share, however, is the absence of a composite measure capable of situating individual jurisdictions along a single institutional continuum. The IIP is designed to provide precisely that.

The inclusion of Kazakhstan in this comparative study is theoretically motivated rather than incidental. As a Council of Europe observer state applying a discretionary parole model in the absence of standardised risk assessment tools and formalised court–probation coordination, Kazakhstan represents an institutionally contrasting case whose low IIP score provides the analytical leverage needed to detect any association between institutional configuration and penitentiary dynamics. In the logic of comparative case design, the inclusion of a jurisdiction that scores far from the cluster of high-IIP Western European states is necessary to avoid a truncated-range problem (a statistical artefact arising when the sample covers only a narrow portion of the key variable's distribution, which artificially attenuates observed correlations) and to test whether the institutional hypothesis holds beyond the relatively homogeneous European core.[5] Far from being a peripheral case, Kazakhstan functions as a critical test of the generalizability of the IIP framework.

The central research question of this study is therefore: does the formal typology of a parole model, discretionary, mandatory, or mixed, possess independent explanatory power with respect to long-run penitentiary dynamics, or is its influence mediated by the degree of institutionalization of risk assessment procedures and post-release support? We hypothesise that the organization of parole institutions is more closely associated with penitentiary outcomes than formal model typology, and that the IIP captures these institutional characteristics in a form suitable for cross-national comparison. Taken together, the conceptual, methodological, and empirical contributions of this study, as set out above, aim to fill the measurement gap in the comparative parole literature and provide a replicable framework for future cross-jurisdictional research in this field. The remainder of the article presents the conceptual framework (Section 1.1), research materials and methods

Supervision (Emerald Group Publishing 2018); Michelle S Phelps, 'The Paradox of Probation: Community Supervision in the Age of Mass Incarceration' (2013) 35(1-2) Law & Policy 51, doi:10.1111/lapo.12002; Peter Raynor, 'Evidence-Based Probation and Its Critics' (2003) 50(4) Probation Journal 334, doi:10.1177/0264550503504002; Efrat Shoham and Noam Haviv, '"There is More to It than Recidivism" – Outcome Scores among Released Prisoners who Participated in Prison-Based "Employment World" Programmes' (2024) 62(1) International Annals of Criminology 79, doi:10.1017/cri.2024.9.

4 Carmen L Diaz and others, 'A Retrospective Study of the Role of Probation Revocation in Future Criminal Justice Involvement' (2024) 93 Journal of Criminal Justice 102225, doi:10.1016/j.jcrimjus.2024.102225.

5 Mark Roberts, 'How Do Community Organizations Develop Successful Strategies of Resistance? Revisiting Institutional Embeddedness and Agency' (2023) 11(5) Territory, Politics, Governance 934, doi:10.1080/21622671.2023.2205882.

(Section 2), empirical results including IIP construction and comparative prison population analysis (Section 3), discussion (Section 4), and conclusions (Section 5).

This study aims to compare the formal typology of parole models with the institutional configurations of their implementation in Council of Europe member states during the period 2010–2024. The analysis focuses on a comparative examination of the relative association between the model's normative structure and the degree of institutionalization of its implementation procedures and long-term penitentiary dynamics.

The conceptual framework of the study is based on the institutional approach to the execution of sentences developed in European penitentiary law doctrine, according to which the sentence execution system is viewed as a set of normatively established and procedurally organized mechanisms aimed at ensuring legality, proportionality, and the resocialization of convicts.[6] The institutional configuration of law enforcement is determined not only by formal norms but also by the degree to which actors are embedded in the organizational structure and their ability to adapt normative requirements to the specific conditions of practice.

This institutional framework is situated within a broader comparative penal policy literature that identifies macro-level structural determinants of prison population dynamics. Foundational work in this tradition has shown that incarceration rates are shaped not only by release mechanisms but by the full architecture of penal governance, including sentencing policy, prosecutorial practice, crime rates, and socioeconomic context. Garland's analysis of the culture of control situates contemporary risk-based penal governance within a long-run transformation of late-modern societies;[7] Tonry's comparative work on sentencing demonstrates that penal severity varies systematically with political economy and institutional design;[8] Lacey's account of the prisoners' dilemma connects cross-national differences in imprisonment rates to coordinated versus liberal market economies;[9] Lappi-Seppälä's research on Nordic penal exceptionalism shows that low imprisonment rates reflect an integrated package of institutional, political, and welfare state factors rather than any single policy instrument;[10] and Cavadino and Dignan's comparative framework links penalty to varieties of capitalism.[11] Taken together, this body of scholarship makes clear that parole institutionalization as captured by the IIP is one

6 Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy* (OUP 2009).

7 David Garland, *Punishment and Modern Society: A Study in Social Theory* (University of Chicago Press 1990); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001).

8 Michael Tonry, *Sentencing Matters* (OUP 1996).

9 Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (CUP 2008).

10 Tapio Lappi-Seppälä, 'Explaining National Differences in the Use of Imprisonment' in Sonja Snacken and Els Dumortier (eds), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (Routledge 2012) ch 3.

11 Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (Sage 2006).

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structural factor among several, and that the association between IIP scores and prison population rates examined in this study operates within a wider causal architecture that the present pilot design cannot fully disentangle.

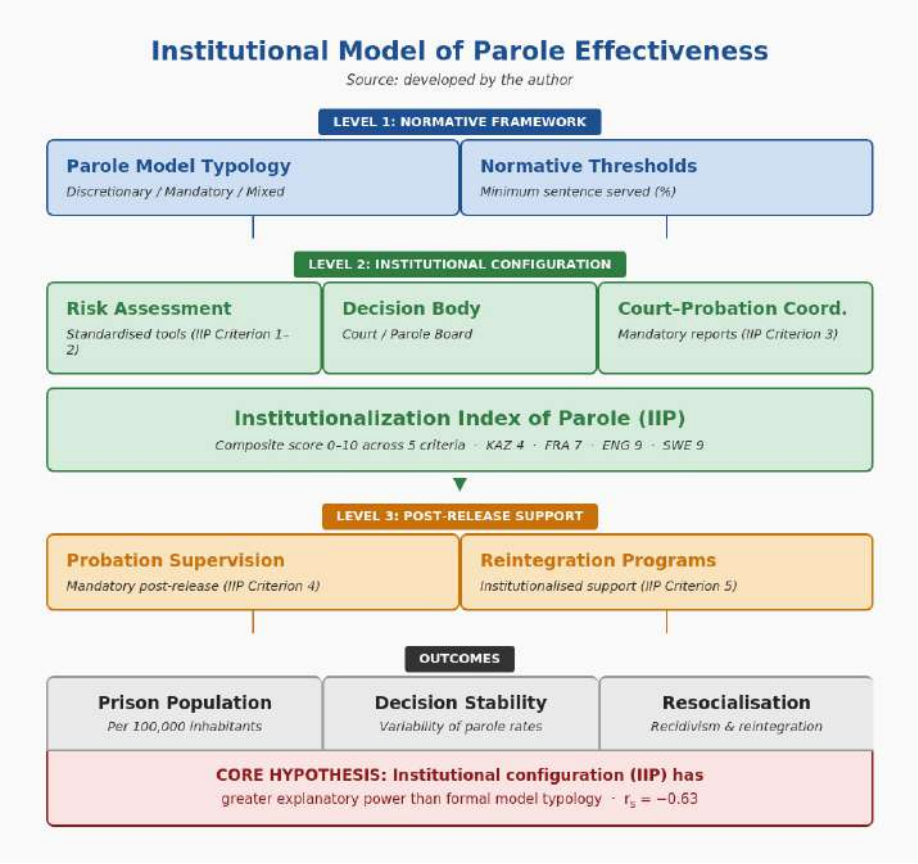


Figure 1. Institutional Model of the Effectiveness of Parole[12]

The model reflects the interrelationship between the normative, procedural, and post-penitentiary levels of parole implementation. The arrows indicate causal-structural links between the degree of institutionalization of risk assessment procedures, coordination among decision-making bodies, and the manageability of the prison population. The Institutionalization Index of Parole (IIP) is used to quantitatively operationalize the institutional block and compare jurisdictions based on the level of procedural organization of the parole mechanism. Figure 1 provides the analytical framework for the study. Within this framework, parole is conceptualized as a multi-level institutional process in which the

12 Source: developed by the author.

regulatory framework, procedural implementation, and post-release support form an interconnected system.

The degree of institutionalization of these levels serves as the key explanatory variable, the presence of standardized risk assessment tools, formalized procedures for interaction between the court and probation authorities, and robust mechanisms for supervision and social support.

The comparative analysis is conducted with this structure in mind, allowing for a comparison of the formal typology of models with the quality of their institutional implementation and an assessment of each level's contribution to the manageability of the prison population.

2 METHODOLOGY

To ensure the comparability of results, the comparative analysis was conducted using standardized statistical sources the World Prison Brief, and the annual reports of the Council of Europe's SPACE I covering the period from 2010 to 2024. The choice of time interval is dictated by the need to track the dynamics of the prison population amid the transformation of criminal policy and to ensure a sufficient duration of observation to identify stable trends.

The selection of jurisdictions is driven by the need to compare institutionally mature systems representing different configurations of the parole model (discretionary, predominantly mandatory, and mixed) while ensuring maximum institutional variance to avoid the truncated-range problem. The study sample comprises eight jurisdictions: Kazakhstan, France, England and Wales, Sweden, Germany, the Netherlands, Poland, and Georgia. The first four constitute the primary analytical group, selected to represent institutionally mature systems with well-documented parole data; the latter four extend the institutional range and are used to test the robustness of the observed association. These were selected to represent (a) a high-IIP Central European civil-law system (Germany), (b) a high-IIP mixed system with strong administrative parole structures (the Netherlands), (c) a transitional post-Soviet system within the EU context (Poland), and (d) a low-to-mid-IIP Caucasian system undergoing institutional reform (Georgia). Together, the eight jurisdictions cover a broad spectrum of institutional configurations and geographic contexts, increasing the analytical leverage of the IIP framework. IIP scores for all eight jurisdictions are reported in Table 1; criterion-level breakdowns are provided in Tables 2 and 3. The full eight-jurisdiction Spearman correlation ($r_s = -0.76$, $n = 8$) exceeds the critical threshold for a two-tailed test at $\alpha = 0.05$ ($|r_s| \geq 0.738$ at $n = 8$), though the sample remains too small for robust inference. The result is therefore treated as an exploratory pilot finding.

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The selection of eight jurisdictions follows the logic of maximum variation sampling as developed in comparative case research.[13] Rather than a random or representative sample, the eight jurisdictions were chosen to maximize the range of the key explanatory variable (IIP scores spanning 3 to 9) and the diversity of formal model types, while maintaining sufficient comparability on background conditions (Council of Europe membership or observer status; availability of standardised SPACE I prison statistics; documented probation structures). At n = 8, this design provides the maximum analytical leverage attainable within the constraints of data availability and resource scope at the pilot stage. The design-based diversity of the sample partially substitutes for statistical control: the inclusion of both Nordic welfare states (Sweden, IIP = 9) and post-Soviet transitional systems (Kazakhstan, IIP = 4; Georgia, IIP = 3), alongside established civil-law (France, Germany) and common-law (England and Wales) systems, means that the IIP range cannot be attributed to any single regional or political-economic cluster. Nevertheless, the authors acknowledge that design-based control is not equivalent to statistical control of named confounders. That expansion to a larger sample using multivariate methods remains the essential next step for confirmatory research. A target of n = 20–25 jurisdictions, using CEPEJ country profiles as the primary comparative source, would permit regression-based isolation of the IIP effect from sentencing policy, crime rates, and socioeconomic variables.

To enhance comparability, standardized indicators per 100,000 population were used, along with average values for the 2010–2024 period, which helped smooth out short-term fluctuations and minimize the impact of methodological differences between jurisdictions. The use of these methods made it possible to examine conditional early release not only as a legal construct but also as an element of criminal policy operating within specific institutional and social conditions. This study is based on aggregated statistical data and regulatory sources, which limits the ability to conduct a detailed analysis of individual parole cases. Furthermore, the public availability of comparable recidivism rates specifically among individuals released under parole remains limited, which prevents a comprehensive quantitative assessment of the models' effectiveness based on uniform criteria. Consequently, this study focuses on the institutional and procedural parameters of parole implementation.

To test the proposed hypothesis, a comparison of three groups of indicators was conducted:

1) normative parameters of the parole model (minimum sentence served, type of model);

2) institutional characteristics of implementation (availability of standardized risk assessment tools, structure of decision-making bodies, level of development of probation services);

13 Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry* (Wiley-Interscience, John Wiley & Sons 1970); Jason Seawright and John Gerring, 'Case Selection Techniques in Case Study Research' (2008) 61 Political Research Quarterly 294, doi:10.1177/1065912907313077.

3) indirect indicators of effectiveness (prison population level, proportion of approved parole applications, stability of the institution's application over time).

The comparative analysis therefore serves as an exploratory assessment of whether institutional characteristics may explain variation in prison population more effectively than formal parole model typologies. Any observed associations should be interpreted as preliminary and subject to validation in larger comparative samples.

3 RESULTS

To quantitatively test the hypothesis put forward in this study, a composite Institutionalization Index of Parole (IIP) has been introduced, which allows for a comparison of jurisdictions based on the degree of procedural organization of the parole system. The index is based on five criteria reflecting the principal procedural components of parole governance.

The selection of criteria is grounded in three strands of the comparative parole literature. The first, risk-based governance research, identifies standardized risk assessment instruments as a key marker of a system's procedural maturity. The second, comparative legal scholarship on normative models, highlights the institutional structure of the decision-making body and court–probation coordination as the defining parameters of procedural architecture. The third, evidence-based probation and desistance research, demonstrates that mandatory supervision and formalized reintegration programmes are structural conditions for the sustainability of post-release outcomes. Together, the five criteria cover the full procedural cycle, from risk assessment to reintegration, and correspond to the institutional dimensions set out in Council of Europe Recommendation CM/Rec(2017)3 and CEP standards.[14]

The construct validity of the IIP is supported by the correspondence between its five criteria and the dimensions of procedural institutionalization identified in the three bodies of literature cited above. Face validity is supported by the alignment of each criterion with a specific institutional function: standardized risk assessment instruments operationalize the procedural maturity of decision-making; a formalized decision-making body captures the structural independence and specialization of the release authority; court–probation coordination reflects the degree of interagency integration; mandatory post-release supervision measures the continuity of institutional oversight; and institutionalized reintegration programmes capture the availability of structured post-release support. Each

14 Recommendation CM/Rec (2017) 3 of the Committee of Ministers 'On the European Rules on Community Sanctions and Measures' (adopted 22 March 2017) <https://rm.coe.int/168070c09b> accessed 17 March 2026; European Directorate for the Quality of Medicines and HealthCare, 'Certification of Suitability (CEP)' (*Council of Europe*, 2025) <https://www.edqm.eu/en/certification> accessed 17 March 2026.

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criterion thus corresponds to a theoretically grounded institutional dimension rather than to an administrative convenience.

Convergent validity at the level of index scores is partially supported by the consistency between IIP rankings and qualitative assessments available in CEPEJ country evaluation reports and CEP probation monitoring data: jurisdictions scoring 9 on the IIP (England and Wales, Sweden, Germany, and the Netherlands) are characterised in those independent sources as having mature, procedurally developed parole and probation systems, while jurisdictions scoring 3–4 (Georgia, and Kazakhstan) are described as transitional systems with limited procedural infrastructure. This convergence between IIP scores and external qualitative assessments provides preliminary indicative support for the index's construct validity, while falling short of formal external validation.

The present study does not establish criterion validity; that is, it does not demonstrate that higher IIP scores predict better-measured parole outcomes such as individual recidivism rates or supervision quality, as comparable cross-national data on these outcomes are unavailable. This constitutes the principal outstanding validity limitation of the index, and external validation against independent outcome measures is identified as the priority for future research.

1. The presence of standardized risk assessment tools (validated scales, algorithmic models, formalized methodologies).[15]
2. A formalized structure of the decision-making body (a specialized parole board or a collegial body).
3. Institutionalized coordination between the court and the probation service (mandatory reports, procedural information exchange).
4. Mandatory post-release supervision.
5. The presence of formalized social reintegration programmes within the probation support structure.

Each criterion was assessed on a scale:

0 — lack of institutionalization;

1 — partial formalization;

2 — high degree of standardization and procedural codification.

The maximum index value is 10 points.

15 Melissa Hamilton, 'Evaluating Algorithmic Risk Assessment' (2021) 24(2) New Criminal Law Review 156, doi:10.1525/nclr.2021.24.2.156.

All index criteria were weighted equally. Scoring was based on an analysis of regulatory acts, official reports from probation services, the organizational structure of decision-making bodies, and other publicly available institutional sources. The assessment was conducted using a standardized 0–2 scale to ensure comparability across jurisdictions. Details of the regulatory and organizational sources used for each country are provided in the Appendix. Source verification followed a two-step protocol: each source was first identified and retrieved by the primary coder, then independently confirmed by the second coder before scoring. Where sources were available only in a national language (e.g., Kazakhstani or Georgian legal instruments), an authorised translation or an officially published English summary was used, which is noted in the Appendix. For each jurisdiction, at least two independent primary sources were required to support any score of 2, ensuring that the highest scoring level is not dependent on a single document. The classification of jurisdictions into discretionary, mandatory, and mixed parole models follows the typology established in Padfield, van Zyl Smit and Dünkel (2012) and Herzog-Evans (2015), cross-checked against CEPEJ country profiles and national legislation. IIP criterion-level scores and the primary documentary sources justifying each score are listed in the Appendix; the scoring rationale for each jurisdiction is documented there in sufficient detail to permit independent replication. Particular caution is warranted with respect to Kazakhstan and Georgia, where IIP scores depend on institutional sources that the authors have not independently verified; the authors note that these scores are based on publicly available legislative texts and official agency publications and flag this as a limitation of the present study.[16]

Equal weighting was adopted as a conservative methodological choice at the pilot stage of index development. This decision was based on three considerations. First, in the absence of a sufficient empirical basis for weight calibration, any differential weighting would inevitably be arbitrary and unverifiable within this sample (n = 8). Second, equal weighting is consistent with the methodological practice of comparable composite

16 The classification of parole model types follows Padfield, Zyl Smit and Dünkel (n 1) and Herzog-Evans (n 1). IIP criterion scores and supporting sources for all eight jurisdictions are documented in the Appendix. For Kazakhstan, principal sources include: Criminal Procedure Code of the Republic of Kazakhstan no 231 of 4 July 2014 (amended 8 March 2026) <https://adilet.zan.kz/eng/docs/K1400000231> accessed 17 March 2026; Law of the Republic of Kazakhstan no 38-IV LRK 'On Probation' of 30 December 2016 (amended 27 June 2022) <https://adilet.zan.kz/eng/docs/Z1600000038> accessed 17 March 2026; Committee on the Legal Statistics and Special Accounts of the State Office of Public Prosecutor of Republic of Kazakhstan, 'Reports' (*Gov.Kz: The Single Platform of Government Agencies*, 2026) <https://www.gov.kz/memleket/entities/pravstat/activities/directions?lang=en> accessed 17 March 2026. For Georgia, sources include Council of Europe advisory mission reports (2019–2022) and the annual report of the National Probation Agency (2022–2023). The authors acknowledge that independent editorial verification of these jurisdiction-specific sources is advisable given their role in IIP scoring.

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indices in the criminal justice field, including CEPEJ monitoring instruments.[17] Third, this decision ensures the transparency and reproducibility of the scoring procedure. The authors acknowledge that equal weighting is a simplifying assumption: future research with a larger number of jurisdictions should test the sensitivity of results to alternative weighting schemes, including data-driven approaches such as factor analysis or regression-based weighting. As a preliminary illustration of robustness, the authors tested an alternative weighting scenario at the pilot stage: doubling the weight of the standardised risk assessment instruments criterion (given its prominence in the risk-based governance literature) while retaining equal weights for the remaining four criteria and rescaling the composite to a 0–10 range. Under this alternative scheme, the rank ordering of the eight jurisdictions is unchanged (Kazakhstan 4.4; France 7.3; England and Wales 9.1; Sweden 9.1; Germany 9.1; Netherlands 9.1; Poland 5.2; and Georgia 2.9), and the Spearman correlation with average prison population rates remains $r_s = -0.76$. This stability across weighting schemes provides preliminary evidence that the inverse association is not an artefact of the equal-weighting assumption. However, comprehensive sensitivity analysis across a broader range of scenarios is reserved for future research with an expanded sample. A further limitation concerns construct validity: the present study demonstrates that the IIP can be constructed and applied consistently across jurisdictions but does not yet establish that the index fully captures the institutional dimensions it claims to measure. External validation against independent assessments of parole procedural quality, for instance, Council of Europe compliance monitoring reports or expert survey data is a necessary step before the index can be used for confirmatory inference and is identified as a priority for future research. To be explicit: this study does not claim criterion validity for the IIP; that is, it does not demonstrate that higher IIP scores predict directly measured parole outcomes such as individual recidivism rates or supervision compliance. Comparable cross-national data on such outcomes are currently unavailable, and criterion validity, therefore, remains an open research task for subsequent studies.

To assess the reliability of IIP scoring, each of the five criteria was coded independently by two members of the research team based on the same documentary sources (regulatory acts, official probation service reports, CEPEJ country profiles, and SPACE I data). Disagreements were resolved through discussion and reference to the primary source. Inter-rater agreement was calculated using Cohen's kappa (κ). The obtained values ranged from $\kappa = 0.72$ (court–probation coordination criterion) to $\kappa = 0.91$ (mandatory post-release supervision criterion), with an overall mean of $\kappa = 0.81$, indicating substantial to near-

17 European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems: CEPEJ Evaluation Report, 2022 Evaluation Cycle* (Council of Europe 2024) <https://www.coe.int/en/web/cepej/dynamic-database-of-european-judicial-systems> accessed 17 March 2026.

perfect agreement.[18] All scoring decisions are documented in the Appendix, which lists the primary source and the rationale for each score assigned. To enhance the transparency and reproducibility of the scoring procedure, the decision rules for each scoring level (0, 1, and 2) were operationalized in advance of coding as follows. A score of 0 was assigned where no formal institutional provision was identifiable in primary legal or regulatory sources. A score of 1 was assigned where partial formalization was evidenced, for instance, where risk assessment tools exist. However, their application is discretionary rather than mandatory, or where interagency coordination mechanisms are stipulated in policy documents but lack procedural codification. A score of 2 was assigned where full standardization was confirmed by multiple convergent sources (e.g., statutory mandate, published assessment instrument, official probation service protocol). These decision rules were applied uniformly across all eight jurisdictions, and any case in which a discrepancy could not be resolved by reference to these rules was escalated to a documented arbitration step recorded in the Appendix. Researchers wishing to replicate or extend the IIP are encouraged to use these operationalized rules as the basis for independent scoring.

The mandatory post-release supervision criterion was revised following peer review to correct a ceiling effect identified in the pilot scoring. The initial operationalization did not distinguish between selective and universal mandatory supervision, resulting in a uniform score of 1 across all eight jurisdictions. The revised scoring assigns 2 to jurisdictions where mandatory supervision is legislatively universal for all conditionally released persons, accompanied by a formalized individual supervision plan and codified recall procedures upon breach of conditions (England and Wales, Sweden, Germany, and the Netherlands); 1 to jurisdictions where supervision is legally provided but applied selectively or inconsistently (France, Kazakhstan, Poland, and Georgia); and 0 where supervision is absent or purely voluntary. Specifically: in England and Wales, licence conditions are mandatory for all released on parole, an OASys-based supervision plan is recorded for each case, and recall is automatic upon breach; in Sweden, villkorlig frigivning imposes mandatory supervision for all conditionally released persons administered by Kriminalvården; in Germany, Führungsaufsicht establishes court-ordered supervision with judicially determined conditions; in the Netherlands, voorwaardelijke invrijheidsstelling mandates supervision with a reintegration plan. This revision increases analytical differentiation without altering the direction or substantive interpretation of the Spearman correlation.

18 J Richard Landis and Gary G Koch, 'The Measurement of Observer Agreement for Categorical Data' (1977) 33(1) Biometrics 159, doi:10.2307/2529310.

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Table 1. Institutionalization Index of Parole (IIP)

Country	Institutionalization Index of Parole (IIP) (0–10)
Kazakhstan	4
France	7
England and Wales	9
Sweden	9
Germany	9
Netherlands	9
Poland	5
Georgia	3

The IIP scores differ across jurisdictions, reflecting variation in the degree of procedural organization of parole implementation mechanisms. Table 1 presents IIP scores for all eight jurisdictions included in the study; Table 2 and Table 3 provide the criterion-level scoring breakdown for the core eight-jurisdiction sample, with Table 2 covering the four primary cases and Table 3 the four supplementary jurisdictions.

To ensure the reproducibility of the calculation, a breakdown of the score for each criterion is provided below.

Table 2. Calculation Methodology for the Institutionalization Index of Parole (IIP)

Institutional Criterion	Kazakhstan	France	England & Wales	Sweden
Standardized risk assessment instruments	1	2	2	2
Formalized decision-making body	1	2	2	2
Court – probation coordination	1	1	2	2
Mandatory post-release supervision	1	1	2	2
Institutionalized reintegration programmes	0	1	1	1
Total (IIP)	4	7	9	9

The criteria were assessed on a scale of 0–2 in accordance with the methodology outlined in the section "Operationalization of the Degree of Institutionalization." The scoring is based on an analysis of regulatory acts, the organizational structure of decision-making bodies, and official materials on probation supervision. One scoring decision warrants explicit note: the criterion "Institutionalized reintegration programmes" was assigned a score of 1 (rather than 2) for Sweden, France, and England and Wales. Although all three jurisdictions possess well-developed probation services and offer reintegration support, a score of 2 requires full standardization confirmed by multiple convergent sources, specifically, a statutory mandate for individual reintegration planning combined with a codified, universally applied reintegration programme framework. In Sweden, reintegration programmes exist but are administered on a discretionary rather than universally mandated basis within Kriminalvården. In France, SPIP provides reintegration support, but programme availability varies across regions without a single standardized national framework. In England and Wales, resettlement services lack the statutory codification required for a score of 2 under the adopted decision rules. Kazakhstan received a score of 0 on this criterion, reflecting the absence of a formalized reintegration programme structure within the probation service during the study period.

***Table* 3. IIP Criterion-Level Scores for Supplementary Jurisdictions**

Institutional Criterion	Germany	Netherlands	Poland	Georgia
Standardized risk assessment instruments	2	2	1	0
Formalized decision-making body	2	2	1	1
Court – probation coordination	2	2	1	1
Mandatory post-release supervision	2	2	1	1
Institutionalized reintegration programmes	1	1	1	0
Total (IIP)	9	9	5	3

IIP scores for Germany and the Netherlands are based on CEP country profiles (2022), CEPEJ evaluations, and probation service annual reports. Poland scores are derived from SPACE I data and the CEP country profile for Poland. Georgia scores are based on the Council of Europe advisory mission reports and the Georgian National Probation Agency annual report (2022–2023). All scoring decisions follow the same 0–2 scale applied to the primary sample. Key sources include CEPEJ country reports, SPACE I datasets, and national probation service publications (see Appendix for full list).

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3.1. Empirical Data and Comparative Context

During the 2010s, there was a significant decline in the prison population (from 393 per 100,000 people in 2010 to 157 per 100,000 in 2020), after which the rate stabilized and showed moderate growth by 2024 (163 per 100,000).[19]

These trends cannot be explained solely by the characteristics of the discretionary model of parole. The reduction in the prison population during the period under review coincided with a phase of humanization of criminal legislation, the decriminalization of certain offences, the expansion of alternatives to imprisonment, as well as the implementation of amnesties and a review of sentencing policies. Thus, the change in the prison population reflects the cumulative effect of criminal policy decisions, rather than the autonomous impact of the parole model per se.

Figure 2 presents the dynamics of the prison population in 2010–2024 across selected jurisdictions (Kazakhstan, France, Sweden, and England and Wales), calculated based on data from the World Prison Brief and the Council of Europe's SPACE I. To empirically test the hypothesis, a visualization of prison population trends in comparable jurisdictions for the period 2010–2024 is presented.

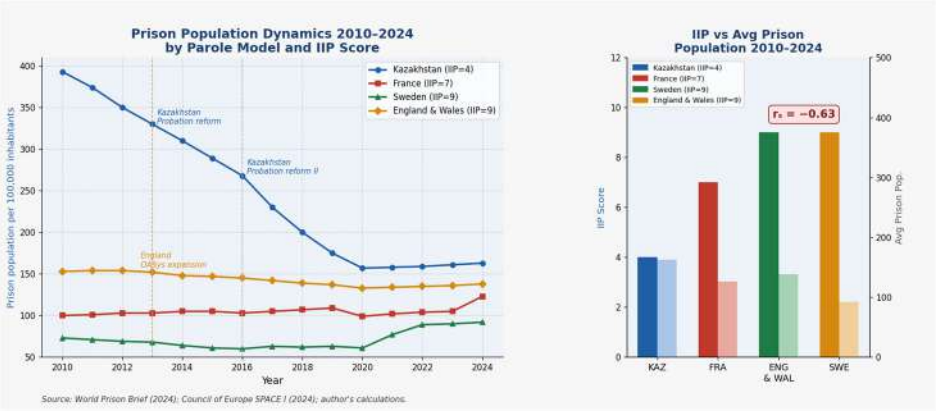


Figure 2. Prison Population Rate (2010-2024)[20]

19 Marcelo F Aebi and Edoardo Cocco, *Prisons and Prisoners in Europe 2023: Key Findings of the SPACE I Report* (Series UNILCRIM 2023/2, Council of Europe, University of Lausanne 2024); Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2023* (TIJ 2023) <https://www.penalreform.org/global-prison-trends-2023/> accessed 17 March 2026.

20 Source: *World Prison Brief (WPB): Database* (Institute for Crime & Justice Policy Research 2024) <https://www.prisonstudies.org/> accessed 17 March 2026; Council for Penological Co-operation (PC-CP), *SPACE – Council of Europe Annual Penal Statistics* (*Council of Europe*, 2024) <https://www.coe.int/en/web/prison/space> accessed 17 March 2026. Author's calculations and visualization.

Indicators are presented in a standardized format per 100,000 population. The authors aggregated the data based on comparable statistical sources to ensure cross-national comparability. The period 2010–2024 was selected as the analytical interval to identify long-term trends in the prison population.

The observed trends do not indicate a consistent association between formal parole model type and long-term prison population trajectories. Jurisdictions with different regulatory frameworks are characterized by comparable fluctuations in the indicator during the period under analysis.

According to judicial statistics for 2020–2024, courts reviewed 61,236 petitions for parole and for replacing the unserved portion of a sentence with a more lenient form of punishment. Of these, 24,774 concerned parole directly; 11,327 petitions were granted, corresponding to a grant rate of 45.7%.[21]

***Table* 4. Comparative Analysis of Parole Models**

Country	Model	Minimum eligibility threshold	Decision-making authority	Post-release supervision	Prison population rate (per 100,000)	Institutionalisation of risk assessment
Kazakhstan	Discretionary	1/2 or 2/3 of the sentence	Court	Probation supervision possible	163	Partially formalized
Sweden	Predominantly mandatory	Usually, 2/3 of the sentence	Administrative mechanism	Probation service supervision	92	High level of standardization
France	Discretionary	At least 1/2 of the sentence	Judicial authority	Conditional supervision	126	Formalized procedures
England and Wales	Mixed	Automatic at 1/2 of the sentence (general regime)	Automatic mechanism + Parole Board	Licence supervision	138	Standardized risk assessment

21 Arstan Nokeshevich Akhpanov, 'On the Status of the Specialized Public Monitoring Commission in Court Consideration of Issues of Parole and Replacement of the Unserved Part of a Sentence with a Milder One' (*Paragraph*, 23 February 2026) <https://prg.kz/document/?doc_id=36333635> accessed 17 March 2026.

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The classification of parole models (discretionary, mandatory, mixed) and the assessment of the degree of institutional organization of implementation procedures (including IIP parameters) were conducted by the authors based on an analysis of regulatory acts and official statistical sources listed in the "Research Materials and Methods" section.

Data on the proportion of granted applications are provided only for the Republic of Kazakhstan due to the public availability of judicial statistics. In European jurisdictions, grant rates are calculated using different methodologies and are not directly comparable, which limits the possibility of quantitative cross-national comparison.

3.2. Empirical Testing of the Relationship Between Institutionalization and Prison Population

To assess the association between the institutional configuration and penitentiary outcomes, a comparison was conducted between the IIP value and the average prison population for the period 2010–2024.

The Spearman rank correlation was computed between IIP scores and average prison population rates (per 100,000 inhabitants) for the period 2010–2024. For the full eight-jurisdiction sample, $r_s = -0.76$ ($n = 8$). At $n = 8$, the critical value for a two-tailed test at $\alpha = 0.05$ is $|r_s| = 0.738$;[22] the obtained coefficient exceeds the critical threshold for a two-tailed test at $\alpha = 0.05$. Although the sample remains too small for robust inference and the result is treated as an exploratory pilot finding. As a robustness check, restricting the analysis to the four-jurisdiction subset comprising Kazakhstan, France, England and Wales, and Sweden yielded ($r_s = -0.63$), after accounting for the tied IIP scores of England and Wales and Sweden. The association remains inverse in direction but is weaker in magnitude than the result obtained for the full eight-jurisdiction sample. Given the very small subgroup size, this coefficient should be interpreted only as a descriptive directional indicator and not as confirmatory evidence.

It should be noted that all results of this pilot study are exploratory in nature and do not permit causal interpretation. The small sample size ($n = 8$) precludes the possibility of statistical control of competing explanations. The identified inverse association between the IIP and the average prison population is preliminary, not an established causal relationship: the overall prison population is shaped by a multitude of factors such as demographic structure, the nature of crime, sentencing policy, and the intensity of the use of alternatives to imprisonment, none of which was controlled for in this analysis.

When comparing jurisdictions based on the formal type of model (discretionary, mandatory, mixed), no quantitatively interpretable relationship with the prison population level was identified within this sample. The difference between judicial

22 Jerrold H Zar, 'Significance Testing of the Spearman Rank Correlation Coefficient' (1972) 67(339) Journal of the American Statistical Association 578, doi:10.1080/01621459.1972.10481251.

discretion (France) and a hybrid mechanism involving a Parole Board (England and Wales) is offset by a similar degree of procedural standardization, the professionalization of the assessment of criminogenic factors, and coordination between decision-making bodies and probation services.

The structuring of discretion through specialized bodies (parole boards) and standardized risk assessment tools is viewed in contemporary literature as a means of institutionalizing discretion and reducing decision variability. It is emphasized that this shift enables the transformation of discretion from an intuitive to a procedurally organised form of professional judgment.

Across the jurisdictions examined, higher IIP scores were consistently associated with lower average prison population rates, whereas no interpretable pattern emerged for formal parole model typology. Given the exploratory design and the limited number of jurisdictions, this association should be regarded as hypothesis-generating rather than confirmatory.

4 DISCUSSION

The findings suggest that institutional characteristics deserve greater attention in comparative parole research than they have traditionally received. Rather than demonstrating the superiority of any single parole model, the analysis indicates that procedural implementation may represent an important dimension requiring further comparative investigation.

A dynamic analysis covering the period 2010–2024 did not reveal a consistent relationship between the formal typology of the conditional early release model and the long-term trajectory of the prison population. Jurisdictions with different regulatory frameworks demonstrated comparable trends in the indicator. At the same time, more stable trajectories were observed in systems where court decisions are institutionally coordinated with probation authorities through formalized procedures for information exchange and risk assessment. This allows us to consider institutional coordination as a potential structural factor in the system's manageability.

In this context, the evolution of approaches reflected in the Council of Europe's recommendations is particularly telling, as the emphasis shifts from the formal structure of release to broader institutional governance of criminal policy. This trend is characteristic not only of the sphere of parole but also of criminal justice as a whole: comparative legal studies document a widespread shift from retributive to rehabilitative and restorative approaches, based on institutionally organized assessment and support procedures.[23]

23 Razwana Begum Abdul Rahim, 'Advancing Restorative Justice in Offender Management' in Majeed Khader, Gabriel Ong and Carolyn Misir (eds), *Prepared for Evolving Threats* (World Scientific 2020) 59, doi:10.1142/9789811219740_0005; Theo Gavrielides, 'Ambitions and Critiques of Restorative Justice Post COVID-19' (2022) 11(1) Laws 6, doi:10.3390/laws11010006.

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Recommendation No. R (99) 22, adopted by the Committee of Ministers of the Council of Europe on September 30, 1999, proposes to address these phenomena through a multifaceted approach encompassing the entire criminal justice process: from examining "the possibility of decriminalizing certain types of offences or reclassifying them so that they do not entail punishment in the form of imprisonment" to developing measures that reduce the actual duration of the sentence served and, in particular, parole.[24]

Recommendation No. R (92) 16 of the Committee of Ministers of the Council of Europe distinguishes between two models of parole: discretionary and mandatory, highlighting differences in their legal structure and decision-making mechanisms.[25] At the same time, European doctrine emphasizes that these models do not form a rigid binary opposition but represent elements of a broader continuum of institutional solutions.[26]

The results obtained in this study are consistent with Herzog-Evans's position on the continuum of models, suggesting that the difference between discretionary and mandatory systems may be mitigated by a high degree of procedural standardization. On this reading, institutional design may function as a mediating factor between the normative model and the practical outcomes of its application. However, this interpretation requires confirmation on larger, multivariate samples.

In this context, parole is viewed as a variable institution whose configuration depends on a combination of normative thresholds, risk assessment procedures, and post-release supervision mechanisms.

However, the sustainability of release outcomes is determined not only by economic considerations but also by the quality of the institutional organization of post-penitentiary support.

What is analytically significant in the case of Kazakhstan is not the description of normative thresholds for time served, which are discussed in detail in Section 3, but rather that the discretionary model with a low IIP score (4/10) is not accompanied by standardized risk assessment instruments, which transforms judicial discretion from an analytically grounded tool into a source of procedural instability.[27] It is precisely this combination, a formally discretionary model without procedural institutionalization, that constitutes the analytically contrasting case that provides the necessary range of IIP values for testing the study's hypothesis.

24 Recommendation No R (99) 22 of the Committee of Ministers 'Concerning Prison Overcrowding and Prison Population Inflation' (adopted 30 September 1999) <https://rm.coe.int/168070c8ad> accessed 17 March 2026.

25 Recommendation No R (92) 16 of the Committee of Ministers 'European Rules on Community Sanctions and Measures' (adopted 19 October 1992) <https://search.coe.int/cm?i=09125948801c4d51> accessed 17 March 2026.

26 Herzog-Evans (n 1) 466.

27 Julia Dressel and Hany Farid, 'The Accuracy, Fairness, and Limits of Predicting Recidivism' (2018) 4(1) Science Advances eaao5580, doi:10.1126/sciadv.aao5580; Hamilton (n 15).

External socioeconomic and criminal-political factors, including GDP per capita, unemployment rates, and crime structure, can influence the dynamics of parole application and prison population levels independently of institutional configuration. The present study does not control for these variables, which constitutes a significant limitation. The observed associations should therefore be interpreted as hypothesis-generating rather than confirmatory, and future research should employ multivariate models that explicitly partition institutional effects from macroeconomic confounders.

What is analytically significant is that the mandatory model, by eliminating judicial discretion at the release decision stage, transfers the institutional burden to the quality of post-release supervision: it is here that procedural institutionalization, the presence of standardized supervision plans and reintegration programmes, becomes the decisive factor for outcomes, in direct correspondence with the study's hypothesis.

Within the framework of mandatory release, the establishment and maintenance of conditions applicable after the convict's release, aimed at monitoring their behaviour and ensuring compliance with assigned obligations during the post-penitentiary period, take on primary importance. Proponents of this model emphasize the difficulty of developing universal, scientifically grounded criteria for determining the point at which a convict may be deemed eligible for parole. To eliminate arbitrariness and disproportion in decisions that depend on the subjective approach of various law enforcement officials, it seems preferable to entrust the authority to make such decisions to a single authorized body.

From this perspective, the key factor is not the type of release model, but the quality of its procedural implementation.

The rates of petition approval in various jurisdictions are determined under differing procedural conditions (judicial proceedings, administrative decisions, automatic release), which makes direct comparison difficult. For this reason, the comparative analysis focuses primarily on the institutional configuration of implementation mechanisms rather than on formal approval rates.

The body of comparative research consistently suggests that the sustainability of parole outcomes is determined not by the formal model type but by the institutional capacity of probation services, human resources, assessment standards, interagency cooperation, and the consistency of post-release support.[28] This conclusion from the literature directly corresponds to the preliminary findings of this study: jurisdictions with high IIP scores, regardless of whether their formal model is discretionary or mixed, exhibit more stable prison population trajectories precisely because a high IIP score captures a well-developed system of probation coordination and reintegration programmes.

28 Ioan Durnescu and others (eds), *The Routledge Handbook on Global Community Corrections* (Routledge 2024); Phelps (n 3); Stephen Pitts and Leo Tigges, *Building Probation Capacity: What Works? Learning from the European Experience of Probation Service Development in the 21st Century* (CEP 2023).

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Recent empirical studies of recidivism in European and comparable legal systems do not reveal a consistent linear relationship between the formal model of release and recidivism rates. Meta-analytic reviews demonstrate significant variability in recidivism rates even within similar regulatory frameworks.[29] In this regard, systematic reviews of the evidence base indicate that reduced recidivism and successful resocialization are determined primarily by the availability of institutionally supported alternative approaches to the execution of sentences, rather than exclusively by the type of normative release model.[30] Studies on the effectiveness of probation supervision and desistance consistently suggest that the sustainability of release outcomes may be more closely associated with the quality of supervision, the consistency of contact, and the nature of professional interaction, than with the type of regulatory model. Relevant factors appear to include the intensity of supervision, access to rehabilitation programmes, and institutional coordination among agencies. On this basis, the institutional quality of post-release implementation may show a stronger association with outcomes compared to the formal typology of the model in the available literature. However, this conclusion requires further empirical testing across larger samples.

At the same time, it is noteworthy that in certain jurisdictions with a high level of institutionalization of procedures (in particular, in France and in England and Wales), the dynamics of the prison population do not demonstrate a proportionally pronounced decline. This suggests that the institutional organization of the parole mechanism primarily affects the predictability and stability of the system's functioning but is not the sole factor determining the absolute level of incarceration. This finding is consistent with cross-national studies showing that institutional differences in release procedures have a more significant impact on the manageability of prison populations and the variability of decisions than on the overall prison population, which is shaped by the broader socioeconomic and criminal justice context. In the European context, available evidence is consistent with the view that the prison population level correlates with crime rates and indicators of the quality of public administration; however, this relationship varies significantly between Western and Central-Eastern Europe, indicating the role of institutional and political factors that go beyond the normative framework of release.[31] These macro-level findings are consistent with the comparative penal policy literature, which has long demonstrated that prison population dynamics reflect structural factors such as political economy, welfare state design, prosecutorial culture, and sentencing legislation that lie largely beyond the reach of parole institutionalization. The IIP captures

29 Seena Fazel and Anna Wolf, 'A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice' (2015) 10 PLOS One e0130390, doi:10.1371/journal.pone.0130390.

30 Anamalia Su'esu'e, Dylan Pilger and Lorinda Riley, 'A Systematic Review of Evidence-Based Alternative Models of Incarceration' (2025) 14(2) Laws 11, doi:10.3390/laws14020011.

31 Beata Gruszczyńska and Marek Gruszczyński, 'Crime and Punishment — Crime Rates and Prison Population in Europe' (2023) 12(1) Laws 19, doi:10.3390/laws12010019.

one institutional dimension of this broader architecture; the present study does not claim that this dimension is dominant, only that it may carry independent associative weight within the limits of an exploratory pilot design.

The inferential bridge between the institutional design literature and the prison population outcome variable rests on a three-link theoretical chain that it is necessary to make explicit. At the first link, institutional design shapes the quality and consistency of individual parole decisions: standardized risk assessment instruments reduce subjectivity, formalized court–probation coordination ensures information exchange, and mandatory supervision structures post-release monitoring. This link is well established in the literature reviewed above (Herzog-Evans; Padfield et al.; Hannah-Moffat; McNeill).[32] At the second link, systematically more consistent and procedurally grounded individual decisions aggregate, across thousands of cases and over a multi-year period, into higher grant rates, shorter effective terms of imprisonment, and lower stock populations in custody. This aggregation mechanism requires no additional citation; it is an arithmetical property of the relationship between flow decisions and stock levels. At the third link, these aggregated decision effects are detectable in national prison population statistics, albeit in attenuated form owing to the concurrent influence of sentencing policy, prosecutorial practice, crime rates, and socioeconomic conditions documented by Garland, Tonry, Lacey, Lappi-Seppälä, and Cavadino and Dignan. The present study does not test all three links simultaneously; it provides a pilot test of whether the distal association between IIP scores and prison population rates is detectable at the national level over a fourteen-year observational window. This framing clarifies what the study can and cannot establish, and guards against the conflation of links one and three that would overstate the article's empirical claims.[33]

Emerging empirical research on reintegration processes suggests that the sustainability of post-penitentiary adaptation may depend on a combination of institutional support, social integration, and consistency of supervision, rather than exclusively on the formal type of release model. However, this remains an area requiring further systematic evidence.

A case-level examination of the principal confounders further clarifies the limits of the IIP association without invalidating it. Sweden (IIP = 9, average prison population = 92 per 100,000) presents the clearest pattern: low incarceration is consistent with both high

32 Herzog-Evans (n 1); Padfield, Zyl Smit and Dünkel (n 1); Kelly Hannah-Moffat, 'Algorithmic Risk Governance: Big Data Analytics, Race, and Information Activism in Criminal Justice Debates' (2018) 23(4) Theoretical Criminology 453, doi:10.1177/1362480618763582; McNeill (n 3).

33 For the broader comparative penal policy framework situating release mechanisms within macro-level determinants of imprisonment, see Garland (n 7); Tonry (n 8); Lacey (n 9); Lappi-Seppälä (n 10); Tapio Lappi-Seppälä, 'Penal Policy in Scandinavia' (2007) 36(1) Crime and Justice 217, doi:10.1086/592812; Cavadino and Dignan (n 11). These works collectively establish that prison population dynamics are determined by a multi-factorial institutional architecture, of which release mechanisms constitute only one component.

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procedural institutionalization and a comprehensive Scandinavian welfare state, meaning the two structural factors operate in the same direction and cannot be disentangled within this single case. England and Wales (IIP = 9, average prison population = 138 per 100,000) is the more diagnostically useful case: despite a high IIP score equal to Sweden's, it maintains a substantially higher prison population. This divergence is explained by a documented history of "tough on crime" sentencing legislation during the 1990s and 2000s that increased custody rates independently of parole institutionalization, precisely the kind of sentencing policy confounder that Tonry's comparative work identifies as a major determinant of cross-national incarceration differences. Far from undermining the IIP hypothesis, this case illustrates it: even with high procedural institutionalization, countervailing sentencing policy can sustain elevated prison populations, confirming that IIP is one factor among several rather than a dominant determinant. Kazakhstan (IIP = 4, average prison population = 163 per 100,000) is included as a theoretically motivated contrasting case rather than a comparator matched on background conditions; its post-Soviet institutional context, including lower judicial independence and limited probation infrastructure, compounds the effect of low IIP scores. These case-level observations do not substitute for multivariate control. However, they demonstrate that the authors have considered the principal confounders at the level of individual jurisdictions and that the observed pattern is not obviously artifactual.

The question of the effectiveness of release shifts from the "discretion versus mandatory" framework to the institutional architecture governing the application of risk assessment tools. Further research on algorithmic decision-making practices in probation shows that digital tools do not eliminate discretion but redistribute it within the institutional structure, thereby increasing demands for procedural transparency and professional training of specialists.[34] In the context of the legal systems of Commonwealth countries and European states, the use of risk assessment tools in making decisions on release raises the question of the balance between algorithmic predictability and individualized judicial discretion, which requires institutional regulation.[35]

Finally, studies on the transformation of probation highlight the influence of managerial rationality on release practices. In the context of the managerial turn, law enforcement officials increasingly focus on measurable indicators of effectiveness and risk manageability.[36] From this perspective, the differences between discretionary and

34 Hannah-Moffat (n 32); Pamela Ugwudike, 'Predictive Algorithms in Justice Systems and the Limits of Tech-Reformism' (2022) 11(1) International Journal for Crime, Justice and Social Democracy 85, doi:10.5204/ijcjsd.2189.

35 Michael Law-Smith, 'Algorithmic Sentencing and Human Dignity' (2026) 45(1) Criminal Justice Ethics 70, doi:10.1080/0731129X.2026.2644706.

36 McNeill (n 3).

mandatory systems lose their explanatory autonomy, giving way to an analysis of procedural organization and institutional design.

Recent comparative studies of European probation systems suggest a pattern of institutional standardization and the strengthening of risk assessment mechanisms across various jurisdictions.[37] The application of evidence-based approaches in probation and post-release supervision systems is viewed not only as a methodological tool but also as a prerequisite for the legitimacy of criminal justice decisions in modern legal systems. Earlier works emphasize that the expansion of community-based supervision transforms the very nature of punishment, shifting the focus from isolation to risk management and the conditional nature of the released individual's social status.

Comparative studies of cross-border enforcement of sentences in EU countries show that formal harmonization of regulatory mechanisms does not in itself guarantee uniformity of practice in the absence of sustained interagency coordination and procedural consistency.[38] In this regard, the effectiveness of parole should be assessed within the context of the entire post-penitentiary risk management system, rather than in isolation through the normative framework of the model.

The combination of empirical comparisons and theoretical arguments is consistent with the view that the institutional organization of risk assessment procedures and post-release support may serve as a systemic factor structuring the effectiveness of parole across various models. The IIP data indicate that it is precisely the standardization of risk assessment that addresses the principal weakness of the discretionary model (subjectivity of decisions). At the same time, a well-developed system of reintegration programmes compensates for the key weakness of the mandatory model (reduced incentives for participation in programmes). In other words, a high degree of procedural institutionalization functions as a structural corrective mechanism for both model types, capturing a dimension that formal typology alone cannot explain, and that the present pilot study identifies as warranting further investigation on larger, multivariate samples.

Returning to the central research question, whether formal model typology possesses independent explanatory power with respect to long-run penitentiary dynamics, the discussion adds three analytical clarifications to the quantitative findings of Section 3. First, court–probation coordination functions as a mediating mechanism between the normative model and practical outcomes: this explains why France and England, with different formal models, display comparable prison population trajectories despite both having high IIP

37 Fergus McNeill, Miranda Boone and Niall Carr, 'Probation and Parole in Europe' (2025) 54 Crime and Justice 415, doi:10.1086/736991.

38 Robin Hofmann and Hans Nelen, 'Cross-Border Cooperation in the Execution of Sentences between the Netherlands, Germany and Belgium: An Empirical and Comparative Legal Study on the Implementation of EU Framework Decisions 2008/909/JHA and 2008/947/JHA' (2020) 74 Crime, Law and Social Change 381, doi:10.1007/s10611-020-09900-7.

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scores. Second, the algorithmization of risk assessment does not eliminate but redistributes judicial discretion, meaning that future increases in IIP scores will require the simultaneous development of procedural safeguards. Third, the gap between Georgia (IIP = 3) and Germany (IIP = 9), with both having mandatory features in their models, demonstrates that model reform towards a mandatory or discretionary structure, without corresponding development of institutional infrastructure, cannot by itself alter system dynamics. All three propositions are preliminary and subject to verification on expanded samples using multivariate models controlling for socioeconomic context.

The identified limitations determine the directions for further empirical research on this topic. First, overcoming the environmental error effect requires a shift from aggregated national indicators to individual-level data. A promising approach would be to form panel samples of released individuals and track their trajectories for three to five years following conditional early release. This would allow for a comparison of the institutional parameters of the procedure with individual recidivism rates and test the hypothesis regarding the mediating role of the quality of probation supervision.

Second, further research could be conducted by expanding the number of jurisdictions and applying multivariate regression models that control for socioeconomic variables (unemployment rate, social spending, crime patterns). Such an approach would allow us to separate the institutional effect from the influence of macroeconomic context and to assess the robustness of the observed association.

Third, the use of quasi-experimental designs (difference-in-differences) is methodologically promising in cases of institutional reforms regarding parole. An analysis of pre- and post-reform periods within a single jurisdiction can reveal the causal effect of standardizing risk assessment and strengthening interagency coordination.

Finally, the development of digital risk assessment tools creates the possibility of integrating administrative data from probation services with judicial statistics. Provided that procedural safeguards and personal data protection are ensured, such databases could serve as the foundation for more accurate modelling of post-penitentiary trajectories and assessment of the sustainability of resocialization.

5 CONCLUSIONS

Preliminary findings from the comparative analysis indicate that the formal typology of parole models does not appear to be an independent determinant of long-run prison population dynamics. The Spearman rank correlation between IIP scores and average prison population rates for 2010–2024 was ($r_s = -0.76$) for the full eight-jurisdiction sample, while the robustness check for the core subgroup of four jurisdictions yielded a weaker coefficient of ($r_s = -0.63$).

Data for 2010–2024, drawn from eight jurisdictions across Council of Europe member and partner states, indicate a more stable association between prison population manageability and the degree of institutionalization of implementation procedures, above all the standardization of risk assessment, court–probation coordination, and the consistency of post-release support. However, the small sample size does not permit competing explanations to be excluded.

The observed association is probabilistic rather than causal. It suggests that a high level of procedural institutionalization is associated with greater decision-making predictability and lower variability in prison population dynamics.

The practical implication of this study is that improvements to parole should be directed not at altering formal eligibility thresholds but at strengthening the procedural infrastructure for its implementation. Priority areas include the standardization of risk assessment, the formalization of interagency cooperation, and the enhancement of transparency in community supervision mechanisms.

Parole should accordingly be understood not as an isolated legal construct but as an element of a broader institutional framework for managing post-release risks. The findings of this study indicate that it is precisely those elements of this framework captured by the IIP, standardisation of risk assessment, court–probation coordination, mandatory supervision, and reintegration programmes, which are associated with more stable prison population trends across the jurisdictions compared.

Several limitations must be acknowledged. The most critical constraint is the small sample size (n = 8): although the coefficient ($r_s = -0.76$, n = 8) nominally exceeds the critical value for a two-tailed test at $\alpha = 0.05$ ($|r_s| \geq 0.738$), Spearman's rank correlation requires substantially more than the minimum of seven observations for such a result to be considered statistically robust, and the finding should therefore be treated as exploratory rather than confirmatory.The findings are strictly exploratory and must not be generalised beyond the pilot context. IIP scores were derived from documentary analysis of publicly available sources; direct access to administrative microdata, individual release decisions and supervision records was unavailable, which constrains the granularity of the institutional assessment. Most significantly, from an interpretive standpoint, prison population dynamics are shaped by a wide range of external factors that were not controlled for in this analysis: GDP per capita, unemployment rates, crime structure, sentencing policy, and legislative reform. The confounding potential of these factors is considerable: high-IIP jurisdictions (Sweden, Germany, the Netherlands) are simultaneously characterised by high levels of economic development and low crime rates, whereas low-IIP jurisdictions (Kazakhstan, Georgia) operate in a markedly different socioeconomic context. It follows that part of the observed correlation between IIP scores and prison population rates may reflect differences in developmental level or crime structure rather

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than the direct influence of the institutional configuration of the parole system. Disentangling the institutional effect from macro-contextual influences requires multivariate regression models incorporating appropriate control variables, and this constitutes the primary direction for future research. The equal weighting of all five IIP criteria is a simplifying assumption; future studies should test alternative weighting schemes through sensitivity analysis. Notwithstanding these limitations, the pilot study establishes the conceptual framework and scoring protocol of the IIP, laying the methodological foundation for cross-national research with an expanded sample of Council of Europe member states and multivariate controls.

A further limitation concerns the construct and criterion validity of the IIP as a measurement instrument. The present study establishes that the index can be constructed and applied consistently across jurisdictions, as evidenced by inter-rater reliability of $\kappa = 0.81$, and that its criteria correspond to theoretically grounded institutional dimensions documented in the comparative parole literature. However, it does not yet demonstrate that the index fully captures the institutional reality it claims to measure. Three specific validity gaps remain. First, the IIP has not been externally validated against independent assessments of parole procedural quality, such as Council of Europe compliance monitoring reports, CEPEJ peer evaluation findings, or expert survey data; such validation would establish whether IIP scores converge with assessments produced by sources independent of the authors. Second, criterion validity, the ability of IIP scores to predict directly measured parole outcomes such as individual recidivism rates, supervision compliance, or reintegration success, cannot be established at present due to the absence of comparable cross-national data on these outcomes. Third, the sensitivity of IIP scores to the choice of primary sources has not been tested through systematic variation of the documentary evidence base. In practical terms, this means that had coders drawn on a different subset of available national legal instruments or agency reports, some criterion-level scores, particularly for jurisdictions with limited English-language documentation, such as Kazakhstan and Georgia, might have differed by one point on the 0–2 scale, with corresponding effects on the composite IIP. A formal sensitivity analysis, in which IIP scores are recalculated under alternative source selections and the Spearman correlation is recomputed for each variant, was not conducted in the present study; this constitutes a recognized limitation, and such analysis is identified as a priority task for the next stage of index development. Addressing these three gaps, through replication by independent research teams, external validation against CEPEJ and Council of Europe monitoring data, and expansion to a sample of $n = 20–25$ jurisdictions that would permit regression-based analysis, constitutes the methodological agenda for the next stage of IIP development.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ІНСТИТУЦІЙНА КОНФІГУРАЦІЯ ТА ЕФЕКТИВНІСТЬ УМОВНО-ДОСТРОКОВОГО ЗВІЛЬНЕННЯ: ПОРІВНЯЛЬНИЙ ДОСВІД ЮРИСДИКЦІЙ ДЕРЖАВ-ЧЛЕНІВ РАДИ ЄВРОПИ

Жанна Шаяхметова, Какімжан Бішманов, Солідат Каїржанова, Ассель Бекбауова* та Нургуль Урбіссінова

АНОТАЦІЯ

Передумови. *Дослідження умовно-дострокового звільнення в державах-членах Ради Європи тривалий час зосереджувалися на дискусії щодо того, яку модель слід застосовувати — дискреційну, обов'язкову чи змішану. Проте такий підхід не враховує більш значущої змінної — ступеня інституційної сформованості відповідної моделі. З погляду справедливості недостатньо інституціоналізований механізм умовно-дострокового звільнення створює ризик того, що це право матиме суто формальний характер та буде відірване від справедливого процесу ухвалення рішень, тоді як належне інституційне забезпечення дає змогу цьому інституту функціонувати як механізму запобігання непропорційному покаранню та практичного втілення принципу справедливості під час виконання кримінальних покарань.*

Методи. *У дослідженні застосовано комплексний порівняльно-правовий підхід, що поєднує аналіз документів, формування індексу та непараметричне статистичне тестування. Стандартизовані дані за 2010–2024 роки було отримано з бази даних World Prison Brief та звітів SPACE I (Щорічна пенітенціарна статистика Ради Європи). Для забезпечення максимальної інституційної варіативності було відібрано вісім юрисдикцій: Казахстан, Францію, Англію та Уельс, Швецію, Німеччину, Нідерланди, Польщу та Грузію. Індекс інституціоналізації умовно-дострокового звільнення (IIP) було сформовано як комплексний інструмент, що охоплює п'ять критеріїв: стандартизовані інструменти оцінки ризику, формалізований орган ухвалення рішень, координацію між судом і службою пробації, обов'язковий нагляд після звільнення та інституціоналізовані програми реінтеграції. Кожен критерій оцінювався за шкалою від 0 до 2 балів, що забезпечувало загальний діапазон індексу від 0 до 10. Для оцінки міжекспертної*

узгодженості використовувався коефіцієнт каппа Коена. Для перевірки зв'язку між значеннями індексу ІІР та середніми показниками чисельності ув'язнених застосовано коефіцієнт рангової кореляції Спірмена. Формальний тип моделі умовно-дострокового звільнення (дискреційний, обов'язковий або змішаний) використовувався як незалежна змінна для порівняльного аналізу.

Результати та висновки. *Порівняльний аналіз восьми юрисдикцій держав-членів Ради Європи за період 2010–2024 років показав, що індекс інституціоналізації умовно-дострокового звільнення (ІІР) демонструє обернений зв'язок із показниками чисельності ув'язнених ($r_s = -0,76$; $n = 8$), який перевищує критичне значення за рівня значущості $\alpha = 0,05$. З огляду на невеликий обсяг вибірки цей результат слід розглядати як попередній. Перевірка стійкості результатів для основної підгрупи, що охоплює чотири юрисдикції (Франція, Англія та Уельс, Швеція і Казахстан), підтвердила той самий напрям кореляційного зв'язку ($r_s = -0,63$). Отримані попередні результати узгоджуються з інституційною моделлю ефективності умовно-дострокового звільнення, відповідно до якої ефективність може бути тісніше пов'язана з організацією процедур, ніж із законодавчою моделлю звільнення. У контексті актуальних дискусій у межах Європейської комісії з питань ефективності правосуддя (CEPEJ) ці результати свідчать про те, що для держав-членів Ради Європи реформування має охоплювати не лише вибір моделі умовно-дострокового звільнення, а й рівень її процедурної інституціоналізації.*

Ключові слова. *Умовно-дострокове звільнення; інституційна конфігурація; індекс інституціоналізації умовно-дострокового звільнення; процедурна інституціоналізація; оцінка ризику; пробація; Рада Європи.*

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ATHLETES' FREEDOM OF EXPRESSION AND THE PRINCIPLE OF OLYMPIC NEUTRALITY: THE CASE OF UKRAINIAN ATHLETE AND SYMBOL OF RESISTANCE VLADYSLAV HERASKEVYCH

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ABSTRACT

Background: *This paper examines the tension between athletes' freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) and the principle of political neutrality within the Olympic Movement. It focuses on the case of Ukrainian skeleton athlete Vladyslav Heraskevych at the Milano-Cortina 2026 Winter Olympic Games, where he was excluded from competition after insisting on wearing a helmet depicting Ukrainian athletes killed during Russia's invasion of Ukraine. The case raises broader questions concerning the extent to which symbolic and humanitarian expression by athletes may be restricted under the Olympic regulatory framework.*

Method: *The study adopts a qualitative doctrinal legal methodology based on systematic document analysis, comparative case-law review, and proportionality-based reasoning. It examines Rule 40.2 and Rule 50.2 of the Olympic*

Charter, the International Olympic Committee (IOC) Expression Guidelines, relevant decisions of the Court of Arbitration for Sport (CAS), and the jurisprudence of the European Court of Human Rights (ECtHR). The proportionality test developed under Article 10 ECHR—legality, suitability, necessity, and proportionality stricto sensu—is applied to assess the compatibility of the restriction imposed on Heraskevych with human-rights standards.

Results and Conclusions: *The analysis demonstrates that the existing IOC regulatory framework permits considerable discretion in determining when athlete expression constitutes prohibited political expression. The Heraskevych case illustrates how peaceful symbolic or humanitarian gestures may be classified as political depending on their context. The paper argues that the relationship between Rule 40.2, Rule 50.2, and the IOC Expression Guidelines creates concerns regarding foreseeability and legal certainty. It further questions whether the objective of preserving political neutrality can justify a particularly severe interference with freedom of expression concerning matters of significant public interest, including armed conflict, human loss, and human rights. The paper concludes that the current framework does not sufficiently satisfy the requirements of legal certainty and proportionality under Article 10 ECHR and advocates a clearer and more balanced distinction between harmful political propaganda and peaceful humanitarian expression by athletes.*

1 INTRODUCTION

> 'The Olympic Games are the only event that unites the entire world in peaceful competition. The universality and inclusiveness that define the Olympic Games require us at the International Olympic Committee (IOC) to be politically neutral. We cannot solve human rights issues which generations of politicians have been unable to solve. But for our actions on peace and human rights to be successful, we need the respect of politics for our mission,'

said Thomas Bach, then IOC President, before the UN Human Rights Council ahead of the Tokyo Olympic Games in 2021.[1]

This statement encapsulates a central tension within the Olympic Movement. While the IOC emphasizes political neutrality as a foundational principle, it simultaneously operates within a global environment in which sport and politics are closely intertwined. A prominent illustration of this tension is the case of Ukrainian skeleton athlete Vladyslav Heraskevych, who was barred from competition for wearing a helmet depicting Ukrainian

1 'The Unifying Power of the Olympic Games to Bring the World Together in Peaceful Competition' (*International Olympic Committee*, 7 July 2021) <https://www.olympics.com/ioc/news/the-unifying-power-of-the-olympic-games-to-bring-the-world-together-in-peaceful-competition> accessed 15 February 2026.

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athletes killed during Russia's invasion of Ukraine.[2] The dispute was subsequently brought before the Court of Arbitration for Sport (CAS), which upheld the decision on the basis that the athlete's conduct violated the IOC Expression Guidelines and Rule 40.2 of the Olympic Charter. These provisions regulate the conditions under which athletes may engage in expression within the Olympic context, including restrictions linked to Olympic values and the prohibition of certain forms of political demonstration or propaganda.[3]

The conduct of V. Heraskevych raises the following question: As sports fans, do we have the right to expect (political) neutrality from Olympians and their teams in accordance with Rule 40.2 and Rule 50.2 of the Olympic Charter, which state that 'no kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas'?[4] Or do athletes enjoy the same freedom of expression on political matters as any other individual?

This paper examines precisely this tension—primarily through the example of V. Heraskevych—between the autonomy and political neutrality of sports and the human right of athletes to freedom of expression, as protected under Article 10 of the European Convention on Human Rights (Convention).[5]

In the context of the Olympic Movement, these two competing interests should be balanced, a task that can be assessed through the proportionality test developed in the jurisprudence of the European Court of Human Rights (ECtHR).[6]

In connection with the proportionality test, a logical question arises: *Why do we apply the ECtHR's test to analyse Rule 40.2 and Rule 50.2 of the Olympic Charter when sport is global?*

The answer lies not in any claim of direct jurisdiction, but in the functional and normative influence of Convention standards within transnational sports law. First, although the ECtHR does not exercise global jurisdiction and cannot adjudicate disputes involving non-member states of the Council of Europe, its jurisprudence has acquired significant persuasive authority within the system of lex sportiva (note: lex sportiva refers to the autonomous legal order of sport, composed of rules created and applied by international sports organizations).[7] In particular, the CAS, while not formally bound by the Convention,

2 'IBSF Jury Decision on Skeleton pilot Vladyslav Heraskevych' (*International Bobsleigh & Skeleton Federation*, 12 February 2026) <https://www.ibsf.org/en/news/detail/ibsf-jury-decision-on-skeleton-pilot-vladyslav-heraskevych> accessed 15 February 2026.

3 CAS OG 26/09 *Vladyslav Heraskevych v International Bobsleigh & Skeleton Federation and International Olympic Committee* (Court of Arbitration for Sport (CAS), 13 February 2026).

4 International Olympic Committee, *Olympic Charter (in force from 3 February 2026)* (IOC 2026).

5 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).

6 *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) <https://hudoc.echr.coe.int/eng?i=001-57499> accessed 15 February 2026.

7 Ken Foster, '*Lex Sportiva and Lex Ludica:* The Court of Arbitration for Sport's Jurisprudence' (2005) 3(2) Entertainment and Sports Law Journal 2, doi:10.16997/eslj.112.

has repeatedly drawn upon ECtHR case law when interpreting fundamental rights issues, including freedom of expression, due process, and proportionality.[8] This practice reflects an effort to align sports adjudication with internationally recognized human rights standards and to enhance the legitimacy of arbitral decision-making.

Second, the institutional and legal anchoring of both the IOC and CAS in Switzerland further reinforces the relevance of ECtHR standards. As Switzerland is a Contracting State to the Convention, Swiss law—including the oversight of arbitral awards by the Swiss Federal Tribunal—operates within a legal environment shaped by the Convention. This indirect link was explicitly confirmed in the case of *Semenya v. Switzerland*, in which the ECtHR accepted its jurisdiction on the basis that Switzerland, through its judicial supervision of CAS awards, bears responsibility for ensuring Convention-compliant protection of fundamental rights. Importantly, this approach suggests that the applicability of Convention standards does not depend primarily on the nationality of the athlete, but rather on the existence of a sufficient jurisdictional link to a Contracting State, such as the seat of CAS. Consequently, ECtHR jurisprudence enters the regulatory framework of international sport indirectly, through the domestic legal order governing arbitration and the enforcement of CAS awards.[9]

Having established the relevance of this human-rights framework within the Olympic Movement, the discussion turns to the case of V. Heraskevych. The analysis first reconstructs the sequence of events and then examines how his actions were interpreted and assessed by the IOC and subsequently by the CAS. Building on this narrative, the analysis will then apply the ECtHR proportionality test to evaluate whether the restriction imposed on his expression can genuinely be regarded as justified in a democratic society.

Finally, the paper will look ahead and consider what this story could mean for the future: namely, what consequences a potential first successful athlete application before the ECtHR might have for the Olympic Movement and for the evolving regulation of political expression in sport.

8 Court of Arbitration for Sport, *Sport and Human Rights: Overview from a CAS Perspective* (*TAS / CAS*, 28 November 2023) <https://www.tas-cas.org/generated/assets/pages/index/CAS_Human_Rights_in_Sport__November_2023_.pdf> accessed 15 February 2026.

9 *Semenya v Switzerland* App no 10934/21 (ECtHR, 10 July 2025) <https://hudoc.echr.coe.int/eng?i=001-244348> accessed 15 February 2026.

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2 METHODOLOGY

This paper adopts a doctrinal legal research design to examine the tension between athletes' freedom of expression under Article 10 of the Convention and the principle of political neutrality within the Olympic Movement. The analysis is centered on the interpretation of Rule 40.2 and Rule 50.2 of the Olympic Charter, the IOC Expression Guidelines, and their compatibility with Article 10 of the European Convention on Human Rights. The study is primarily case-law driven, with particular emphasis on the CAS award in the Vladyslav Heraskevych dispute, complemented by relevant jurisprudence of the ECtHR concerning freedom of expression and proportionality assessment of restrictions on that right.

The methodological core of this paper is document-based doctrinal analysis. This includes a systematic examination of primary legal sources, namely the Olympic Charter, IOC regulatory instruments, CAS arbitral awards, and ECtHR judgments interpreting Article 10 of the Convention. The analysis focuses on identifying how legal standards such as legality, legitimacy, necessity, and proportionality are articulated and operationalized in sports arbitration and human-rights adjudication.

A comparative case-law method is also employed to situate the Heraskevych dispute within a broader constellation of sports-related expression cases. This includes CAS decisions involving political or symbolic expression by athletes in different contexts, as well as ECtHR jurisprudence on permissible restrictions of speech in matters of public interest. The comparative approach enables the identification of recurring interpretive patterns, particularly regarding the margin of discretion afforded to sports governing bodies, the treatment of symbolic speech, and the threshold for establishing necessity in restricting expression.

Finally, the study applies a structured proportionality analysis modelled on the ECtHR's jurisprudence, broken down into legality, suitability, necessity, and proportionality stricto sensu. The findings of the doctrinal and comparative analyses are synthesized to evaluate whether the current regulatory framework of the Olympic Movement meets Convention standards. The scope of the research is intentionally limited to supranational norms and adjudicatory bodies (IOC regulations, CAS jurisprudence, and ECtHR case law), as these constitute the primary sources of lex sportiva and human-rights standards relevant to Olympic disputes. Internal disciplinary practices of national federations and broader empirical governance processes are referenced only insofar as they assist in illustrating the practical application of the examined rules, but do not form the core dataset of the analysis.

3 BETWEEN SYMPATHY AND SANCTION: THE HERASKEVYCH CASE BEFORE CAS

Vladyslav Heraskevych is not an unknown name in the skeleton community. The 27-year-old Ukrainian athlete became widely known during the 2022 Winter Olympics in Beijing, where he displayed a banner reading 'No War in Ukraine'. His protest took place in February 2022, only a few days before the outbreak of the Russian invasion of Ukraine. Although such a statement could potentially have raised questions under Rule 50.2 of the Olympic Charter, which prohibits political expression at the Olympics, the IOC, in that specific geopolitical context, did not impose any disciplinary sanction on the athlete.[10]

Since the outbreak of the war in Ukraine, the athlete has repeatedly used his social media profiles to draw attention to the humanitarian consequences of the conflict and to support the Ukrainian sports community.

A few days before the start of the skeleton event at the Milano-Cortina Games, during official training sessions, V. Heraskevych used a helmet bearing portraits of Ukrainian athletes who had been killed as a result of the Russian invasion. The IOC subsequently informed the Ukrainian delegation that such personalized equipment is not compatible with the Olympic Charter and the Expression Guidelines, which regulate the permissible scope of athlete expression within Olympic settings. The IOC suggested an alternative form of commemoration, such as wearing a black armband without personalization.[11]

V. Heraskevych nevertheless publicly announced his intention to compete with that helmet. The IOC therefore decided that he would not be allowed to start if he insisted on using the helmet in question. The International Bobsleigh & Skeleton Federation (IBSF) implemented this decision by withdrawing the athlete from the starting list on race day. The athlete then filed an application with the CAS ad hoc division, seeking both provisional measures allowing him to start and the annulment of the decision excluding him.[12]

CAS held that although freedom of expression under Article 10 of the Convention is a fundamental right, it is not absolute. Wearing the helmet constituted an expression of views,

10 'Ukrainian Athlete Escapes Winter Olympics Censure After Anti-War Protest', *The Guardian* (London, 11 February 2022) <https://www.theguardian.com/sport/2022/feb/11/ukranian-athlete-vladyslav-heraskevych-risks-winter-olympics-rebuke-after-anti-war-protest> accessed 28 February 2026.

11 'Skeleton pilot Vladyslav Heraskevych not allowed to participate at Milano Cortina 2026 after refusing to adhere to the IOC athlete expression guidelines International Olympic Committee's Guidelines on Athlete Expression' (*International Olympic Committee*, 12 February 2026) <https://www.olympics.com/ioc/news/skeleton-pilot-vladylsav-heraskevych-not-allowed-to-participate-at-milano-cortina-2026-after-refusing-to-adhere-to-the-ioc-athlete-expression-guidelines> accessed 15 February 2026; International Olympic Committee, 'Guidelines on Athlete Expression – Olympic Winter Games Milano Cortina 2026' <https://img.olympics.com/images/image/private/w_auto/primary/hlhnqokktckbxgc3vbd7> accessed 15 February 2026.

12 Case CAS OG 26/09 (n 3).

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particularly since the athlete had publicly framed it as a political/societal message. The exclusion was considered proportionate, as the athlete could have competed with a different helmet and expressed his views outside the field of play.

Notably, the Sole Arbitrator did not base the assessment on Rule 50.2, which specifically addresses political demonstrations and propaganda, but instead relied primarily on Rule 40.2 and the Expression Guidelines as the applicable regulatory framework governing athlete expression during competitions.[13] CAS considered these rules compatible with Article 10 of the Convention, concluding that limiting expression on the field of play serves the legitimate aim of preserving neutrality and maintaining the focus on sporting performance.[14]

The Heraskevych decision has attracted academic criticism, particularly concerning the Sole Arbitrator's assessment of the requirements of Article 10 of the Convention. In this regard, R. Cairns argues that, although the Sole Arbitrator of the CAS acknowledged that athletes participating in the Olympic Games are subject to non-negotiable rules that should respect their fundamental rights, and recognized that freedom of expression may be restricted only under the conditions established by Article 10(2) of the Convention, the reasoning of the award fails to identify the specific legitimate aim underlying the interference. Rather, the Sole Arbitrator merely states that the IOC's objective is legitimate, without demonstrating how it falls within one of the permissible grounds enumerated in Article 10(2). Furthermore, while the award refers to the need to preserve an undisturbed sporting environment and to ensure that public attention remains focused on athletic performance, it does not sufficiently clarify whose rights were being protected or why such interests were capable of justifying an interference with Heraskevych's freedom of expression. These deficiencies raise broader concerns as to whether the award adequately applied the principles of legality, necessity and proportionality required under the ECtHR's jurisprudence.[15] Building on these concerns, the next step is to examine whether Rule 40.2 and Rule 50.2 of the Olympic Charter are compatible with Article 10 of the Convention and whether the restriction of V. Heraskevych's freedom of expression was proportionate.

13 ibid, para 100.

14 ibid, para 81.

15 Roddy Cairns, 'Winter Olympics: CAS decision in *Heraskevych v IBSF & IOC* raises questions as to athlete justice' (*Strathclyde Law Blog*, 27 February 2026) <https://www.strath.ac.uk/humanities/lawschool/blog/winterolympicscasdecisioninheraskevychvibsfiocraisesquestionsastoathletejustice/> accessed 26 July 2026.

4 SILENT STADIUMS? APPLYING THE PROPORTIONALITY TEST TO LEX OLYMPICA

4.1. Rule 40.2 and Rule 50.2 of the Olympic Charter and the Boundaries of Legal Certainty

As noted above, Rule 40.2 provides that Olympians enjoy freedom of expression in accordance with Olympic values and the Expression Guidelines determined by the IOC Executive Board. Although Rule 40.2 appears to affirm athletes' freedom of expression, Rule 50.2, which prohibits any form of political demonstrations or propaganda in Olympic venues, operates in a way that substantially limits and in practice, neutralizes it. To assess whether these rules satisfy the proportionality test under the Convention and ECtHR case law, we must first analyse whether the restriction fulfils the test of legality.

As F. Shahlaei has stated, any restriction of human rights must be established exclusively by law, and no form of 'traditional, religious, or other customary law' can justify limiting freedom of expression. The law should be as specific as possible and must provide clear guidance on the types of prohibited expression.[16]

The Olympic Charter, as binding Lex Sportiva, 'has the character of law—or even a constitution—in the world of sport', because it is a constitutive document of the IOC and it defines the rights and obligations of the members of the Olympic family.[17]

However, the Olympic Charter's quasi-constitutional status does not exempt it from general legal principles governing the adoption and application of binding norms. In this respect, CAS jurisprudence has clarified that the principle of legality requires that binding regulations be duly enacted, clearly define the elements of each disciplinary offence, and set out the applicable sanctions—either directly in the rule itself or by referring to another provision.[18] The ECtHR has confirmed the same standard, holding in *The Sunday Times v. the United Kingdom* that, for a binding rule to satisfy the legality test, it must be 'clear, accessible, and foreseeable'.[19]

The CAS decision in the case of V. Heraskevych raises questions regarding the foreseeability of the applicable rules. The IOC's communication to the athlete prior to the competition

16 Faraz Shahlaei, 'Athletes' Gestures Are Protected by International Human Rights Law' (*Play the Game*, 11 August 2020) <https://www.playthegame.org/news/athletes-gestures-are-protected-by-international-human-rights-law/> accessed 15 February 2026.

17 Antoine Duval, 'The Olympic Charter: A Transnational Constitution Without a State?' (2018) 45(s1) Journal of Law and Society S245, doi:10.1111/jols.12112.

18 CAS 2014/A/3832 & 3833 *Vanakorn v Fédération Internationale de Ski (FIS)* (Court of Arbitration for Sport (CAS), 19 June 2015) para 86.

19 *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) paras 49, 50 <https://hudoc.echr.coe.int/eng?i=001-57584> accessed 15 February 2026.

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did not specify which provision of the Olympic Charter had allegedly been violated, referring only to a general obligation to respect the Olympic Charter and the Expression Guidelines. This created uncertainty as to whether the alleged breach concerned Rule 50.2, which prohibits political, religious, or racial propaganda, or Rule 40.2, which regulates athletes' expression more broadly through the Expression Guidelines. The distinction is significant, as it is easier to classify conduct as an 'expression of views' than as 'political propaganda,' thereby lowering the threshold for finding a breach and raising doubts as to whether the dispute was assessed under the correct legal framework.[20]

In this regard, the author shares the view of A. Duval and M. James that the relationship between Rule 40.2 and Rule 50.2 remains unclear, particularly as it is uncertain whether the rules prohibit all forms of expression or only those with a specific political dimension. As they observe, if the former interpretation were correct, the IOC would effectively enshrine freedom of expression in the Olympic Charter while simultaneously emptying it of content through the Expression Guidelines on Athlete Expression at the most visible moments of the Olympic Games.[21]

Moreover, the CAS acknowledged that wearing a helmet bearing portraits of athletes killed in the war constituted an 'expression of a view' within the meaning of the Expression Guidelines. This conclusion was based primarily on the fact that V. Heraskevych himself connected the helmet to the broader political context of the war in Ukraine in his public media statements.[22] However, the CAS award does not contain a detailed analysis of whether the Expression Guidelines themselves satisfy the 'quality of law' requirement under Article 10 of the Convention.

This omission is particularly significant in light of the ECtHR's established case law, according to which restrictions on freedom of expression must not only have a basis in law but must also satisfy the qualitative requirements of accessibility, precision, and foreseeability to protect individuals against arbitrary interference.[23] Moreover, following the Grand Chamber judgment in *Semenya v. Switzerland*, CAS is expected to subject interferences with athletes' fundamental rights to particularly rigorous judicial scrutiny. In the present case, however, the award does not explain in sufficient detail whether the Expression Guidelines satisfy these requirements or why the interference with the athlete's freedom of expression meets the standard of review required under Article 10 of the Convention.

20 Cairns (n 15).

21 Antoine Duval and Mark James, 'Is the International Olympic Committee's Decision to Disqualify Vladyslav Heraskevych Legal?' (*Verfassungsblog*, 12 February 2026) <https://verfassungsblog.de/disqualify-vladyslav-heraskevych-legal-olympics-court-arbitration/> accessed 15 February 2026.

22 CAS OG 26/09 (n 3) para 97.

23 *Hashman and Harrup v United Kingdom* App no 25594/94 (ECtHR, 25 November 1999) para 31 <https://hudoc.echr.coe.int/eng?i=001-58365> accessed 15 February 2026.

The Expression Guidelines allow certain forms of expression (e.g., in mixed zones, press conferences, or before competitions) provided they are not discriminatory, targeted against people, countries, or organizations, or disruptive, and are consistent with the Fundamental Principles of Olympism. Their aim is to safeguard Olympic neutrality and maintain harmony among participants.[24]

However, these guidelines are not legally binding under the Olympic Charter, which limits their enforceability. Only the IOC Executive Board can issue binding guidance on Rule 40 and Rule 50, meaning that the Athletes' Commission's guidelines, despite being more detailed, cannot legally regulate athletes' freedom of expression.[25]

Third, for a legal norm to meet the requirement of legality, a norm must be formulated with sufficient precision so that an athlete can regulate their conduct and foresee, to a reasonable degree, the consequences of their actions.[26] As A. Duval and M. James mentioned 'it seems that banning expressions wholesale from certain parts of the Olympic Games is problematic from the point of view of legal certainty, as what constitutes an 'expression' under the Expression Guidelines remains entirely undefined.'[27]

The Expression Guidelines prohibit 'expressions of views' during competition without clarifying whether this refers only to political propaganda or also to humanitarian gestures, commemorative acts, or expressions of solidarity. Interpreted broadly, the rule could effectively ban any expressive conduct during competition, raising serious concerns regarding foreseeability under Article 10 of the Convention.[28]

For the aforementioned reasons we can state that due to the vague interpretation of Rules 40.2 and 50.2 of the IOC Charter, the IOC enjoys unfettered discretion in imposing sanctions in the case of athletes' expressions. The Expression Guidelines prohibit 'expressions of views' during competition—a notion broader than the 'political propaganda' banned by Rule 50.2—yet neither rule defines what constitutes such expression. In the Heraskevych case, the helmet displayed portraits of deceased athletes without slogans; its political meaning was inferred mainly from context and the athlete's prior media statements. This context-dependent assessment raises doubts as to whether athletes can reasonably foresee that a commemorative symbol without explicit political wording would fall within the prohibition of 'expressions of views' on the field of play.

The uncertainty is reinforced by the fact that previous Olympic practice appears to have tolerated several comparable forms of symbolic athlete expression (e.g. demonstrations relating to racial justice, armed conflicts or other issues of public concern) without

24 International Olympic Committee, 'Guidelines on Athlete Expression (n 11).
25 International Olympic Committee, *Olympic Charter* (n 4) Rule 19, para 3.10.
26 *Hashman and Harrup v United Kingdom* (n 23) para 31.
27 Duval and James (n 21).
28 ibid

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disciplinary sanctions.[29] Although each case depends on its own facts, inconsistent enforcement may affect athletes' legitimate expectations and further weaken the foreseeability of the applicable rules.[30] During the Beijing 2022 Winter Olympics V. Heraskevych displayed a 'No War in Ukraine' sign without facing sanctions, since the IOC described the message as a general call for peace rather than a political demonstration.[31] By contrast, at Milano-Cortina 2026 he was excluded for a helmet portraying deceased Ukrainian athletes—an act that could equally be interpreted as remembrance rather than political advocacy. This contrast suggests that the assessment of what constitutes impermissible expression may not be static, but sensitive to broader contextual and geopolitical developments.[32]

At the same time, it should be acknowledged that supporters of the current Olympic framework argue that a degree of regulatory flexibility is unavoidable in a global sporting event involving athletes from diverse political, cultural, and religious backgrounds. From this perspective, broad standards are regarded as necessary to preserve Olympic neutrality and prevent sporting competitions from becoming platforms for geopolitical confrontation.[33]

From the perspective of the legality test, the critical question is whether the norm restricting freedom of expression is sufficiently precise and structured to prevent arbitrary application.

The Heraskevych case illustrates the structural tension: the same symbolic act (displaying images related to a geopolitical conflict) could potentially be interpreted either as prohibited political expression or as permissible humanitarian remembrance, depending on the reputational considerations of the IOC. When the decisive criteria emerge primarily through ex post interpretation rather than from the wording of the rule itself, the requirement of legality becomes fragile.

Based on the above, it may be concluded that Rule 40.2 and Rule 50.2 of the Olympic Charter only partially satisfy the legality test. Although the Olympic Charter functions as a quasi-normative document within the Olympic Movement, the wording of the aforementioned rules suffers from several fundamental deficiencies: they lack a clear definition of the elements of a disciplinary offence, do not specify concrete sanctions, and

29 Cem Abanazir, 'The Court of Arbitration for Sport's Multifarious Views on Freedom of Expression' (*Verfassungsblog*, 23 February 2022) <https://verfassungsblog.de/the-court-of-arbitration-for-sports-multifarious-views-on-freedom-of-expression/> accessed 27 July 2026.

30 Mark James, 'The Re-Emergence of the Athlete Activist: Rule 50 and the Precarious Position of Free Speech under the IOC's Guidelines' (*Verfassungsblog*, 8 February 2022) <https://verfassungsblog.de/the-re-emergence-of-the-athlete-activist/> accessed 27 July 2026.

31 'Ukrainian Athlete Escapes Winter Olympics Censure (n 10).

32 Abanazir (n 29).

33 Chui Ling Goh, 'Rule 50 of the Olympic Charter and the Right to Freedom of Expression' [2022] The Regulatory Review <https://www.theregreview.org/2022/03/22/goh-rule-50-of-the-olympic-charter-and-freedom-of-expression/> accessed 27 July 2026.

fail to provide the level of legal foreseeability required by the principle of legal certainty. Nevertheless, this conclusion should not be interpreted as questioning the legitimacy of the IOC's objective of safeguarding political neutrality during the Olympic Games. Rather, it suggests that greater normative clarity, more consistent application of Rules 40.2 and 50.2, and more rigorous judicial review would strengthen both legal certainty and the protection of athletes' fundamental rights without undermining the legitimate regulatory autonomy of the Olympic Movement. Such an approach would also better reflect the standards of legality, proportionality and effective judicial scrutiny developed under Article 10 of the Convention.

4.2. Suitability and Necessity Test

According to the established case-law of the ECtHR, any restriction on freedom of expression must pursue a legitimate aim. The ECtHR considers factors such as public interest, the extent of the harm caused, and the injury to reputation or the rights of others.[34]

The suitability test examines whether the interference with a fundamental right serves an aim that is sufficiently important to justify such interference and whether a rational connection exists between the aim pursued by the legal norm and the restriction of the right. At this stage, only the purpose of the restriction is assessed, not its actual effects, which are examined later in the proportionality analysis.[35] The suitability test merely asks whether a constitutional right may be restricted to pursue a specific objective.

The necessity test requires an assessment of whether the restriction is indispensable to achieve the intended aim and whether less intrusive measures could achieve the same objective. In this context, it must be demonstrated that the restriction is necessary (not merely useful or desirable) to meet a 'pressing social need' and that a direct and immediate link exists between the expression and the alleged harm.[36]

The IOC argues that allowing athletes to express views related to politics would open the Olympic arena to numerous geopolitical disputes. However, the existence of multiple conflicts worldwide cannot in itself justify a blanket prohibition on all forms of expression. Article 10(2) of the Convention provides an exhaustive list of legitimate grounds for restricting freedom of expression, and the desire to avoid political controversy or maintain symbolic neutrality does not fall within these categories.[37]

34 *Steel and Morris v United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) <https://hudoc.echr.coe.int/eng?i=001-68224> accessed 15 February 2026.

35 Daniela Švecová, 'Sloboda prejavu v judikatúre Európskeho súdu pre ľudské práva a Ústavného súdu Slovenskej Republiky z pohľadu dynamiky vývoja' in Ladislav Orosz, Sabina Grabowska and Tomáš Majerčák (eds), *Ústavné dni: Tretie funkčné obdobie Ústavného súdu Slovenskej Republiky, VII. ústavné dni* (Kancelária Ústavného súdu Slovenskej republiky 2019) 32.

36 *Gorzelik and Others v Poland* App no 44158/98 (ECtHR, 17 February 2004) paras 95, 96 <https://hudoc.echr.coe.int/eng?i=001-61637> accessed 15 February 2026.

37 Duval and James (n 21).

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In the case of V. Heraskevych the CAS confirmed that the helmet constituted an 'expression of a view' within the meaning of the Expression Guidelines and held that the field-of-play restriction was compatible with Article 10 of the Convention. From the perspective of the IOC and the CAS, the restriction pursues the legitimate objective of preserving the neutrality of the Olympic Games and ensuring that the field of play remains focused on athletic performance rather than political debate.[38] It may also be argued that uniform restrictions are intended to prevent inconsistent treatment of competing political causes and to minimize the risk of escalating geopolitical tensions among athletes representing different states. The critical question, however, is not whether these objectives are legitimate in the abstract, but whether the specific restriction imposed in the Heraskevych case was necessary and proportionate to achieve them, respectively whether it constitutes a 'pressing social need.'[39]

The CAS award accepts that safeguarding Olympic neutrality constitutes a legitimate objective, yet it devotes comparatively little attention to explaining why the exclusion of the athlete represented a necessary response in the particular circumstances of the case. Following the Grand Chamber judgment in *Semenya v. Switzerland*, sports arbitral tribunals are expected to undertake particularly rigorous scrutiny where disciplinary measures interfere with Convention rights.[40] From this perspective, a more detailed assessment of necessity and proportionality would have strengthened the reasoning of the award.

ECtHR's judgment in *Handyside v. the United Kingdom* emphasizes that no single European conception of morality exists among the Council of Europe member states. Moral requirements vary over time and across societies, and views on morality change rapidly. Because national authorities are in direct contact with the needs of their own societies, Article 10(2) of the Convention grants a margin of appreciation reserved for domestic legislators and authorities tasked with interpreting and applying the law.[41] The situation within the Olympic Movement is different. The IOC operates globally, and its rules must be applied uniformly across all member states. At the same time, because the IOC exercises regulatory authority in a monopolistic environment—where athletes must accept non-negotiable rules in order to compete at the Olympic Games—the margin of appreciation should be interpreted narrowly. This is particularly true where the expression concerns matters of public interest, such as armed conflict, human loss, or human rights violations.[42]

38 Thomas Bach, 'The Olympics Are about Unity and Diversity, Not Politics and Profit: Boycotts Don't Work', *The Guardian* (London, 24 October 2020) <https://www.theguardian.com/sport/2020/oct/24/the-olympics-are-about-diversity-and-unity-not-politics-and-profit-boycotts-dont-work-thomas-bach> accessed 28 July 2026.

39 CAS OG 26/09 (n 3) para 94.

40 *Gorzelik and Others v Poland* (n 36) paras 95, 96.

41 *Handyside v United Kingdom* (n 6) para 48.

42 *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) para 125 <https://hudoc.echr.coe.int/fre?i=001-154265> accessed 15 February 2026.

In this context, Heraskevych's helmet, commemorating athletes killed in the war in Ukraine, constitutes speech on a matter of undeniable public interest and therefore requires strict scrutiny when assessing the necessity of restrictions.

The gesture of V. Heraskevych was a general, non-personalized political expression with a human-rights dimension. Under the ECtHR's case-law, such expressions may be regarded as speech on matters of public interest and therefore require a high level of protection.[43] By contrast, the conduct of Iranian judoka Fethi Nourine—who refused to compete against an Israeli opponent during the Tokyo Olympic Games for political reasons—represents a form of political expression that directly results in discrimination against another athlete and a specific nation.[44] Unlike Nourine's actions, Heraskevych's gesture did not target any competitor, did not incite hostility, and did not undermine the integrity of the competition. The CAS itself acknowledged that his message was consistent with the Fundamental Principles of Olympism, including peace and human dignity.[45] Consequently, the only relevant issue concerned the place and timing of the expression rather than its substance. This distinction is crucial for the necessity test: where an expression neither harms the rights of others nor disrupts the event, any restriction must be supported by particularly compelling reasons.

The IOC may nevertheless contend that differentiating between forms of political expression according to their substantive content would compromise the principle of political neutrality. Once sports governing bodies begin determining which political causes are sufficiently humanitarian or morally justified to merit protection, they inevitably assume the role of arbiters of political legitimacy. From this perspective, a generally applicable restriction based primarily on the place and timing of expression, rather than on the content of individual messages, may represent a more predictable and institutionally neutral regulatory approach. However, this argument does not fully resolve the proportionality analysis. Even content-neutral restrictions constitute interferences with freedom of expression and remain subject to the requirements of Article 10 of the Convention. Consequently, the IOC must demonstrate that the interference corresponded to a pressing social need and that the restriction was supported by sufficiently compelling reasons in the particular circumstances of the case.

At first sight, the difference between the expression of F. Nourine and V. Heraskevych is evident, not only from a moral but also from a legal perspective. Yet, both athletes were punished for violating the freedom of expression in their respective eras. Whether, in the case of V. Heraskevych, the interference with his fundamental right pursued an aim sufficiently important—and whether a rational connection existed between the aim of the legal rule and the restriction of the right—is highly disputable.

43 *Steel and Morris v United Kingdom* (n 34).

44 Decisions nos 2021-8 and 2021-9 (International Judo Federation Disciplinary Commission, 6 September 2021).

45 CAS OG 26/09 (n 3) para 98.

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According to T. Gábriš and P. Hrbek,

> 'At the Olympic Games, the focus must be on athletic performance and on the international unity and harmony that the Olympic Movement seeks to promote. (…) But this is possible only if everyone respects this diversity. The fundamental principle is that sport is neutral and must remain separate from political, religious, or other influences.'[46]

This position reflects one of the principal justifications underlying Rule 50.2 of the Olympic Charter. However, it is not the only possible understanding of the relationship between sports and politics. The ECtHR has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and protects not only information and ideas that are favorably received, but also those that offend, shock or disturb.[47] In the author's view, the proposition that the Olympic Movement can remain politically neutral is difficult to sustain in practice. As the supreme governing body of the Olympic Movement, the IOC cannot be regarded as an entirely apolitical organization. The adoption of the Olympic Truce by the UN General Assembly, the presence of active politicians on the IOC Executive Board,[48] and the IOC's 'sport-diplomatic interventions' in armed conflicts[49] all clearly demonstrate that maintaining political neutrality within the Olympic Games and the Olympic Movement is impossible. For precisely this reason, restrictions imposed in the name of neutrality must satisfy the strict requirements of Article 10 of the Convention. The ECtHR has repeatedly emphasized that political expression and expression concerning matters of public interest enjoy the highest level of protection, and that any interference therefore requires particularly weighty and convincing reasons. This principle is reflected in judgments such as *Vajnai v. Hungary*, *Murat Vural v. Türkiye* and *Animal Defenders International v. the United Kingdom*, in which the Court stressed that restrictions on political speech must be supported by compelling justifications.

Applied to the Heraskevych case, the decisive question is therefore not whether the IOC pursued a legitimate aim by seeking to preserve Olympic neutrality, but whether excluding the athlete from competition constituted a necessary and proportionate response to the particular expression displayed on his helmet. The CAS award largely accepted the IOC's position that any form of political expression on the field of play threatens Olympic neutrality. However, it devoted comparatively little attention to whether Heraskevych's

46 Tomáš Gábriš and Patrik Hrbek, 'Zmení hnutie Black Lives Matter podobu olympijských hier?' (*Slovenský olympijský a športový výbor*, 12 April 2021) <https://www.olympic.sk/clanok/zmeni-hnutie-black-lives-matter-podobu-olympijskych-hier> accessed 5 March 2026.

47 *Handyside v United Kingdom* (n 6) para 49.

48 'IOC Members' (*International Olympic Committee*, 2026) <https://www.olympics.com/ioc/members> accessed 22 February 2026.

49 Kamil Kołsut, 'IOC Under Fire: Pro-war Russian Athletes Allowed at Paris Olympics' (*Visegrad Insight*, 27 July 2024) <https://visegradinsight.eu/ioc-under-fire-pro-war-russian-athletes-allowed-at-paris-olympics/> accessed 5 March 2026.

specific gesture created a genuine risk of disrupting the competition or interfering with the rights and freedoms of other participants. Accepting the protection of Olympic neutrality—or, more broadly, the IOC's commercial interests—as sufficient justification for restricting freedom of expression without such an individualized assessment risks suppressing legitimate public debate on matters of significant public interest, including questions concerning the governance of international sports. A balance must therefore be found between safeguarding neutrality and respecting the right to freedom of expression.

In the Heraskevych case, no evidence was presented that wearing the helmet during competition created disorder, threatened safety, or impaired the rights of other athletes. The alleged 'threat' identified by the IOC was symbolic: a potential distraction from sporting performance of V. Heraskevych. Under ECtHR standards, however, abstract or speculative risks are insufficient. A restriction must respond to a concrete and pressing social need, which the CAS award failed to demonstrate.[50]

The absence of evidence demonstrating concrete harm is particularly relevant under the ECtHR's necessity test. The Court has repeatedly held that restrictions cannot be justified solely on the basis of speculative or hypothetical risks. In cases such as *Stoll v. Switzerland* and *Bédat v. Switzerland*, the Grand Chamber required a careful examination of the concrete harm allegedly resulting from the expression concerned.[51] Similarly, in the present case, the CAS award contains little analysis demonstrating how Heraskevych's helmet endangered sporting integrity, disrupted the event or interfered with the rights of other competitors. The alleged harm remained largely symbolic.

The necessity analysis becomes even more complex when considering the broader regulatory practice of the IOC during the same Olympic Games. In evaluating whether the restriction imposed on Heraskevych responded to a 'pressing social need,' it is relevant to examine whether comparable expressions were treated in the same way.

Reports indicate that several Russian athletes were allowed to compete at the Olympic Games despite their previous public expressions of support for the Russian invasion of Ukraine. These expressions arguably fall within the category of geopolitical or state-centric political speech.[52]

50 *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008) para 55 <https://hudoc.echr.coe.int/eng?i=001-87404> accessed 15 February 2026.

51 *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) paras 153, 154 <https://hudoc.echr.coe.int/eng?i=001-83870> accessed 15 February 2026; *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) <https://hudoc.echr.coe.int/eng?i=001-161898> accessed 15 February 2026.

52 Jeremy Pizzi, 'The IOC's Discriminatory Approach to Mr Heraskevych and Implications for Their International Legal Obligations' (*Global Rights Compliance*, 16 February 2026) <https://globalrightscompliance.org/the-iocs-discriminatory-approach-to-mr-heraskevych/> accessed 19 February 2026.

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Selective enforcement of rules may itself indicate that the restriction does not correspond to a genuine pressing social need but rather reflects discretionary or inconsistent regulatory practice. Although the ECtHR does not require absolute uniformity in administrative practice, inconsistent enforcement may undermine the proportionality of an interference. If comparable forms of expression are treated differently without objective and reasonable justification, doubts arise as to whether the restriction genuinely pursues the stated legitimate aim or instead reflects discretionary decision-making.[53] Consistency is therefore an important component of the proportionality assessment.

Such inconsistencies therefore reinforce the argument that less intrusive measures were available and that the sanction imposed on V. Heraskevych cannot easily satisfy the strict suitability test required under Article 10 of the Convention.

Even if restrictions on expression on the field of play are generally acceptable, the necessity test requires assessing whether the same legitimate aim could have been achieved through less intrusive measures. Although states and other regulatory authorities are not required to adopt the least restrictive measure in every case, they must demonstrate why less severe responses would have been insufficient.[54] In the case of V. Heraskevych, several less restrictive alternatives were available, such as allowing the helmet with a warning, permitting its use given the memorial context, or conducting a proportional post-competition review rather than immediate exclusion.

The IOC offered the possibility of wearing a black armband without personalization.[55] However, this alternative significantly diluted the expressive content of the message. Under ECtHR jurisprudence, authorities may not require speakers to replace a specific message with a more neutral one if the original expression is lawful and peaceful.[56] Compelling substitution may itself constitute a disproportionate interference.

To sum up, we can state that prohibiting expressions concerning inadequate protection of the rights of athletes or criticism of the IOC does not constitute an aim sufficiently important to justify interference with freedom of expression. It is acceptable that certain limitations may be justified in order to protect the rights of other competitors, ensure the orderly conduct of competitions and preserve the institutional autonomy of the Olympic Movement. On the other hand, no rational connection exists between the aim pursued by Rule 40.2 and Rule 50.2 of the Olympic Charter and the restriction of freedom of expression of V. Heraskevych, because political neutrality will not be achieved.

53 *Bédat v Switzerland* (n 51).

54 *Animal Defenders International v United Kingdom* App no 48876/08 (ECtHR, 22 April 2013) paras 108–110 <https://hudoc.echr.coe.int/eng?i=001-119244> accessed 15 February 2026.

55 'Skeleton Pilot Vladyslav Heraskevych Not Allowed to Participate at Milano Cortina 2026 (n 11).

56 *Women On Waves and Others v Portugal* App no 31276/05 (ECtHR, 3 February 2009) para 42 <https://hudoc.echr.coe.int/eng?i=002-1667> accessed 15 February 2026.

4.3. Test of Proportionality stricto sensu

The current regulatory framework of the IOC creates a paradox. There is a conflict between two legitimate constitutional values. Neither freedom of expression nor Olympic neutrality enjoys absolute protection. The task of both the IOC and CAS is therefore not to maximize one value at the expense of the other, but to reconcile them through a careful proportionality analysis consistent with Article 10 of the Convention.

The case of V. Heraskevych demonstrates that it is impossible to fully maximize both interests without limiting one of them. It is therefore crucial to apply a balancing formula (test of proportionality stricto sensu). At this stage, we need to weigh the severity of the interference with a fundamental right against the importance of the legitimate aim pursued. Even if a measure is suitable and necessary, it will still be disproportionate if the burden imposed on the individual is excessive in relation to the benefits achieved for the public interest. In other words, the advantages gained by restricting the right must outweigh the harm caused to the right-holder; otherwise, the interference cannot be considered proportionate.[57] The ECtHR has consistently emphasized that the decisive issue is whether the authorities have advanced 'relevant and sufficient reasons' capable of justifying the interference and whether a fair balance has been struck between the competing interests.[58] This balancing exercise lies at the core of Article 10 jurisprudence and cannot be replaced by a simple finding that a regulatory rule has been formally violated. The IOC relied mainly on the abstract interest of preserving symbolic neutrality on the field of play, without demonstrating disruption of competition or harm to others. From the IOC's perspective, the field of play represents a unique environment in which uniform restrictions may be necessary to avoid transforming sporting competitions into platforms for geopolitical disputes. The organization could therefore reasonably argue that clear ex ante rules provide legal certainty, ensure equal treatment of athletes and avoid requiring sporting officials to evaluate the legitimacy of competing political messages on a case-by-case basis. The proportionality test therefore requires asking whether safeguarding an abstract conception of neutrality justifies the most severe form of exclusion from participation in the Olympic Games. For the restriction to be deemed proportionate, it must represent the least intrusive measure capable of effectively achieving the aim of Rules 40.2 and 50.2. Automatic and blanket prohibitions without considering these factors are impermissible, as they may lead to unjustified interference with fundamental rights.[59]

In the Heraskevych case, the interference reached its maximum intensity: the athlete was withdrawn from Olympic competition. Even if formally framed as a preventive eligibility

57 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 340, doi:10.1017/CBO9781139035293.

58 *Animal Defenders International v United Kingdom* (n 54) para 110.

59 Antonio Di Marco, 'Athletes' Freedom of Expression: The Relative Political Neutrality of Sport' (2021) 21(3) Human Rights Law Review 620, doi:10.1093/hrlr/ngab009

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measure rather than a disciplinary sanction, its practical impact was equivalent to exclusion from the Games. From a proportionality perspective, such interference affects not only the expressive dimension of the right but also the athlete's professional career, competitive opportunity, and four-year Olympic cycle. The 'cost' of the interference was therefore extraordinarily high. The ECtHR has repeatedly recognized that the severity of the sanction constitutes an important element of proportionality analysis. Even where the underlying restriction pursues a legitimate objective, particularly severe consequences require correspondingly weighty justifications.[60] This principle is reflected throughout the ECtHR's Article 10 jurisprudence and has acquired particular significance following the Grand Chamber judgment in *Semenya v. Switzerland*, which requires especially rigorous judicial scrutiny where sports-regulatory measures substantially interfere with Convention rights.

The reasoning of CAS illustrates the difficulty of the balancing exercise. The Sole Arbitrator emphasized rule consistency and the need to prevent announced non-compliance. Yet proportionality stricto sensu requires more than confirming the formal validity of the rule; it requires demonstrating that, in the concrete circumstances, the systemic interest outweighs the severe personal and expressive loss suffered by the athlete. Where the expression is peaceful, non-discriminatory, and aligned with human dignity, the threshold for overriding it should be correspondingly high.

If the restriction does not achieve an appropriate balance between public interest and the interference with the fundamental right, it cannot be considered constitutionally compliant and must be deemed disproportionate and unlawful.

In line with the above, we can agree with M. James and G. Osborn, who argue that political expressions should be permitted within the Olympic Movement except in the situations explicitly defined in Article 10(2) of the Convention.[61] In their view, the default assumption should not be that expressions are prohibited unless exceptionally authorized by the IOC; rather, they should be allowed unless the IOC can demonstrate that restriction is necessary. Moreover, no convincing or concrete reasons have been presented thus far that would justify broad restrictions—beyond the general insistence on maintaining political neutrality. This approach reflects the general methodology adopted by the ECtHR. Freedom of expression constitutes the starting point, while restrictions require convincing justification. Accordingly, the existence of institutional interests does not reverse the burden of demonstrating necessity.

60 *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004) paras 111–116 <https://hudoc.echr.coe.int/eng?i=001-67816> accessed 15 February 2026.

61 Mark James and Guy Osborn, 'Athlete Activism at the Olympics: Challenging the Legality of Rule 50 as a Restriction on Freedom of Expression' in Véronique Boillet, Sophie Weerts and Andreas R Ziegler (eds), *Sports and Human Rights* (Springer 2024) 187, doi:10.1007/978-3-031-56452-9_8.

The IOC maintains that Rule 50.2 and Guidelines issued under Rule 40.2 are necessary to achieve the neutrality of sport, but it cannot be said that prohibiting freedom of expression represents the least restrictive measure. While it is true that allowing political speech carries the risk of opening controversial and socially sensitive issues that may be perceived very differently across countries, Rule 50.2 and Expression Guidelines issued under Rule 40.2 of the Olympic Charter impose a general ban, which is not the mildest means of protecting Olympic values. However, the existence of such risks does not automatically justify the broadest possible restriction. The ECtHR has consistently distinguished between concrete risks capable of justifying interference and speculative concerns unsupported by evidence. A general possibility that political expression may prove controversial cannot, without further analysis, demonstrate the existence of a pressing social need.[62] On the other hand, if athletes engage in hate speech or incite hostility against particular groups or nations, such conduct may indeed harm the IOC's reputation or threaten the public interest; in these cases, the IOC proportionately restricts expression. However, a blanket prohibition of any expression does not meet a pressing social need.[63]

A more narrowly tailored regulatory framework—for example one prohibiting only expression that threatens the rights of others, incites violence or seriously disrupts sporting competition—might achieve the same institutional objective while interfering less extensively with athletes' Convention rights. Whether such alternatives would prove equally effective is ultimately an empirical question, however, Article 10 requires decision-makers to explain why less restrictive measures would be insufficient.

As John Stuart Mill famously argued, 'opinions that may have been rejected in the past may become unquestionable axioms in the future—but only through freedom of expression.[64]' Silencing athletes cannot be viewed merely as individual harm but as the systematic impoverishment of public discourse by excluding voices that could shape collective values and contribute to uncovering truth through pluralism and open dialogue.[65] Prohibiting expressions that challenge the interests of the IOC and its powerful actors—who often benefit from the absence of public scrutiny in the international arena—appears untenable.

From an Article 10 perspective, the concern extends beyond the applicant. The ECtHR has frequently recognized the 'chilling effect' that overly broad restrictions may produce, discouraging others from engaging in lawful expression because of uncertainty or fear of

62 *Stankov and the United Macedonian Organization Ilinden v Bulgaria* Apps nos 29221/95 and 29225/95 (ECtHR, 2 October 2001) paras 86–97 <https://hudoc.echr.coe.int/eng?i=001-59689> accessed 15 February 2026.

63 Trusha Modi, 'To What Extent Is Rule 50 of the Olympic Charter Valid? Balancing Athletes Freedom of Expression and the Mythical Political Neutrality of Sport' (2023) 23(3) International Sports Law Journal 377, doi:10.1007/s40318-023-00249-2.

64 John Stuart Mill, *On Liberty* (JW Parker and Son 1859) 187.

65 Melina Constantine Bell, 'John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' (2010) 33(2) Utilitas 174, doi:10.1017/S0953820820000229.

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sanctions. Within the Olympic context, an excessively broad interpretation of Rule 50.2 may similarly discourage athletes from engaging in legitimate human-rights advocacy even where such expression would ultimately deserve Convention protection.

For these reasons, Rule 50.2 and Expression Guidelines cannot be regarded as a proportionate restriction on freedom of expression, as a less intrusive measure could more effectively achieve the intended aim—such as prohibiting only expressions that incite violence, hatred, or war propaganda. From this perspective, a categorical ban on political or ideological expression in sport is disproportionate and violates Article 10 of the Convention. Moreover, such a ban risks creating a 'chilling effect', meaning that athletes may refrain from expressing their political or ideological views out of fear of punishment—even when such expression is protected under Article 10 of the Convention.[66]

5 CONCLUSION: SILENCE IS NOT NEUTRALITY: REVISITING THE LEX OLYMPICA THROUGH A HUMAN-RIGHTS LENS

The historical development of the Olympic Movement clearly demonstrates the impossibility of fully eliminating political expression from the Olympic sphere. Numerous historical events—from Nazi propaganda in 1936 to the Black Power protest in Mexico City in 1968, and more recent athlete-led human-rights initiatives—confirm that the Olympic Games have always served as a platform for social and political messaging. At the same time, these historical examples also illustrate why the IOC has consistently sought to regulate political expression. Each episode generated controversy extending well beyond sport and raised legitimate concerns regarding the ability of the Olympic Movement to maintain its universal and inclusive character. The existence of athlete activism therefore does not, in itself, demonstrate that all forms of political expression should be permitted during Olympic competition.

However, the current legal formulation of Rule 40.2 and Rule 50.2 of the Olympic Charter and Expression Guidelines exhibits several shortcomings. The aforementioned Lex Olympica in its existing form is legally ambiguous and enables highly subjective decision-making. Although the IOC has recently allowed athletes to express their views in certain pre-designated spaces and moments (for example, in mixed zones or via social media), a coherent, proportionate, and legally consistent approach aligned with international human-rights standards remains absent. Clear criteria should therefore distinguish permissible expression from conduct incompatible with Olympic values, particularly hate speech or incitement to violence. The Heraskevych case illustrates these broader

66 *Sürek v Turkey* (no 3) App no 24735/94 (ECtHR, 8 July 1999) para 37 <https://hudoc.echr.coe.int/eng?i=001-58281> accessed 15 February 2026.

concerns. It demonstrates the difficulty of applying a general prohibition to expressions that are simultaneously political, humanitarian and commemorative. Whether the applicant's helmet should ultimately have been permitted is open to legitimate disagreement. Reasonable arguments exist on both sides. On the one hand, the IOC may legitimately argue that maintaining a content-neutral rule applicable to all athletes represents the only realistic means of preventing Olympic Games from becoming an arena for competing political campaigns. From this perspective, introducing exceptions based on the perceived legitimacy of individual causes would inevitably require sporting authorities to make political judgments that fall outside their institutional expertise. On the other hand, the present case concerned a peaceful commemorative gesture that neither discriminated against other competitors nor disrupted the competition. The CAS itself acknowledged that the values underlying the expression were compatible with the Fundamental Principles of Olympism. These particular circumstances strengthen the argument that a more individualized proportionality assessment may have been required under Article 10 ECHR.

From a human-rights perspective, neutrality should not operate as a mechanism for suppressing humanitarian or memorial speeches, especially when that speech concerns issues of armed conflict, loss of life, and human dignity. On the contrary, the consistent protection of such expressions may strengthen, rather than weaken, the moral legitimacy of the Olympic Movement. Accordingly, the crucial legal issue is not whether the IOC may pursue neutrality as a legitimate objective—it undoubtedly may—but whether the specific restriction imposed on the athlete represented a proportionate response supported by relevant and sufficient reasons.

To address these concerns, the IOC should ensure a transparent, consistent, and non-discriminatory procedure for assessing athlete expression. Establishing an independent review mechanism involving athlete representatives and experts in sports and human-rights law, together with systematic consideration of ECtHR jurisprudence, would significantly strengthen the legitimacy of the Olympic regulatory framework. Equally important is an inclusive dialogue within the Olympic Movement on redefining political neutrality in a manner that respects fundamental rights while preserving the values of sport.

The Olympic Games are among the most viewed and influential events worldwide. They bring together athletes from around the globe not only to compete but also to represent values of humanity, equality, respect, and unity. If the Olympic Movement truly rests on these principles, athletes' freedom of expression cannot be suppressed in such symbolic public spaces.

The concept of political neutrality must therefore be understood carefully. Institutional neutrality does not equate to silencing individuals. While the IOC may remain politically neutral as an organization, athletes should retain the right to express peaceful, non-violent, and non-discriminatory views.

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In conclusion, the Olympic Games should be a space where freedom and unity coexist, yet protected from misuse for political or ideological purposes. A balanced regulatory framework that distinguishes between different forms of expression while leaving room for dignified and peaceful communication offers a realistic solution to this complex issue. In this way, the Olympic Movement can evolve in accordance with democratic values without compromising its neutrality and universal character.

Ultimately, the Heraskevych case concerns more than the interpretation of a helmet design or a specific Olympic rule. It reflects a broader structural tension within the Olympic Movement: while athletes constitute the central protagonists of the Games, their ability to express personal convictions on matters of global concern remains tightly constrained. When the Olympic platform is used extensively for commercial visibility and institutional messaging, denying athletes the possibility of peaceful and respectful expression may appear increasingly difficult to justify.

The Heraskevych decision therefore revives a long-standing debate about the institutional relationship between CAS and the IOC. Although important reforms were introduced following the Gundel case[67] to strengthen the independence of CAS, critics continue to argue that the tribunal sometimes shows excessive deference to sports governing bodies.[68] In the case of Heraskevych, the Sole Arbitrator largely accepted the IOC's interpretation of the applicable rules without undertaking a deeper examination of the relationship between Rule 40.2, Rule 50.2 and the Expression Guidelines. Such an approach may reinforce the perception that CAS functions less as a strict judicial reviewer and more as a body that legitimizes regulatory choices made by the IOC.

Hopefully, Heraskevych—as a pioneer who has dared to raise questions that many athletes feel but rarely express—will not abandon his struggle prematurely. By challenging the CAS decision before the Swiss Federal Tribunal, and if necessary, bringing the case before the ECtHR, he could carry this debate to the institutions capable of giving it a definitive legal answer. The ECtHR is uniquely positioned to clarify the boundary between the IOC's claim of political neutrality and the fundamental human rights of athletes. A judgment in favor of the athlete could become a turning point, compelling the IOC to rethink and revise its rules in light of human rights standards. Such a decision would not only matter for one athlete or one Olympic cycle; its significance could reach far beyond Europe, shaping the global conversation about dignity, voice, and justice in sport.

67 CAS 92/A/63 *Elmar Gundel v Fédération Équestre Internationale (FEI)* (Court of Arbitration for Sport (CAS), 1 February 1992; BGE 119 II 271 *Gundel v Fédération Équestre Internationale (FEI)* (Swiss Federal Tribunal, 15 March 1993).

68 Grit Hartmann, 'Tipping the Scales of Justice – The Sport and Its 'Supreme Court' (*Play the Game*, November 2021) <https://www.playthegame.org/publications/tipping-the-scales-of-justice-the-sport-and-its-supreme-court/> accessed 25 July 2026.

The Olympic Games are not only about sporting performance and global celebration; they are also about rules, authority, and the institutions that interpret and enforce them. In this sense, the Heraskevych case reminds us that the Olympic arena is not only a field of play but also a space where questions of justice, rights, and power inevitably arise. These often-overlooked dimensions of the Olympic Movement deserve as much attention as the competitions themselves.[69]

This article has argued that Rule 50.2 of the Olympic Charter is not, in itself, necessarily incompatible with Article 10 ECHR. However, its application in the Heraskevych case raises serious doubts as to whether the interference with the athlete's freedom of expression satisfied the requirements of legality, necessity and proportionality developed in the ECtHR's case-law.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СВОБОДА ВИРАЖЕННЯ ПОГЛЯДІВ СПОРТСМЕНІВ ТА ПРИНЦИП ОЛІМПІЙСЬКОГО НЕЙТРАЛІТЕТУ: СПРАВА УКРАЇНСЬКОГО СПОРТСМЕНА І СИМВОЛУ ОПОРУ ВЛАДИСЛАВА ГЕРАСКЕВИЧА

Чілла Смолаїова

АНОТАЦІЯ

Передумови. *У цій статті досліджується співвідношення між свободою вираження поглядів спортсменів відповідно до статті 10 Європейської конвенції з прав людини (ЄКПЛ) та принципом політичної нейтральності в межах Олімпійського руху. Основну увагу приділено справі українського скелетоніста Владислава Гераскевича на зимових Олімпійських іграх 2026 року в Мілані–Кортіні, де його було відсторонено від участі у змаганнях після того, як він наполягав на використанні шолома із зображеннями українських спортсменів, загиблих унаслідок російського вторгнення в Україну. Ця справа порушує ширше питання щодо того, якою мірою символічне та гуманітарне вираження позиції спортсменів може бути обмежене відповідно до нормативної бази Олімпійського руху.*

Методи. *Дослідження ґрунтується на якісній доктринальній юридичній методології, що охоплює системний аналіз документів, порівняльний аналіз судової та арбітражної практики, а також оцінювання на основі принципу пропорційності. У статті проаналізовано Правила 40.2 та 50.2 Олімпійської хартії, Керівні принципи Міжнародного олімпійського комітету (МОК) щодо свободи вираження поглядів, відповідні рішення Спортивного арбітражного суду, а також практика Європейського суду з прав людини (ЄСПЛ). Для оцінки відповідності обмеження, застосованого до Гераскевича, стандартам у сфері прав людини застосовується тест на пропорційність, сформований у практиці ЄСПЛ щодо застосування статті 10 ЄКПЛ, який охоплює критерії законності, придатності, необхідності та пропорційності у вузькому розумінні.*

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Результати та висновки. *Проведений аналіз свідчить про те, що чинна нормативна база МОК залишає значний простір для розсуду під час визначення того, коли висловлювання спортсмена становить заборонене політичне вираження поглядів. Справа Гераскевича демонструє, що мирні символічні або гуманітарні жести залежно від контексту можуть бути кваліфіковані як політичні. У статті обґрунтовується, що взаємозв'язок між Правилами 40.2 і 50.2 Олімпійської хартії та Керівними принципами МОК стосовно свободи вираження поглядів породжує питання щодо передбачуваності застосування відповідних норм та дотримання вимог правової визначеності. Крім того, ставиться під сумнів, чи може мета збереження політичної нейтральності виправдати істотне втручання у свободу вираження поглядів щодо питань, які становлять значний суспільний інтерес, зокрема збройного конфлікту, людських втрат та прав людини. У статті зроблено висновок, що чинна нормативна база недостатньою мірою відповідає вимогам правової визначеності та пропорційності відповідно до статті 10 ЄКПЛ. Також обґрунтовується необхідність більш чіткого і збалансованого розмежування між шкідливою політичною пропагандою та мирним гуманітарним вираженням поглядів спортсменів.*

Ключові слова. *Свобода вираження поглядів, Lex Olympica, тест на пропорційність, Владислав Гераскевич, Європейська конвенція з прав людини, Правило 50.2 Олімпійської хартії.*

ABSTRAKT V SLOVENSKOM JAZYKU

Vedecký článok

SLOBODA PREJAVU ŠPORTOVCOV A PRINCÍP OLYMPIJSKEJ NEUTRALITY: PRÍPAD UKRAJINSKÉHO ŠPORTOVCA A SYMBOLU ODPORU VLADYSLAVA HERASKEVYCHA

Csilla Szomolaiová

ABSTRAKT

Úvod: *Článok sa zaoberá napätím medzi slobodou prejavu športovcov chránenou článkom 10 Európskeho dohovoru o ľudských právach (EDĽP) a princípom politickej neutrality uplatňovaným v rámci olympijského hnutia. Ťažiskom analýzy je prípad ukrajinského skeletonistu Vladyslava Heraskevycha na Zimných olympijských hrách Miláno – Cortina 2026. Heraskevych bol vylúčený zo súťaže po tom, ako trval na tom, že bude používať prilbu so zobrazením ukrajinských športovcov, ktorí zahynuli v dôsledku ruskej invázie na Ukrajinu. Tento prípad zároveň otvára širšiu otázku, do akej miery možno v rámci olympijských pravidiel obmedzovať symbolické a humanitárne prejavy športovcov.*

Metódy: *Výskum vychádza z kvalitatívnej doktrinálnej právnej metodológie a kombinuje systematickú analýzu relevantných dokumentov, komparatívne skúmanie súdnej a arbitrážnej judikatúry a posúdenie založené na princípe proporcionality. Predmetom analýzy sú najmä pravidlá 40.2 a 50.2 Olympijskej charty, Usmernenia MOV týkajúce sa slobody prejavu, relevantné rozhodnutia Športového arbitrážneho súdu, ako aj judikatúra Európskeho súdu pre ľudské práva (ESĽP). Súlad obmedzenia uloženého Heraskevychovi so štandardmi ochrany ľudských práv sa posudzuje prostredníctvom testu proporcionality vyvinutého v rámci judikatúry k článku 10 EDĽP, ktorý zahŕňa posúdenie zákonnosti, vhodnosti, nevyhnutnosti a proporcionality v užšom zmysle.*

Výsledky a závery: *Analýza poukazuje na to, že súčasný regulačný rámec MOV poskytuje značný priestor na uváženie pri posudzovaní toho, kedy možno prejav športovca považovať za zakázaný politický prejav. Prípad Heraskevycha ukazuje, že aj pokojné symbolické alebo humanitárne gestá môžu byť v závislosti od konkrétneho kontextu označené za politické. Článok poukazuje na problematický vzťah medzi pravidlami 40.2 a 50.2 Olympijskej charty a Usmerneniami MOV týkajúcimi sa prejavu, ktorý vyvoláva otázky z hľadiska predvídateľnosti právnej úpravy a právnej istoty. Zároveň skúma, či môže cieľ zachovania politickej neutrality odôvodniť taký závažný zásah do slobody prejavu, pokiaľ sa tento prejav týka otázok významného verejného záujmu, akými sú ozbrojený konflikt, straty na ľudských životoch či ochrana ľudských práv. Článok dospieva k záveru, že súčasný regulačný rámec nespĺňa v dostatočnej miere požiadavky právnej istoty a proporcionality vyplývajúce z článku 10 EDĽP. Z tohto dôvodu poukazuje na potrebu jasnejšieho a vyváženejšieho rozlišovania medzi škodlivou politickou propagandou na jednej strane a pokojným humanitárnym prejavom športovcov na strane druhej.*

Kľúčové slová: *Sloboda prejavu, Lex Olympica, test proporcionality, Vladyslav Heraskevych, Európsky dohovor o ľudských právach, Pravidlo 50.2 Olympijskej charty.*

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Research Article

STATE-LED ACCESS TO JUSTICE FOR VULNERABLE GROUPS: WHAT THE CHINESE AND VIETNAMESE PROCURATORIAL MODELS OFFER EASTERN EUROPEAN AND EU REFORM

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ABSTRACT

Background: *Vulnerable groups often face substantial barriers to obtaining effective remedies through ordinary civil litigation, while civil-society organizations may lack the capacity or independence necessary to act on their behalf. In response, both China and Vietnam have expanded the role of the people's procuratorate in civil justice. China has institutionalized procuratorial public interest litigation (PIL) since 2017, whereas Vietnam, through Resolution No. 205/2025/QH15, has introduced a pilot mechanism authorizing the procuratorate to initiate civil proceedings to protect vulnerable groups. Although commonly associated with East Asian socialist legal systems, this institution derives from the same prokuratura tradition that continues to influence prosecutorial systems in post-socialist Eastern Europe, where the Council of Europe has developed standards governing prosecutorial functions outside the criminal justice sphere.*

Method: *The article adopts a comparative legal methodology, examining the legislative frameworks, institutional designs, and developmental trajectories of the Chinese and Vietnamese models. It further evaluates both systems against European prosecutorial standards, particularly Recommendation CM/Rec(2012)11 of the Committee of Ministers and the equality-of-arms jurisprudence of the European Court of Human Rights.*

Results and Conclusions: *The analysis demonstrates that the two models embody contrasting approaches. Vietnam adopts a rights-based model that prioritizes the direct protection of vulnerable individuals but provides only limited guidance regarding the boundaries of procuratorial intervention. China employs a public-interest-oriented model that offers a more structured framework for state involvement, yet subordinates individual rights protection to a broader collective conception of the public interest. To address these limitations, the article proposes a hybrid model that combines vulnerability with a minimum public-interest dimension as a unified threshold for litigation, supported by transparent case-selection criteria and a structured evaluation framework. The significance of the analysis extends beyond Vietnam and China. By identifying conditions under which prosecutorial intervention may remain compatible with fair-trial guarantees, the article contributes to ongoing debates concerning the prosecutor's civil role in post-socialist jurisdictions and offers insights relevant to the EU's collective-redress framework.*

1 INTRODUCTION

In March 2025, Vietnamese authorities uncovered and dismantled one of the largest organized consumer fraud schemes to date, in which the primary victims were elderly individuals. The perpetrators operated in a systematic manner, using deceptive product demonstrations, misleading claims about health benefits, and high-pressure sales tactics. The total financial losses were estimated to reach hundreds of billions of Vietnamese dong, with the number of victims nationwide potentially in the hundreds of thousands.[1] This case is not an isolated incident but reflects a broader pattern in which vulnerable groups, including the elderly, children, persons with disabilities, ethnic minorities, and low-income households, are increasingly targeted by organized and large-scale practices that undermine their rights. In this context, the harm involved cannot be understood merely as a collection of individual disputes but should be viewed as a systemic and public issue. This, in turn, points to the need for protective mechanisms with broader reach and stronger authority, beyond what conventional forms of private litigation can provide.

A notable paradox is that those who suffer the most serious harm are often the least able to access legal protection. Vulnerable groups face a range of structural barriers to justice

1 Thang Quoc, 'Script of a Criminal Ring Trapping Hundreds of Thousands of Elderly Victims' (*VnExpress*, 23 June 2025) [in Vietnamese] <https://vnexpress.net/kich-ban-bang-toi-pham-giang-bay-hang-tram-nghin-nguoi-gia-4904947.html> accessed 22 July 2026.

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including financial incapacity to bear litigation costs, limited legal awareness, psychological reluctance to acknowledge harm, and geographical distance from courts and legal aid services.[2] Taken together, these factors produce what may be described as a "justice paradox": the greater the harm suffered by vulnerable groups, the more limited their ability to seek protection through conventional litigation mechanisms.

For a long time, civil society organizations such as consumer protection associations, non-governmental organizations, and legally authorized representative bodies have been regarded as the primary means of addressing this paradox. In practice, however, these actors often lack the investigative authority, financial resources, and procedural standing necessary to counter well-resourced business entities, particularly in cases involving large numbers of dispersed victims.[3] These limitations are structural and cannot be resolved simply by strengthening organizational capacity. At a deeper level, they reflect a mismatch between the collective nature of the harm suffered by vulnerable groups and the individualized structure of traditional civil litigation. This results in a persistent enforcement gap, in which neither private litigation nor civil society advocacy is able to provide an effective response.

In this context, PIL initiated by the procuratorate has emerged as a distinct institutional response. By granting the people's procuratorate the authority to bring actions in the public interest, this model reflects a form of state-led enforcement that can address structural problems beyond the reach of private litigation and civil society initiatives. China formally institutionalized this approach following a nationwide pilot from 2015 to 2017, culminating in the recognition of procuratorial PIL in the 2017 Civil Procedure Law.[4] In Vietnam, a similar institutional development has recently taken place. On 24 June 2025, the National Assembly adopted Resolution No. 205/2025/QH15, which for the first time authorizes the people's procuratorate to initiate civil proceedings on a pilot basis to protect vulnerable groups, with effect from 1 January 2026. The Resolution identifies six categories of vulnerable subjects under Article 3(1), marking an initial step toward formalizing this mechanism within the domestic legal framework.[5]

2 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 186-96 <https://www.repository.law.indiana.edu/facpub/1142> accessed 22 July 2026.

3 Harriet Samuels, 'Public Interest Litigation and the Civil Society Factor' (2018) 38(4) Legal Studies 516 <https://doi.org/10.1017/lst.2018.9> accessed 22 July 2026.

4 Law of the People's Republic of China 'On Civil Procedure' of 9 April 1991 (amended 27 June 2017) art 55 <https://cicc.court.gov.cn/html/1/219/199/200/644.html> accessed 22 July 2026.

5 Resolution of the National Assembly of the Socialist Republic of Vietnam no 205/2025/QH15 'On Piloting the Initiation of Civil Lawsuits by the People's Procuracy to Protect the Civil Rights of Vulnerable Groups or to Protect Public Interests' (adopted 24 June 2025) <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Nghi-quyet-205-2025-QH15-thi-diem-Vien-Kiem-sat-khoi-kien-vu-an-dan-su-bao-ve-chu-the-de-bi-ton-thuong-662747.aspx> accessed 22 July 2026.

However, the procuratorate is not a uniquely Chinese or Vietnamese institution. Rather, it originates from the Soviet prokuratura,[6] an institution historically entrusted not only with criminal prosecution but also with a broader mandate of general supervision over legality, including the authority to initiate or participate in civil proceedings for the protection of public interests and individual rights.[7] This institutional model subsequently spread across socialist legal systems, shaping both the procuracies of East Asia and the prokuratura institutions that continue to be recognized by the Council of Europe as a characteristic feature of Eastern European legal systems, including those of the Russian Federation, Ukraine, and the Republic of Moldova.[8] In recent decades, the civil and supervisory powers of the prokuratura in these countries have been progressively narrowed, redefined, or subjected to heightened scrutiny in the context of rule-of-law reforms and legal approximation to European standards.[9] By contrast, China and Vietnam have expanded the role of the procuratorate in civil litigation, particularly as a mechanism for addressing structural barriers to justice experienced by vulnerable groups. The contrasting trajectories of China and Vietnam provide an opportunity to reconsider an issue that remains unsettled within the European legal space: the conditions under which a state prosecutorial body may initiate civil litigation on behalf of vulnerable individuals without compromising the equality of arms or the autonomy of private parties. It is this unresolved tension that gives the present comparison its relevance beyond the two jurisdictions examined.

Despite the growing literature on procuratorial PIL, three important gaps remain. *First*, although the Chinese model has received extensive scholarly attention since its codification in 2017, Vietnam's mechanism has yet to be examined in a systematic manner, particularly with respect to its distinctive rights-based foundation and how it differs from the Chinese approach. *Second*, existing studies have generally analyzed these East Asian models within their own domestic contexts without evaluating them against the European standards governing the prosecutor's role outside the criminal justice system, despite their shared prokuratura heritage, which provides a meaningful basis for comparison. *Third*, the current scholarship has not developed a coherent institutional framework capable of reconciling the protection of vulnerable individuals with the rule-of-law requirements of equality of arms

6 Margaret Hanson and Michael Thompson-Brusstar, 'Building Socialist Legality: Political Order and Institutional Development in the Soviet and Chinese Procuracies' (2021) 73(1) Europe-Asia Studies 157 <https://doi.org/10.1080/09668136.2020.1854185> accessed 22 July 2026; Lan Phuong Pham, 'The Procuracy as a Subject of Constitutional Debate: Controversial and Unresolved Issues' (2016) 11(2) Asian Journal of Comparative Law 309-11 <https://doi.org/10.1017/asjcl.2016.25> accessed 22 July 2026.

7 European Commission for Democracy through Law (Venice Commission), *Report on European Standards as Regards the Independence of the Judicial System, pt 2: The Prosecution Service* (CDL-AD(2010)040, 3 January 2011) para 80 <https://rm.coe.int/1680700a60> accessed 22 July 2026.

8 Recommendation CM/Rec(2012)11 Council of Europe of the Committee of Ministers to Member States on the Role of Public Prosecutors Outside the Criminal Justice System (adopted 19 September 2012) para 4 <https://search.coe.int/cm?i=09000016805c9d19> accessed 22 July 2026.

9 Venice Commission (n 7) paras 72, 81.

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and clearly defined prosecutorial powers. This article seeks to address these gaps by providing the first systematic comparison of the Vietnamese and Chinese models, assessing both against European prosecutorial standards and proposing a hybrid threshold that combines vulnerability and public interest within a unified, rule-of-law-compatible framework for procuratorial intervention.

Against this background, this article addresses the following central research question: Does Vietnam's treatment of vulnerability as an autonomous basis for procuratorate-led litigation mark a substantive departure from China's public-interest-centred approach, and what does this difference suggest for the institutional design of effective state-led protection mechanisms for vulnerable groups? It also reflects on the broader implications of this comparison for ongoing debates concerning the role of prosecutors outside the criminal justice system in post-socialist Eastern Europe and the EU.

To address this question, this article adopts a comparative legal approach, combining doctrinal analysis with institutional comparison. It examines relevant legal provisions, policy instruments, and implementation practices in both systems, moving beyond formal legislative design to consider the underlying institutional conditions. These include the degree of independence of the procuratorate, the scope of its authority to initiate proceedings, and the relationship between procuratorate-led PIL and enforcement mechanisms operated by civil society. Together, these factors are central to determining whether the mechanism can function effectively as a means of providing substantive protection for vulnerable groups. In addition, methodological clarification is necessary at the outset. Since Vietnam's mechanism came into force only in January 2026, no empirical evidence or established body of practice is yet available. Accordingly, the Vietnamese model is examined from an ex ante and doctrinal perspective, focusing on the institutional framework created by Resolution No. 205/2025/QH15, including its triggering conditions, procedural architecture, and built-in safeguards, rather than its practical implementation. Although this limits the analysis, it reflects the purpose of the study. Evaluating the institutional design before implementation makes it possible to identify potential risks, assess the coherence of the legislative framework, and provide guidance while the pilot mechanism remains open to adjustment. Where reference is made to practical experience, the analysis draws on the more developed Chinese model, using it as a comparative point of reference for anticipating the institutional and procedural issues that may emerge during Vietnam's pilot phase.

The article is structured as follows. Part II develops the theoretical framework, drawing on scholarship on access to justice, state-led litigation, vulnerability, and using these perspectives to analyze procuratorate-initiated PIL as a distinct institutional model. Part III examines the procuratorial PIL system in China, with particular attention to how it addresses the protection of vulnerable groups, its institutional evolution and the structural tensions embedded in the model. Part IV analyzes the emerging legal framework in Vietnam under Resolution No. 205/2025/QH15, assessing key design choices and identifying outstanding

institutional issues. Building on this foundation, Part V compares the two systems against European prosecutorial standards. Part VI proposes a hybrid model for Vietnam and draws out its implications for Eastern European and EU reform. Part VII concludes.

2 THEORETICAL FOUNDATIONS OF PROCURATORIAL PIL

To assess procuratorial PIL as a distinct institutional model, this article develops a theoretical framework built on three interrelated analytical strands: access to justice, state-led litigation, and vulnerability. Rather than treating these strands as discrete, they are integrated into a coherent line of analysis. Specifically, access to justice theory is used to identify the underlying problem that PIL mechanisms seek to address; the theory of state-led litigation provides the conceptual basis for understanding why a procuratorate-led model may be institutionally justified; and vulnerability theory helps to identify the groups requiring protection, while also informing a comparative perspective that highlights meaningful differences between the Vietnamese and Chinese models.

2.1. Access to Justice Theory and Structural Judicial Gaps

The first theoretical foundation of this article is grounded in access to justice scholarship, most notably the influential work of Mauro Cappelletti and Bryant Garth on the global access to justice movement. They argue that modern legal systems have undergone three successive "waves" of reform: the expansion of legal aid, the development of mechanisms to protect collective and diffuse interests, and the refinement of alternative dispute resolution mechanisms. Importantly, they recognized early on that traditional civil litigation, structured around bilateral disputes between parties of relatively equal legal capacity, is ill-suited to address harms that are collective, diffuse, and lack a clearly identifiable plaintiff.[10] This constitutes a structural gap within the justice system and it is this insight that laid the groundwork for later debates on the legitimacy of PIL as a supplementary enforcement mechanism.

Nevertheless, early access to justice theory was largely developed in the context of Western democracies with relatively strong civil societies, where non-governmental organizations and individuals possess both the capacity and independence to act as plaintiffs in PIL. As a result, a key question remains insufficiently addressed: in contexts where civil society lacks either the capacity or the autonomy to initiate such claims, who is to assume this role? This issue is not confined to post-colonial or authoritarian contexts. It also arises in contemporary European debates concerning collective redress and the appropriate role of the prosecutor outside the criminal justice system, both of which are discussed later in this article.

10 Garth and Cappellett (n 2).

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2.2. State-Led Litigation Theory and the Procuratorial PIL Model

The second strand of the framework builds on the recognition that PIL systems do not operate according to a single logic regarding the identity of the enforcement actor. From a comparative perspective, three basic structural models can be distinguished. *First*, the court-centred model, exemplified by India, where the Supreme Court may initiate proceedings on its own motion (suo motu) or admit petitions from any citizen acting on behalf of vulnerable groups, thereby placing the judiciary at the center of public interest enforcement. Upendra Baxi termed this "social action litigation," distinguishing it from more citizen-participation-oriented PIL models.[11] *Second*, the civil society-led model, as reflected in the European Union under Directive 2020/1828 on representative actions, grants standing to qualified entities to bring claims on behalf of affected groups, thereby emphasizing the legitimacy of the litigation actor.[12] *Third*, the procuratorate-led model, characteristic of China and currently being piloted in Vietnam, confers authority on a state prosecutorial body to initiate PIL independently of direct participation by individuals or representative organizations.

The distinctiveness of this third model lies not only in the identity of the claimant but also in its underlying institutional logic. From a governance perspective, S. P. Sathe argues that courts may deploy PIL to enforce constitutional or legal obligations where administrative systems fail to act effectively.[13] The procuratorate-led model extends this logic in a more proactive direction: rather than relying on judicial initiative or civil society mobilization, the state, acting through the procuratorate, assumes the role of plaintiff to protect the public interest. As Fuhua Wang suggests in the Chinese context, PIL should be understood not merely as a dispute resolution mechanism but as a multifunctional institution that combines adjudication, oversight of public power, and participation in social governance.[14]

At the same time, this model gives rise to an inherent institutional tension. When the state simultaneously acts as both supervisor of legal compliance and litigant, the boundary between genuine public interest protection and the instrumental use of litigation risks becoming blurred. The question of procuratorial independence, particularly in relation to the executive and in cases involving state-owned enterprises or politically connected actors, thus becomes a central factor in determining the credibility and effectiveness of the model.

11 Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4(6) Third World Legal Studies 108 <https://scholar.valpo.edu/twls/vol4/iss1/6/> accessed 22 July 2026.

12 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 'On Representative Actions for the Protection of the Collective Interests of Consumers' [2020] OJ L 409/1 <http://data.europa.eu/eli/dir/2020/1828/oj> accessed 22 July 2026.

13 SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2002).

14 Fuhua Wang, 'Jurisprudential Foundation of Public Interest Litigation' (2024) 19(4) Frontiers of Law in China 299, <https://doi.org/10.3868/s050-013-024-0020-1> accessed 22 July 2026.

The tension outlined above is not merely theoretical. It is also reflected in European efforts to define the proper role of prosecutors outside the criminal justice system. Before applying European standards as an evaluative framework, however, it is necessary to explain why they provide an appropriate benchmark for two East Asian legal systems. The justification does not rest on any claim of universal applicability, but on the institutional lineage of the mechanism under examination. As discussed above, the procuratorates of China and Vietnam and the prokuratura of post-socialist Eastern Europe all derive from the same Soviet institutional model. The standards developed by the Council of Europe therefore address the same institutional tradition examined in this article rather than imposing an external liberal framework. Moreover, they constitute the most comprehensive and systematically developed body of principles governing the prosecutor's role outside the criminal justice sphere. For this reason, European standards are employed here not as universally applicable norms, but as the most appropriate and fully developed benchmark for evaluating a shared institutional tradition. Turning to their content, although procuratorate-led litigation is sometimes viewed as inconsistent with liberal legal traditions, the Council of Europe has recognized that, in a number of member States, public prosecutors may legitimately perform functions beyond criminal prosecution, including representing public interests, protecting human rights and fundamental freedoms, and upholding the rule of law. Recommendation CM/Rec(2012)11 does not exclude such involvement. Instead, it subjects the exercise of these powers to a series of safeguards intended to preserve the principles of a fair trial and the balance between the parties. These safeguards include a clear legal basis for prosecutorial powers, respect for the equality of arms, the continued procedural participation of the individuals whose interests are represented, and cooperation with civil society actors.[15] The European Court of Human Rights (ECtHR) has reinforced these requirements through its interpretation of Article 6(1) of the Convention, holding that prosecutorial intervention in civil proceedings must be justified by sufficiently weighty public-interest or protective considerations in order to remain compatible with the principle of equality of arms.[16]

2.3. Vulnerability Theory and the Significance of the China – Vietnam Divergence

The third analytical strand centers on the concept of vulnerability, which is integral to this article but remains underdeveloped in much of the PIL literature. In legal philosophy and human rights theory, vulnerability is not understood as an inherent personal trait but as a context-dependent condition. An individual is considered vulnerable when they

15 Recommendation CM/Rec(2012)11 (n 8) paras 12, 15.

16 *Menchinskaya v Russia* App no 42454/02 (ECtHR, 15 January 2009) paras 39-40 <https://hudoc.echr.coe.int/eng?i=001-90620> accessed 22 July 2026.

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occupy a position of particular disadvantage in protecting their own interests against certain risks of harm, as a result of the interaction between personal characteristics and structural conditions in their environment.[17] This approach carries an important legal implication: institutional interventions aimed at protecting vulnerable groups must be tailored to the specific nature of the disadvantage they face, rather than relying solely on predefined personal characteristics. For the purposes of this article, the term "vulnerable groups" is not understood in the broad sense advanced by Fineman, under which vulnerability is regarded as a universal human condition. Instead, it is used in a narrower, functional sense to refer to individuals whose ability to enforce their rights through ordinary civil litigation is substantially constrained by structural disadvantages, including economic hardship, limited legal capacity, dependency, or persistent informational and institutional barriers. In such circumstances, legal rights are unlikely to be effectively vindicated without external support. This understanding is also consistent with the approach adopted in positive law. Article 3(1) of Resolution No. 205/2025/QH15 identifies six specific categories of vulnerable persons, and it is this legally defined conception, rather than the broader theory of universal vulnerability, that provides the analytical framework for the discussion that follows.

Against this background, the divergence between Vietnam and China emerges as a point of particular theoretical significance. In China, the PIL system does not construct a unified concept of "vulnerable groups." Instead, protection is organized along sector-specific lines such as child protection, women's rights, and food safety, with primary emphasis placed on the extent to which harm affects the public interest.[18] Vulnerability, in this framework, plays a secondary role, while the principal basis for intervention remains the infringement of public interest. By contrast, Vietnam, through Resolution No. 205/2025/QH15, adopts a different approach by recognizing vulnerability as an independent and direct ground for procuratorate-initiated litigation, separate from the public interest criterion.[19] This shift from a predominantly collective model toward a more rights-based approach reflects an emerging human rights orientation. At the same time, it raises a number of unresolved issues, including the scope of application, the criteria for identifying vulnerability, and the risk of an overly expansive role for the procuratorate in the civil law field.

17 Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1 <https://ssrn.com/abstract=1131407> accessed 22 July 2026.

18 Wang (n 14) 315-8.

19 Resolution of the National Assembly of the Socialist Republic of Vietnam no 205/2025/QH15 (n 5).

3 EXPERIENCE FROM CHINA IN OPERATING PROCURATORIAL PIL FOR THE PROTECTION OF VULNERABLE GROUPS

3.1. Institutional Development in China

The emergence of procuratorial PIL in China is closely linked to the institutional pressures arising from the country's transition to a socialist-oriented market economy since the 1990s.[20] As market mechanisms gradually replaced the centrally planned system, gaps in the protection of public interests became increasingly visible, particularly in relation to the loss of state assets and the limited capacity of administrative oversight. In response, several local procuratorates began experimenting with civil litigation to protect public interests, despite the absence of a formal legal basis.[21] A notable example occurred in 1997 in Henan, where a local procuratorate successfully brought a case challenging the unlawful transfer of state-owned assets. This case prompted similar practices to spread across other localities.[22] However, this period of largely spontaneous experimentation did not persist. In 2004, the Supreme People's Court issued guidance requiring courts to cease accepting such cases, effectively bringing this early phase to a close and raising fundamental questions regarding the legality and constitutional basis of procuratorial PIL.[23]

A decisive turning point came in 2014, when the Communist Party of China formally endorsed the establishment of a procuratorial PIL mechanism as part of a broader programme of legal reform.[24] This was followed in 2015 by authorization from the Standing Committee of the National People's Congress to implement the model on a nationwide pilot basis.[25] In 2017, the mechanism was formally codified through

20 Decision of the Central Committee of the Communist Party of China 'On Some Major Issues Concerning Comprehensively Deepening the Reform' (adopted 12 November 2013) <https://english.court.gov.cn/2015-10/08/c_766126.htm> accessed 22 July 2026.

21 Yu Cui, 'The Recent Development of China's System of Procuratorate Public Interest Litigation' (2018) 48(6) Environmental Law Reporter: News & Analysis 10468.

22 Alex Wang, 'The Role of Law in Environmental Protection in China: Recent Developments' (2007) 8 Vermont Journal of Environmental Law 222 <https://ssrn.com/abstract=2123980> accessed 22 July 2026.

23 Reply of the Supreme People's Court on the En'shi Prefecture People's Procuratorate v Zhang Suwen (Returning State Property) Case (promulgated 17 June 2004), discussed in: Chunyan Ding and Huina Xiao, 'A Paper Tiger? Prosecutorial Regulators in China's Civil Environmental Public Interest Litigations' (2021) 32(3) Fordham Environmental Law Review 323 <https://ir.lawnet.fordham.edu/elr/vol32/iss3/2> accessed 22 July 2026.

24 Decision of the Central Committee of the Communist Party of China 'On Several Major in Comprehensively Advancing Governance According to Law' (adopted 23 October 2014) <https://www.chinalawtranslate.com/en/fourth-plenum-decision/> accessed 22 July 2026.

25 Decision of the Standing Committee of the National People's Congress on Authorizing the Supreme People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Litigation in Certain Areas (adopted 1 July 2015) <http://www.npc.gov.cn/wxzl/gongbao/2015-08/27/content_1946100.htm> accessed 22 July 2026.

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amendments to the Civil Procedure Law and the Administrative Procedure Law. This trajectory reflects an important structural feature of the Chinese model: the development of new judicial institutions is closely aligned with political direction from the central authorities. Rather than emerging organically from legal doctrine, the procuratorial PIL system represents a deliberate governance choice.

3.2. China's Legal Framework for Procuratorial PIL

The legal framework governing procuratorate-initiated PIL in China is structured around two core pillars: civil public interest litigation (CPIL) and administrative public interest litigation (APIL), each reflecting a distinct logic of state intervention in the protection of public interests.

With respect to CPIL, Article 55 of the Civil Procedure Law (as amended in 2017) authorizes the procuratorate to initiate proceedings in areas such as environmental protection, natural resources, consumer rights (particularly food and drug safety), and other public interests. However, this authority is subsidiary rather than primary. The procuratorate may act only where no authorized entity exists or where such entities fail to exercise their right to bring a claim. The requirement of a 30-day public notice period prior to filing further reinforces the procuratorate's role as a gap-filler, rather than as the primary initiator of litigation.

By contrast, APIL is structured according to a different logic, as reflected in Article 25 of the Administrative Procedure Law (as amended in 2017).[26] The procuratorate cannot proceed directly to litigation but must first undertake a pre-litigation stage by issuing procuratorial recommendations requiring the administrative agency to rectify violations. Only where the agency fails to act, or acts inadequately within the prescribed timeframe (typically two months, or 15 days in urgent cases), may the procuratorate initiate proceedings. This two-step structure highlights a defining feature of APIL in China: the prioritization of supervision and administrative compliance before resorting to judicial confrontation, reflecting a governance-oriented rather than purely adversarial approach.

Beyond this general framework, China has further expanded and embedded procuratorate-initiated PIL within a range of sector-specific statutes aimed at protecting vulnerable groups. For example, Article 106 of the Law on the Protection of Minors (amended in 2020) authorizes the procuratorate to bring actions to safeguard children's rights where no appropriate party is able to do so.[27] Similarly, Article 77 of the Law on the Protection of Women's Rights and Interests (2022) empowers the procuratorate not only to issue

26 Law of the People's Republic of China 'On Administrative Procedure' of 4 April 1989 (amended 2017) <http://www.china.org.cn/english/government/207336.htm> accessed 22 July 2026.

27 Law of the People's Republic of China 'On the Protection of Minors' (adopted 17 October 2020) <https://www.chinalawtranslate.com/en/protection-of-minors-2020/> accessed 22 July 2026.

recommendations but also to initiate litigation in cases of serious violations, including employment discrimination and sexual harassment.[28]

However, a notable structural issue lies in the overlap between the scope of CPIL and APIL, particularly in areas such as environmental protection and food safety. In practice, the procuratorate is often required to choose between procedural pathways without clear guiding criteria, meaning that such decisions are significantly influenced by considerations of enforcement efficiency and political risk. This overlap in jurisdiction not only creates inconsistencies in legal application but also blurs the boundary between the procuratorate's supervisory role over administrative bodies and its function as a civil litigant.[29]

3.3. Operational Practice in China

Empirical data on the operation of procuratorial PIL in China indicate rapid expansion in both scale and frequency. During the pilot phase from 2015 to 2017, procuratorates identified more than 11,000 instances of harm to public interests and brought 1,150 cases before the courts. Following formal codification in 2017, the number of cases increased sharply, reaching tens of thousands annually.[30] By November 2025, the total number of public interest cases handled nationwide had exceeded 1.24 million.[31]

A notable feature is the significant imbalance between the two types of proceedings, with APIL overwhelmingly dominating CPIL. Even during the pilot phase, APIL accounted for approximately 90% of cases; this proportion rose to nearly 97% by the end of 2017 and has remained above 90% in subsequent years.[32] As of 2025, there are an estimated 1.12 million administrative cases compared to around 124,000 civil cases.[33] This distribution is not incidental but reflects a consistent institutional orientation in which the supervision and correction of administrative action is prioritized over the resolution of civil disputes.

Nevertheless, these figures raise important questions that must be addressed to fully assess the nature of the model.

28 Law of the People's Republic of China 'On the Protection of Women's Rights and Interests (adopted 30 October 2022) <https://www.chinalawtranslate.com/en/law-on-protection-of-wome-2022/> accessed 22 July 2026.

29 Weijian Tang, 'Study on the Implementation Models of Procuratorial Public Interest Litigation' (2024) 19(4) Frontiers of Law in China 360 <https://doi.org/10.3868/s050-013-024-0022-5> accessed 22 July 2026.

30 ibid 361.

31 'Public Interest Litigation Grows Steadily, Top Procuratorate Says' (*Supreme People's Procuratorate of the People's Republic of China*, 10 February 2026) <https://en.spp.gov.cn/2026-02/10/c_1160488.htm> accessed 22 July 2026.

32 Tang (n 29) 361.

33 'Public Interest Litigation Grows Steadily (n 31).

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First, to what extent is procuratorial PIL instrumentalized to serve political objectives? The near-perfect success rate in cases brought by the procuratorate, together with compliance rates exceeding 97% for procuratorial recommendations, is often cited as evidence of the system's effectiveness. However, these figures may obscure a different dynamic: high success rates may result from the strategic selection of relatively straightforward, "easy-win" cases, rather than those with the greatest environmental or social impact.[34] In addition, politically sensitive cases, particularly those involving large state-owned enterprises or entities closely linked to local authorities, rarely become targets of litigation. This suggests that case selection may be shaped by strategic considerations, rather than driven purely by neutral and objective law enforcement logic. In such circumstances, the boundary between judicial function and political instrument becomes increasingly difficult to delineate.

Second, does the procuratorate operate with genuine independence in initiating litigation? In practice, the mechanism depends significantly on authorization and policy direction from the central level, as reflected in the need for formal approval by the Standing Committee of the National People's Congress before nationwide implementation.[35] At the local level, procuratorates often operate under the need to balance the pursuit of legal accountability, particularly in areas such as environmental protection, with the management of responses from local governments. This balance, however, tends to depend more on the support of provincial leadership than on a robust foundation of institutional independence.[36] More fundamentally, scholars such as Shi and Van Rooij argue that constraints arising from the Party – state structure at the local level, combined with limited technical capacity in complex fields such as environmental litigation, inhibit the development of the procuratorate into a genuinely powerful enforcement actor.[37]

Third, does the expanding role of the procuratorate risk displacing civil society actors? In formal design, the CPIL framework provides that the procuratorate may initiate litigation only where no qualified organization is available, thereby preserving space for civil society, particularly in environmental matters. In practice, however, the picture is more complex. As Campbell observes, high prosecution rates do not fully capture the underlying incentives at play.[38] There is a possibility that procuratorates may, at times, limit or fail to facilitate civil

34 Nicholas Campbell, 'Individual Rights and the Environmental Public Interest: A Comparison of German and Chinese Approaches to Environmental Litigation' (2023) 32(1) Review of European, Comparative & International Environmental Law 113-4 <https://doi.org/10.1111/reel.12466> accessed 22 July 2026.

35 See, Decision of the Standing Committee of the National People's Congress (n 25) (requiring legislative authorisation as a precondition for procuratorial PIL to operate).

36 Yueduan Wang and Ying Xia, 'Judicializing Environmental Politics? China's Procurator-led Public Interest Litigation against the Government' (2023) 253 China Quarterly 90 <https://doi.org/10.1017/S0305741022001709> accessed 22 July 2026.

37 Yifan Shi and Benjamin van Rooij, 'Prosecutorial Regulation in the Global South: Environmental Civil Litigation by Prosecutors in China Compared to Brazil' (2016) 10(1) Regulation & Governance 49-51, <https://doi.org/10.1111/rego.12112> accessed 22 July 2026.

38 Campbell (n 34) 111.

society participation in order to consolidate their own institutional role and performance outcomes. This raises an unresolved concern that, rather than functioning as a complementary mechanism, procuratorial PIL may, in practice, crowd out and narrow the operational space of civil society actors.

3.4. Application of the Mechanism to Protect Vulnerable Groups in China

As discussed in Part II, China's PIL system does not adopt a unified concept of "vulnerable groups." Instead, protection is fragmented across sector-specific legislation and is primarily structured around the degree to which harmful conduct affects the public interest, rather than the direct protection of group-based rights.

In the field of women's rights, practice reveals a clear preference for APIL, particularly through pre-litigation mechanisms. Representative cases published in 2022 by the Supreme People's Procuratorate and the All China Women's Federation show that procuratorates typically rely on investigation, public hearings and procuratorial recommendations to prompt administrative agencies to fulfil their obligations, ranging from maternity protection and occupational health to the prevention of workplace sexual harassment.[39] While this approach delivers notable governance efficiency, it also raises important concerns. Where the procuratorate prioritizes administrative channels over litigation, it remains unclear whether the rights of affected individuals are effectively enforceable, or whether the mechanism primarily promotes administrative compliance without securing long-term rights protection.

For elderly persons and persons with disabilities, the Barrier-Free Environment Construction Law of 2023 establishes a distinct structural approach.[40] Rather than focusing on discrete rights violations, the law targets systemic barriers affecting access to physical spaces, information, and social services. Under Article 63, the procuratorate is empowered to intervene through recommendations or litigation where such barriers implicate the public interest. In practice, cases from Chongqing, Hebei, Henan, Guangdong and Xinjiang indicate that procuratorates primarily address deficiencies in policy implementation and systemic governance issues, rather than individual disputes. Typical issues include failures by medical institutions to implement fee reductions for the elderly and the absence of non-voice-dependent emergency communication systems for persons with hearing impairments.[41]

39 Supreme People's Procuratorate of the People's Republic of China and All China Women's Federation, 'Typical Cases of Public Interest Litigation by Procuratorates to Protect Women's Rights' (23 November 2022) <https://zzylawyer.com.cn/yaxue/94.html> accessed 22 July 2026.

40 Law of the People's Republic of China 'On Barrier-Free Environment Construction' (adopted 28 June 2023) < http://www.csrcare.com/Law/LawShowEn?id=230263 > accessed 22 July 2026.

41 Supreme People's Procuratorate of the People's Republic of China, 'Notification on the Progress of the "Protecting People's Livelihoods" Special Campaign' (12 August 2024) <https://www.055110.com/law/1/34889.html> accessed 22 July 2026.

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Taken together, the Chinese model, as applied to vulnerable groups, reflects a preventive and governance-oriented approach. The procuratorate operates primarily as an administrative supervisory body, supplemented by judicial authority, with emphasis placed on promoting compliance rather than maximizing the protection of individual rights. However, this operational logic reveals inherent limitations as a focus on governance efficiency and compliance may constrain the development of strong rights-based standards for individual protection.

4 VIETNAM'S LEGAL FRAMEWORK FOR PROCURATORIAL LITIGATION TO PROTECT THE INTERESTS OF VULNERABLE GROUPS

4.1. Identifying Vulnerable Groups under Vietnamese Law

Vietnamese law has begun to recognize vulnerable groups within its legal framework, most notably through the Law on Protection of Consumer Rights 2023[42] and Resolution No. 205/2025/QH15.[43] However, these two instruments do more than extend or consolidate existing provisions; they reflect distinct conceptual approaches to the nature of vulnerability.

The Law on Protection of Consumer Rights 2023 marks the first time that Vietnamese law formally defines the notion of a "vulnerable consumer." Under Article 8, this category is identified based on the heightened risk of disadvantage in areas such as access to information, health, property, and the capacity to resolve disputes at the time of purchasing or using goods and services. The provision further enumerates seven categories of vulnerable consumers, including the elderly, persons with disabilities, children, ethnic minorities, individuals residing in mountainous, island, or socio-economically disadvantaged areas, pregnant women or those raising children under 36 months of age, persons with serious illnesses, and members of low-income households. This approach indicates that vulnerability is not determined solely by inherent personal characteristics, but also by the specific circumstances in which individuals engage in consumer transactions. In other words, groups such as pregnant women, older persons, or ethnic minorities are considered "vulnerable" within the context of consumer relations, rather than being treated as inherently vulnerable across all civil legal relationships.

By contrast, Resolution No. 205/2025/QH15 adopts a different conceptualization of "vulnerable groups." Specifically, Article 3(1) identifies six categories of protected individuals, including children, older persons, persons with disabilities, pregnant women,

42 Law *of the Socialist Republic of Vietnam* no 19/2023/QH15 'On Protection of Consumer Rights' (adopted 20 June 2023) <https://english.luatvietnam.vn/thuong-mai/law-on-protection-of-consumer-rights-no-19-2023-qh15-259732-d1.html> accessed 22 July 2026.

43 Resolution of the National Assembly of the Socialist Republic of Vietnam no 205/2025/QH15 (n 5).

those raising children under 36 months of age, individuals with cognitive or behavioral impairments or lacking civil capacity, and ethnic minorities living in areas with particularly difficult socio-economic conditions, without linking these groups to any specific transactional context. Unlike the more context-sensitive approach of the Law on Protection of Consumer Rights 2023, which combines personal characteristics with situational factors, Resolution No. 205/2025/QH15 defines vulnerability solely on the basis of personal status. Under this framework, vulnerability is treated as an inherent attribute that applies across all civil legal relationships, rather than arising only in specific contexts such as consumer transactions. Consequently, the scope of civil disputes that may fall within the procuratorate's authority to initiate proceedings is significantly broadened. It is no longer confined to consumer relationships but may extend to any civil matter involving individuals belonging to the listed vulnerable groups.

4.2. Characteristics and Limits of Procuratorial Litigation for Public Interest Protection in Vietnam

First, the scope of litigation is confined to civil cases. Resolution No. 205/2025/QH15 expressly limits the procuratorate's authority to initiate proceedings in civil matters, without extending it to administrative cases. This reflects a cautious institutional approach: while the procuratorate is assigned a new function, the traditional boundary between judicial supervision and administrative control is preserved. Nevertheless, this limitation raises practical concerns in situations where harm to vulnerable groups is closely linked to administrative inaction or regulatory failure. For example, where elderly individuals are defrauded by a company while the competent authority fails to conduct inspections as required, the current framework allows the procuratorate to bring claims against the company, but not to address the responsibility of the administrative body. In such cases, the effectiveness of protection may be constrained, as corporate misconduct and administrative omission often form interconnected aspects of the same problem.

Second, harm to vulnerable groups constitutes an independent ground for litigation. The use of the disjunctive "or" in the phrase "to protect the civil rights of vulnerable groups or to protect the public interest" is significant, as it permits the procuratorate to initiate proceedings even where the harm affects only a specific vulnerable group, without requiring proof of broader public impact. This reflects a shift from a collective-interest model toward a rights-based approach. However, this expansion also carries implications. In the absence of a requirement to demonstrate widespread social harm, the potential scope of intervention becomes very broad, potentially encompassing most civil disputes involving individuals such as the elderly, persons with disabilities, or children. This raises the risk of blurring the boundary between the procuratorate's supervisory function and its role as a civil litigant. In the absence of clear case-selection criteria, the tension between effective rights protection and the risk of overreach into private legal relations remains insufficiently resolved under Resolution No. 205/2025/QH15 and its implementing framework.

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Third, Vietnam's procuratorial litigation mechanism is currently in a pilot phase, reflecting a cautious institutional approach. This pilot character is evident in three respects: it is introduced by a resolution rather than a statute, limited to six localities, and subject to a three-year duration. Such a design suggests a strategy aimed at managing institutional risk, allowing the National Assembly to adjust or terminate the mechanism if it does not meet expectations. The selection of economically and socially diverse localities further indicates an intention to test the model across varied contexts, rather than implementing it nationwide from the outset. However, the Resolution does not establish clear criteria for evaluating the success of the pilot phase. Article 18(3) merely assigns the Supreme People's Procuratorate the responsibility of reporting implementation outcomes to the National Assembly, without specifying how such "outcomes" should be measured. It remains unclear whether evaluation will be based on the number of cases filed, success rates, the extent to which compensation is actually enforced, behavioral changes among violators, or feedback from vulnerable groups themselves. More broadly, the absence of defined evaluation metrics not only reduces transparency but also limits the possibility of objective assessment. As a result, decisions on whether to continue or terminate the pilot mechanism risk relying more on subjective judgment than on systematically generated and measurable evidence.

5 PROCURATORIAL LITIGATION FOR THE PROTECTION OF VULNERABLE GROUPS: A COMPARATIVE ANALYSIS OF CHINA AND VIETNAM AGAINST EUROPEAN PROSECUTORIAL STANDARDS

Before turning to the comparison, it is useful to state the criteria on which it proceeds. The two models are assessed along four axes: (i) the philosophical basis on which each justifies state intervention into private legal relations; (ii) the degree of institutionalization and legal certainty of each mechanism; (iii) the developmental trajectory each system is following; and (iv) the extent to which each conforms to the European safeguards governing the prosecutor's civil role, in particular the requirements of clearly defined powers and equality of arms. The first three axes structure the descriptive comparison in subsections A to C, while the fourth is applied throughout and drawn together in the assessment that follows.

5.1. Foundational Philosophies of State Intervention Through the Mechanism

In the Chinese system, PIL is grounded in a collectivist philosophy in which the public interest, understood as the interests of the state and society as a whole, serves as the primary basis for legitimizing intervention. The procuratorate does not act solely in response to infringements of individual rights, but because such harms are framed as manifestations of broader systemic failures in social governance. Within this logic, the protection of vulnerable groups is not rooted in the independent value of individual rights, but in the

extent to which the harms they suffer signal or generate risks to the wider social order. Vulnerability thus functions as an indicator of public interest, rather than as an autonomous legal ground for state action. This approach maintains a relatively clear boundary between the public and private spheres, as state intervention in civil relations is justified only where a demonstrable impact on the public interest can be established.

By contrast, Vietnam, through Resolution No. 205/2025/QH15, adopts a fundamentally different rights-based approach. Under this framework, the procuratorate may initiate litigation on the basis that the civil rights of individuals belonging to vulnerable groups have been infringed, without the need to demonstrate broader societal impact. Vulnerability is thereby elevated to an independent legal ground for intervention, detached from the requirement to establish harm to the public interest. This shift reorients the focus of state intervention from the protection of social order to the direct protection of individual rights. As a result, Vietnamese authorities are empowered to intervene more deeply in civil relations, even where wider social consequences are not clearly established. This approach has the potential to strengthen protection for vulnerable groups, particularly in cases where harm is individualized yet severe and difficult for affected persons to address on their own.

Despite their differences, both approaches raise a question that also occupies a central place in European standards concerning the role of prosecutors outside the criminal justice system: not whether the state may intervene to protect vulnerable groups, but how such intervention in private legal relations is to be justified. Recommendation CM/Rec(2012)11 frames prosecutorial functions outside the criminal sphere in terms of protecting human rights and representing the general or public interest, while the case law of the ECtHR similarly treats the existence of a sufficient public-interest or protective rationale as an important consideration in assessing the fairness of proceedings.

5.2. Degree of Institutionalization and Legal Stability of the Mechanism

In China, the certainty and stability of the mechanism have been firmly established since its formal codification in 2017 through amendments to the Civil Procedure Law and the Administrative Procedure Law. This reflects a high level of legal commitment that is difficult to reverse, enabling the system to operate continuously and accumulate institutional experience over time. Within this stable framework, procuratorates can define litigation strategies with greater clarity, courts can gradually standardize their approach to a novel category of cases, and regulated actors, such as corporations and administrative agencies, are better able to anticipate legal risks and adjust their conduct accordingly. Moreover, this stability facilitates the development of inter-agency coordination, internal guidance, and professional norms, all of which are difficult to sustain in a fluid legal environment.

On the other hand, Vietnam currently occupies a different institutional starting point. While Resolution No. 205/2025/QH15 provides a necessary legal basis, it remains temporary in nature, limited to a three-year period and six localities. This uncertainty may

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weaken the incentives for long-term investment in specialized expertise, dedicated personnel, and the development of consistent adjudicatory practice. Institutions may instead adopt a cautious, provisional approach during the pilot phase, rather than committing resources to optimize long-term effectiveness.

China's experience suggests that the development of such a mechanism is neither linear nor rapid. From early localized experimentation (1997), suspension (2004), revival through central political endorsement (2014), nationwide piloting (2015 – 2017) and eventual codification (2017), the process reflects a gradual accumulation of both practical experience and political acceptance. Vietnam can be seen as operating at a stage comparable to China's early pilot phase. The key question, therefore, is not only whether the mechanism can function effectively in the short term, but whether a three-year period is sufficient to generate both the empirical evidence and institutional momentum necessary for codification, or whether a longer pilot cycle will be required to achieve comparable levels of stability and maturity.

The difference between the two approaches also has implications when assessed against European standards. Recommendation CM/Rec(2012)11 requires that the powers of prosecutors outside the criminal justice system be established by law and clearly defined to avoid ambiguity. China's PIL framework largely satisfies this requirement through a comprehensive legislative structure, although certain issues concerning the interaction between civil and administrative proceedings remain unresolved. Vietnam's framework presents a different picture. Because it operates through a temporary pilot resolution and relies on vulnerability as a broadly defined trigger for intervention, the limits of procuratorial authority are less clearly specified. This does not merely raise questions regarding the practical operation of the mechanism; it also highlights a potential tension with a recognized European rule-of-law standard requiring legal certainty and clearly delimited powers.

5.3. Development Trajectories of the Mechanism

In China, the draft Law on Procuratorial PIL released in October 2025[44] indicates a shift from expansion to consolidation. Rather than further extending the procuratorate's powers, legislative efforts are now directed toward systematizing, standardizing, and harmonizing existing rules within a comprehensive legal framework. This marks a phase of institutional deepening, reflecting the "maturation" of the PIL mechanism, where the priority is no longer experimentation or expansion, but enhancing coherence, operability, and overall institutional effectiveness.

44 Draft Law of the People's Republic of China 'On Public Interest Litigation' (October 2025) <https://www.chinalawtranslate.com/en/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E6%A3%80%E5%AF%9F%E5%85%AC%E7%9B%8A%E8%AF%89%E8%AE%BC%E6%B3%95%E8%8D%89%E6%A1%88/> accessed 22 July 2026.

Vietnam, on the contrary, faces a critical juncture as the pilot phase approaches its conclusion in 2028. Should the National Assembly decide to codify the mechanism, the direction of reform remains open, with at least three plausible scenarios. *The first* is to retain the current rights-based model, confined to civil PIL, with adjustments limited to technical refinements informed by practice. *The second* is to move closer to the Chinese model by incorporating administrative PIL and reasserting the centrality of public interest as the basis for intervention. *The third* is to extend or broaden the pilot phase rather than proceeding immediately to codification, in order to accumulate further empirical data and institutional experience. The choice among these paths will depend not only on observed outcomes but also on the broader trajectory of judicial reform in Vietnam.

The significance of these developments becomes clearer when viewed against the experience of other legal systems that share the procuratorate's institutional heritage. Whereas China has continued to strengthen the role of the procuratorate in PIL and Vietnam has recently expanded its civil functions through Resolution No. 205/2025/QH15, a number of post-socialist Eastern European states have pursued reforms aimed at limiting or more closely regulating prosecutorial powers outside the criminal sphere in accordance with European rule-of-law standards[45]. This results in a notable divergence in the evolution of institutions derived from a common prokuratura tradition. This contrast places the Chinese and Vietnamese experiences within a broader comparative context and provides a useful reference point for contemporary European debates on the prosecutor's role in civil proceedings.

6 DESIGNING PROCURATORIAL LITIGATION FOR VULNERABLE GROUPS: A PROPOSAL FOR VIETNAM AND ITS EUROPEAN IMPLICATIONS

6.1. A Hybrid Procuratorial PIL Model for Vietnam

The comparative analysis indicates that neither the Vietnamese nor the Chinese model can be adopted without modification as each combines distinct strengths and limitations. Accordingly, this study proposes a hybrid model that draws selectively on Chinese experience while adapting it to Vietnam's legal and institutional context to address the structural constraints identified above.

At the theoretical level, the model rests on the premise that vulnerability and public interest are not entirely separate grounds, but rather two manifestations of the same social phenomenon. When individuals belonging to vulnerable groups suffer systematic rights

45 Tetiana A Tsuvina, 'Participation of the Prosecutor in Non-Criminal Proceedings: ECtHR Case Law and National Context' (2024) 2 Theory and Practice of Jurisprudence 58 <https://doi.org/10.21564/2225-6555.2024.26.319929> accessed 22 July 2026.

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violations, the harm also reflects a collective dimension and signals failures in markets and regulatory oversight. Recognizing this does not abandon a rights-based approach but situates individual rights within their broader social context. The proposed model comprises four core elements.

First, it integrates vulnerability with a minimum public interest threshold. Instead of maintaining a strict separation between the two grounds, the model introduces a threshold requiring (i) that a vulnerable individual's civil rights have been infringed and the individual is unable to initiate proceedings; and (ii) that the violation is repeated, systemic, or capable of affecting others within the same group, without requiring proof of large-scale societal harm. This threshold performs two functions simultaneously. On the one hand, it preserves the rights-based philosophy of Resolution No. 205/2025/QH15 by allowing the procuratorate to initiate proceedings without having to demonstrate large-scale societal impact. On the other hand, it creates a substantive filter that prevents the procuratorate from intervening in purely individual civil disputes that could be resolved through private mechanisms or legal aid. In this sense, it represents a balance between the high level of protection characteristic of the Vietnamese model and the element of control embedded in the Chinese model.

Second, the introduction of an APIL mechanism. Specifically, the model proposes granting the procuratorate the authority to initiate administrative litigation, but within a narrower and more conditional scope than in the Chinese model. In particular, the procuratorate would only be permitted to bring administrative actions in two situations: (i) where an administrative authority fails to fulfil its assigned duties in protecting vulnerable groups, and (ii) where pre-litigation mechanisms (administrative recommendations) have been undertaken but have not produced results within the prescribed time limit. Limiting APIL to the protection of vulnerable groups, rather than extending it comprehensively as in China, may be more appropriate given Vietnam's institutional starting point. Where the procuratorate has limited experience with CPIL, an immediate expansion into full-scale APIL would entail excessive risk; however, the complete absence of APIL, as in the current framework, also creates a protection gap in the longer term.

Third, the development of specific case-selection criteria. The model accordingly proposes that the procuratorate formulate and publish case-selection criteria in the form of internal guidelines within the procuracy system. These criteria should include factors such as the severity and recurrence of the violation, and the affected party's capacity for self-protection. Such a framework serves two purposes simultaneously as it constrains the scope of prosecutorial intervention from within, and it provides a basis for external oversight. This constitutes a form of accountability mechanism that is notably underdeveloped in both existing models.

These first three elements are not merely procedural requirements but safeguards that ensure that the proposed model remains compatible with fair-trial guarantees. The public

interest threshold limits prosecutorial intervention by excluding ordinary two-party disputes of the kind criticized in *Menchinskaya*. The subsidiarity requirement ensures that the procuratorate complements rather than replaces private litigation and civil-society enforcement, whereas published case selection criteria, together with the individual's continued participation as a party, promote transparency and preserve equality of arms. Taken together, these safeguards give concrete institutional effect to the principles embodied in Recommendation CM/Rec(2012)11 by translating them into clear and reviewable limits on the exercise of prosecutorial power.

Fourth, the introduction of a set of evaluation metrics for the effectiveness of the pilot mechanism. The proposed indicator framework comprises four dimensions: (i) procedural effectiveness (case resolution rates, processing time, and enforcement rates of judgments); (ii) protective impact (the actual level of compensation received by vulnerable groups); (iii) preventive impact (changes in the behavior of violating actors within the relevant sectors); and (iv) feedback from protected groups (levels of satisfaction and perceived effectiveness of protection among vulnerable individuals themselves). This fourth dimension is of particular academic significance, as it reorients the focus of evaluation from what the procuratorate does to the substantive impact on those it seeks to protect. This shift is consistent with the rights-based orientation that Vietnam has adopted as the foundation of its model.

6.2. Implications for Eastern European and EU Reform

Because the procuratorate examined in this article shares a common prokuratura heritage with post-socialist Eastern Europe, the implications of the analysis extend beyond Vietnam. The proposed hybrid model addresses a broader question that remains relevant in European debates: how can prosecutorial intervention protect vulnerable groups while remaining compatible with fair-trial guarantees and the autonomy of private parties? Three observations may be drawn in this regard.

First, for post-socialist jurisdictions in which prosecutors retain or continue to debate functions outside the criminal sphere, the proposed model illustrates one possible approach to defining and limiting such powers. European standards have consistently emphasized the need for clearly delimited prosecutorial competences in civil proceedings, particularly in light of concerns relating to the rule of law and equality of arms. At the same time, the complete withdrawal of prosecutorial involvement may leave certain vulnerable individuals without effective protection where private litigation and civil society mechanisms remain weak. The threshold proposed in this article, combining vulnerability with a minimum systemic or public-interest dimension and supported by transparent case-selection criteria, seeks to identify circumstances in which state intervention may be justified while remaining subject to meaningful limits.

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Second, the comparison highlights certain limitations of collective-redress mechanisms that rely exclusively on civil society actors. Directive (EU) 2020/1828 assumes the existence of qualified entities capable of representing collective interests through litigation. However, the effectiveness of this model may vary across jurisdictions depending on the strength and capacity of the associational sector. Emerging scholarship on the implementation of the Directive confirms this concern. Its transposition has been neither uniform nor straightforward, resulting in significant variation across Member States and leaving the effectiveness of the collective-redress framework closely dependent on the capacity and maturity of the qualified entities responsible for its operation.[46] Where such associational structures remain weak or insufficiently developed, protection gaps similar to those that prompted state intervention in China and Vietnam may continue to arise. In this respect, the conditionally scoped administrative mechanism proposed above suggests one possible means of supplementing existing enforcement structures in situations where competent authorities have failed to act and pre-litigation measures have been exhausted. The objective is not to replace representative actions but to consider how limited forms of public intervention might operate alongside them while remaining subject to the procedural safeguards required by European fair-trial standards.

Third, the analysis contributes to ongoing discussions within the Council of Europe and the Venice Commission concerning the legitimate scope of prosecutorial functions beyond criminal justice. One of the central challenges in this debate is identifying the circumstances in which state intervention in private legal relations is justified. The comparative analysis suggests that vulnerability may provide a useful criterion where structural disadvantage prevents affected individuals from effectively enforcing their own rights. Viewed in this way, the hybrid threshold proposed in this article may be understood as an attempt to give more concrete expression to the conditions under which prosecutorial intervention can remain compatible with equality of arms and the autonomy of private parties. From this perspective, the Vietnamese pilot mechanism is relevant not as a model to be replicated, but as an example of how legal systems sharing a common prokuratura heritage continue to grapple with the boundaries of prosecutorial authority in civil justice.

7 CONCLUSION

This article demonstrates that the differences between the Vietnamese and Chinese models of procuratorate-led litigation for the protection of vulnerable groups are not merely institutional but also philosophical. China grounds procuratorial intervention in the protection of the public interest, whereas Vietnam, through Resolution No. 205/2025/QH15, recognizes vulnerability as an autonomous basis for litigation,

46 Alexandre Biard-Denieul, 'Thunder Road: The Implementation of the Representative Actions Directive in Europe' (2024) 38(4) Emory International Law Review 751 <https://scholarlycommons.law.emory.edu/eilr/vol38/iss4/3> accessed 22 July 2026.

reflecting a more rights-oriented approach. Each model possesses distinct strengths and limitations. China benefits from a relatively stable and institutionalized framework but remains dependent on political support and a collective conception of public interest. Vietnam places greater emphasis on the direct protection of vulnerable individuals but lacks clearly defined limits on procuratorial intervention and does not yet incorporate administrative litigation tools capable of addressing systemic problems. Assessed against European prosecutorial standards, these limitations reflect a broader tension between the protection of vulnerable groups through state intervention and the requirements of equality of arms and clearly delimited prosecutorial powers. Because both systems share a common prokuratura heritage with post-socialist Eastern Europe, the significance of this tension extends beyond the jurisdictions examined.

On this basis, the article proposes a hybrid model that treats vulnerability and public interest not as separate grounds but as interconnected dimensions of the same justificatory framework. The model combines China's public-interest threshold with Vietnam's rights-based orientation, while adding transparent case-selection criteria and a structured evaluation mechanism for the pilot phase. Its relevance is not limited to Vietnam. By identifying conditions under which a prosecutor may legitimately initiate civil proceedings on behalf of vulnerable individuals, the model contributes to ongoing European debates on the proper scope of prosecutorial functions outside criminal justice. It also offers a possible approach for post-socialist jurisdictions seeking to define and constrain prosecutorial intervention without eliminating it entirely, while providing a comparative perspective on the limitations of collective-redress systems that rely primarily on civil-society actors.

As the Vietnamese pilot mechanism has only recently entered into force, empirical evidence remains unavailable. Future research should therefore examine its practical operation and assess the feasibility of the proposed model in light of emerging experience.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДЕРЖАВНЕ ЗАБЕЗПЕЧЕННЯ ДОСТУПУ ДО ПРАВОСУДДЯ ДЛЯ ВРАЗЛИВИХ ГРУП НАСЕЛЕННЯ: ДОСВІД КИТАЙСЬКОЇ ТА В'ЄТНАМСЬКОЇ МОДЕЛЕЙ ПРОКУРАТУРИ ДЛЯ РЕФОРМУВАННЯ ПРАВА КРАЇН СХІДНОЇ ЄВРОПИ ТА ЄС

Чан Нгок Хієп та Хоанг Тхі Лан Фионг*

АНОТАЦІЯ

Передумови. *Вразливі групи населення нерідко стикаються із суттєвими перешкодами у доступі до ефективних засобів юридичного захисту в межах загального цивільного судочинства, тоді як організації громадянського суспільства можуть не мати достатньої інституційної спроможності або незалежності для представництва їхніх інтересів. У відповідь на ці виклики як Китай, так і В'єтнам розширили роль органів*

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прокуратури у сфері цивільного судочинства. Китай інституціоналізував прокурорські позови в інтересах суспільства (public interest litigation) у 2017 році, тоді як В'єтнам Резолюцією № 205/2025/QH15 запровадив пілотний механізм, який уповноважує органи прокуратури ініціювати цивільні провадження для захисту вразливих груп. Хоча цей інститут зазвичай асоціюється із соціалістичними правовими системами Східної Азії, він походить із традиції прокуратури, яка досі впливає на прокурорські системи пострадянських та постсоціалістичних країн Східної Європи, де Рада Європи розробила стандарти щодо здійснення прокурорами функцій поза сферою кримінальної юстиції.

Методи. *У статті застосовано порівняльно-правову методологію, що передбачає дослідження нормативно-правової бази, інституційної побудови, становлення та розвитку китайської та в'єтнамської моделей. Крім того, обидві системи проаналізовано з урахуванням європейських стандартів діяльності прокуратури, зокрема Рекомендації Комітету міністрів Ради Європи CM/Rec(2012)11 та практики Європейського суду з прав людини щодо принципу рівності сторін (equality of arms).*

Результати та висновки. *Проведений аналіз засвідчує, що досліджувані моделі ґрунтуються на контрастних підходах. В'єтнам використовує людиноцентричну модель, орієнтовану на захист суб'єктивних прав (rights-based model), яка надає пріоритет безпосередньому захисту прав окремих представників вразливих груп, проте встановлює розмиті межі для втручання прокурора. Китай натомість застосовує модель, орієнтовану на суспільний інтерес (public-interest-oriented model), що передбачає більш структуровані нормативні межі участі держави, однак підпорядковує захист суб'єктивних прав ширшій колективній концепції суспільного інтересу. Для подолання цих недоліків автори пропонують гібридну модель, яка поєднує фактор уразливості та мінімальний поріг суспільного інтересу як єдиний критерій для звернення до суду, а також передбачає прозорі правила відбору справ і структуровану методологію їх оцінювання. Наукове значення статті не обмежується контекстом В'єтнаму та Китаю: окреслюючи умови, за яких втручання прокурора залишається сумісним із гарантіями справедливого судового розгляду, дослідження робить внесок у сучасну дискусію щодо ролі прокуратури в цивільному процесі постсоціалістичних юрисдикцій, а також пропонує практичні рекомендації для вдосконалення системи колективного захисту прав (collective redress) у праві Європейського Союзу.*

Ключові слова: *прокурорські позови в інтересах суспільства; вразливі групи; порівняльне правознавство; В'єтнам; Китай; доступ до правосуддя; Східна Європа.*

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Research Article

FROM JOINT TO DIFFERENTIATED LIABILITY: REFORMING UKRAINIAN MEDICAL LAW IN LIGHT OF THE EU AI ACT AND THE ESTONIAN EXPERIENCE

Volodymyr Kapustnyk* and Volodymyr Kurylo

ABSTRACT

Background: *The growing use of high-risk artificial intelligence (AI) systems in healthcare challenges traditional models of medical liability, particularly where clinical decisions emerge from interactions among healthcare professionals, healthcare institutions, software providers, and algorithmic systems. In such circumstances, establishing causation and allocating responsibility becomes significantly more complex because of algorithmic opacity, distributed decision-making, and the involvement of multiple actors with different degrees of control over AI-related risks.*

Method: *This study employs doctrinal and comparative legal methods to examine the transformation of liability models in the context of AI-assisted medical decision-making. The analysis is based on Ukrainian civil and medical law, Regulation (EU) 2024/1689 'the EU Artificial Intelligence Act' (EU AI Act), standards of access to justice under Article 6 of the European Convention on Human Rights, and the Estonian model of digital healthcare governance and accountability.*

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Results and Conclusions: *The study demonstrates that traditional models of joint liability are increasingly inadequate for disputes involving high-risk medical AI systems because they fail to distinguish between actors exercising different degrees of control over algorithmic risk. It further demonstrates that the EU AI Act provides both a normative and conceptual foundation for a differentiated liability framework based on functional responsibility, human oversight, and risk governance. The article pays particular attention to the procedural significance of explainability, logging, and traceability as mechanisms that support causation assessment, access to evidence, and effective judicial review. The Estonian experience illustrates how digital accountability infrastructure, supported by clear institutional responsibilities and legal regulation, can strengthen oversight of AI-assisted medical decision-making. The article identifies key legislative gaps in Ukrainian medical law on AI-assisted healthcare. It proposes practical reform directions, including a differentiated liability model based on control over algorithmic risk. It concludes that this approach provides a more coherent and legally predictable framework for allocating responsibility in AI-assisted healthcare than traditional models of collective liability and aligns with emerging European approaches to AI governance and liability.*

1 INTRODUCTION

The increasing use of artificial intelligence (AI) systems in healthcare poses significant challenges to traditional models of legal liability. When harm to a patient arises in AI-assisted medical decision-making, the relevant outcome often depends on the interaction of multiple actors, including AI developers, software providers, healthcare institutions, and healthcare professionals. Under such circumstances, establishing causation and allocating legal responsibility become considerably more complex than in traditional medical malpractice disputes, particularly where algorithmic processes are opaque or difficult to verify.[1]

These challenges are becoming increasingly relevant for Ukraine as the healthcare sector undergoes rapid digital transformation and gradually incorporates AI-assisted technologies into clinical practice. Although Ukrainian legislation currently lacks a specialised framework governing liability for harm caused by medical AI systems, disputes involving algorithmically supported decision-making are likely to become more frequent. Existing civil and medical liability mechanisms were largely designed for

1 On the challenges that algorithmic opacity creates for legal accountability, evidential assessment, and the allocation of responsibility in AI-assisted decision-making, see Katie Atkinson, Trevor Bench-Capon and Danushka Bollegala, 'Explanation in AI and Law: Past, Present and Future' (2020) 289 Artificial Intelligence 103387 <https://doi.org/10.1016/j.artint.2020.103387> accessed 18 July 2026; Karen McGregor Richmond and others, 'Explainable AI and Law: An Evidential Survey' (2024) 3(1) Digital Society 1 <https://doi.org/10.1007/s44206-023-00081-z> accessed 18 July 2026.

situations in which medical decisions are made exclusively by human actors and therefore may prove inadequate in cases involving high-risk AI systems.

At the European level, the adoption of Regulation (EU) 2024/1689 (the EU AI Act) marks an important shift towards a risk-based and function-oriented approach to AI governance.[2] Rather than treating liability as a uniform concept, the EU regulatory framework differentiates obligations according to the actor's role, degree of control over algorithmic risk, and capacity to prevent harm.[3] This approach provides an important conceptual foundation for reconsidering traditional models of liability in healthcare.

The article argues that the conventional model of joint liability is increasingly ill-suited to disputes involving high-risk medical AI systems. Instead, a differentiated liability model based on control over algorithmic risk offers a more coherent framework for allocating responsibility among developers, healthcare institutions, and healthcare professionals.

To explore this proposition, the article analyses the EU AI Act's regulatory approach and Estonia's experience of digital healthcare governance. Estonia was selected as the primary comparative jurisdiction because it represents one of Europe's most advanced digital health ecosystems and provides a particularly relevant example for Ukraine as a post-socialist legal system that has undergone extensive digital transformation.[4] The study further examines the implications of explainability, logging, traceability, and human oversight for judicial review and liability allocation.[5]

2 For the legal framework establishing a risk-based approach to AI regulation and governance, see 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 (AI Act) [2024] OJ L 2024/1689 <http://data.europa.eu/eli/reg/2024/1689/oj> accessed 18 July 2026.

3 On the EU's risk-based regulatory model and the differentiated allocation of obligations among actors involved in the AI lifecycle, see Henry Fraser and José-Miguel Bello y Villarino, 'Acceptable Risks in Europe's Proposed AI Act: Reasonableness and Other Principles for Deciding How Much Risk Management is Enough' (2024) 15(2) European Journal of Risk Regulation 431 <https://doi.org/10.1017/err.2023.57> accessed 18 July 2026; Kasia Söderlund and Stefan Larsson, 'Enforcement Design Patterns in EU Law: An Analysis of the AI Act' (2024) 3 Digital Society 41 <https://doi.org/10.1007/s44206-024-00129-8> accessed 18 July 2026.

4 On Estonia's development as one of Europe's most advanced digital health ecosystems and its transition towards integrated data-driven healthcare, see Lili Milani and others, 'The Estonian Biobank's Journey from Biobanking to Personalized Medicine' (2025) 16 Nature Communications 3270 <https://doi.org/10.1038/s41467-025-58465-3> accessed 18 July 2026.

5 On transparency, explainability, and the right to explanation as elements of AI accountability and legal oversight, see Gintare Makauskaite-Samuole, 'Transparency in the Labyrinths of the EU AI Act: Smart or Disbalanced?' (2025) 8(2) Access to Justice in Eastern Europe 38 <https://doi.org/10.33327/AJEE-18-8.2-a000105> accessed 18 July 2026; Alycia Noë, Sarah Bouhouita-Guermech and Ma'n H Zawati, 'The Right to Explanation in AI: In a Lonely Place' (2025) 27 Journal of Medical Internet Research e64482 <https://doi.org/10.2196/64482> accessed 18 July 2026; Richmond and others (n 1); Ida Varošanec, 'On the Path to the Future: Mapping the Notion of Transparency in the EU Regulatory Framework for AI' (2022) 36(2) International Review of Law, Computers & Technology 95 <https://doi.org/10.1080/13600869.2022.2060471> accessed 18 July 2026.

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This article assesses the feasibility of shifting Ukrainian medical law from a model of joint liability to one of differentiated liability in disputes involving high-risk AI systems. It proposes legal and institutional mechanisms to support such a transition.

2 METHODOLOGY

This study uses doctrinal and comparative legal approaches to examine how legal liability is transforming in the context of using high-risk AI systems in healthcare.

The research analyses Ukrainian civil and medical law, the provisions of the EU AI Act, and standards of access to justice and fair trial guarantees developed in European Court of Human Rights case law applying Article 6 of the European Convention on Human Rights.[6]

This study uses a comparative-functional method to assess how different legal models allocate liability in cases involving AI-assisted medical decision-making. This study focuses on the Estonian experience in digital healthcare. Estonia was selected as the primary comparative jurisdiction because it represents one of Europe's most advanced digital health ecosystems and provides a relevant point of comparison for Ukraine as a post-socialist legal system that has undergone extensive digital transformation.[7] In particular, the Estonian model offers practical examples of how logging, traceability, digital evidentiary mechanisms, and human oversight can be integrated into healthcare governance and judicial accountability frameworks.[8]

The study also conducts a functional analysis of how responsibility is allocated among actors using medical AI, including system developers, healthcare institutions, software providers, and healthcare professionals. It pays particular attention to the relationship between legal responsibility and the degree of control exercised over algorithmic risk.[9]

6 Regulation (EU) 2024/1689 (AI Act) (n 2); 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) art 6 <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 18 July 2026.

7 On Estonia's development as one of Europe's most advanced digital health ecosystems and its transition towards integrated data-driven healthcare, see Milani and others (n 4).

8 On traceability, transparency, explainability, and oversight mechanisms within contemporary AI governance frameworks, see Makauskaite-Samuole (n 5); Richmond and others (n 1); Kasia Söderlund, 'High-Risk AI Transparency? On Qualified Transparency Mandates for Oversight Bodies under the EU AI Act' (2025) 2025 Technology and Regulation 97 <https://doi.org/10.71265/6bedar76> accessed 18 July 2026.

9 On the relationship between legal liability, causation, and control over algorithmic risk in AI-assisted decision-making, see Daiju Ueda and others., 'Legal Liability of Physicians and New Governance in the AI Era' (2026) 44 Japanese Journal of Radiology 1316 <https://doi.org/10.1007/s11604-026-01997-5> accessed 18 July 2026; Sylwia Wojtczak and Sylwia Księżak, 'Causation in Civil Law and the Problems of Transparency in AI' (2021) 29(4) European Review of Private Law 561 <https://doi.org/10.54648/erpl2021030> accessed 18 July 2026.

In addition, the research adopts a problem-oriented approach to identify shortcomings in the existing Ukrainian legal framework for addressing disputes involving AI-assisted medical decision-making. This approach assesses the extent to which the differentiated liability model emerging from European AI regulation may contribute to future reforms of Ukrainian medical law.

The study pays particular methodological attention to the procedural dimension of disputes involving medical AI. In this context, the study examines evidentiary asymmetry, access to technical information, explainability, the burden of proof, and the possibility of effectively challenging AI-assisted decisions through judicial proceedings.[10]

A methodological limitation is the lack of established Ukrainian case law on civil liability for harm caused by high-risk medical AI systems. Accordingly, the research relies on comparative legal analysis, emerging regulatory approaches, and contemporary scholarship on AI accountability.

3 THE CRISIS OF TRADITIONAL LIABILITY MODELS IN MEDICAL AI DISPUTES

3.1. The Transformation of Medical Decision-Making in AI-Assisted Systems

The growing use of artificial intelligence in healthcare is transforming the traditional model of medical decision-making, under which physicians exercised primary responsibility for diagnosis, risk assessment, and treatment selection. Contemporary AI-assisted systems increasingly support clinical decision-making through predictive analytics, medical image interpretation, risk stratification, and automated clinical data analysis.[11] As a result, medical decisions are no longer produced exclusively by human actors but emerge through interactions between healthcare professionals, algorithmic systems, and digital infrastructure.

10 On evidentiary asymmetry, access to technical information, digital evidence, and procedural guarantees in technology-related disputes, see Council of Europe, *European Convention on Human Rights* (n 6) art 6; European Committee on Legal Co-operation, Guidelines on Electronic Evidence in Civil and Administrative Proceedings (adopted on 30 January 2019) <https://www.coe.int/en/web/cdcj/digital-evidence/-/asset_publisher/7dbCE86mCocc/content/-the-administration-and-you-a-handbook> accessed 18 July 2026; Richmond and others (n 1).

11 On the growing use of AI-assisted technologies in clinical practice, including diagnostic support, medical image analysis, and predictive decision-making systems, see World Health Organization, *Ethics and Governance of Artificial Intelligence for Health: Guidance on Large Multi-Modal Models* (WHO 2024); Geeta Joshi and others, 'FDA-Approved Artificial Intelligence and Machine Learning (AI/ML)-Enabled Medical Devices: An Updated Landscape' (2024) 13(3) Electronics 498 <https://doi.org/10.3390/electronics13030498> accessed 18 July 2026; Sanju Kaladharan, Dhanya Manayath and Rejikumar Gopalakrishnan, 'Regulatory Challenges in AI/ML-Enabled Medical Devices: A Scoping Review and Conceptual Framework' (2024) 18(4) Journal of Medical Devices 040801 <https://doi.org/10.1115/1.4066280> accessed 18 July 2026.

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This transformation has important legal implications. Under the EU AI Act, most medical AI applications are classified as high-risk AI systems because algorithmic errors may directly affect patients' health and safety.[12] High-risk medical AI systems include, among others, clinical decision support tools, diagnostic software, and AI-enabled medical devices subject to conformity assessment under European medical device regulations.[13]

Clinical decision support systems (CDSS) integrated into electronic health records are particularly significant. Such systems analyse patient data in real time and generate recommendations concerning diagnosis, treatment, and risk management.[14] In practice, AI-generated recommendations may substantially influence clinical decisions, even where the physician formally retains final decision-making authority.

The increasing involvement of AI systems fundamentally challenges traditional models of medical liability. In conventional malpractice disputes, courts generally focus on the conduct of healthcare professionals or healthcare institutions. In contrast, AI-assisted medical decision-making involves a broader network of actors, including developers, software providers, healthcare institutions, digital infrastructure operators, and healthcare professionals. Harm may result from algorithmic defects, biased training data, software failures, inadequate system integration, or improper human use of AI-generated recommendations.

These developments are particularly significant for Ukraine. Existing Ukrainian civil and medical liability mechanisms were developed on the assumption that medical decisions originate primarily from human actors. Consequently, current legal frameworks offer limited guidance on allocating responsibility when harmful outcomes arise from interactions among multiple actors in AI-assisted medical decision-making.

Under such circumstances, traditional concepts of joint liability may provide compensation mechanisms but do not necessarily identify which actor exercised effective control over the relevant algorithmic risk. This creates difficulties in establishing causation, allocating

12 On the classification of medical AI applications as high-risk systems and the corresponding regulatory requirements under EU law, see Regulation (EU) 2024/1689 (AI Act) (n 2).

13 For discussions of AI-enabled medical devices, clinical decision support systems, and regulatory challenges associated with their deployment in healthcare, see Joshi and others (n 11); Kaladharan, Manayath and Gopalakrishnan (n 11).

14 On the risks associated with AI-assisted medical decision-making, including hidden model limitations, algorithmic errors, and the implications of such failures for legal liability, see Michael H Bernstein and others, 'Randomized Study of the Impact of AI on Perceived Legal Liability for Radiologists' (2025) 2(6) NEJM AI <https://doi.org/10.1056/AIoa2400785> accessed 18 July 2026; Qiao Jin and others, 'Hidden Flaws Behind Expert-Level Accuracy of Multimodal GPT-4 Vision in Medicine' (2024) 7 npj Digital Medicine 190 <https://doi.org/10.1038/s41746-024-01185-7> accessed 18 July 2026; David O Shumway and Hayes J Hartman, 'Medical Malpractice Liability in Large Language Model Artificial Intelligence: Legal Review and Policy Recommendations' (2024) 124(7) Journal of Osteopathic Medicine 287 <https://doi.org/10.1515/jom-2023-0229> accessed 18 July 2026.

responsibility, and ensuring legal certainty for both patients and participants in the AI ecosystem.[15] Accordingly, the growing use of medical AI creates a need to reconsider traditional liability models and to explore differentiated approaches based on the degree of control exercised over algorithmic risk.

3.2. The Black Box Effect and the Problem of Causation

One of the most significant challenges of using high-risk AI systems in healthcare is the so-called black box effect: the reasoning behind an algorithmic output is wholly or partially inaccessible to users, patients, or even system developers.[16] In disputes involving medical AI, this phenomenon substantially complicates the establishment of causation, which remains a central requirement for civil liability.[17]

Under traditional models of medical malpractice, courts typically assess healthcare professionals' conduct and determine whether harm resulted from professional negligence, diagnostic error, or a breach of applicable medical standards. In AI-assisted medical decision-making, however, harmful outcomes may arise from a combination of factors, including algorithmic defects, biased training data, software failures, inadequate system integration, or inappropriate reliance on AI-generated recommendations.[18] As a result, causation becomes distributed across multiple actors and technological processes rather than being attributable to a single identifiable decision-maker.

This development exposes an important limitation of traditional joint liability. Although collective liability may facilitate compensation where causal uncertainty exists, it does not necessarily identify which actor effectively controlled the risk that ultimately materialised. In the context of medical AI, the central legal question is often not whether several actors participated in the decision-making process, but which actor could have prevented the specific failure that caused harm.[19] Thus, causation and control become closely interconnected.

15 On the challenges of causation, responsibility allocation, and tort liability arising from AI-assisted decision-making, see Jan De Bruyne and Wannes Ooms, '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 <http://doi.org/10.1017/9781009367783.011> accessed 18 July 2026; Wojtczak and Księżak (n 9).

16 On the concept of the black box effect, explainability, and the difficulties associated with understanding algorithmic reasoning in AI-assisted decision-making, see Atkinson, Bench-Capon, and Bollegala (n 1); Richmond and others (n 1).

17 On the relationship between transparency, causation, and civil liability in AI-related disputes, see Wojtczak and Księżak (n 9).

18 For discussions of hidden model limitations, algorithmic errors, biased outputs, and the implications of such failures for healthcare decision-making, see De Bruyne and Ooms (n 15); Jin and others (n 14).

19 On the allocation of liability according to control over risk and the ability to prevent harm, see De Bruyne and Ooms (n 15); Wojtczak and Księżak (n 9).

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From this perspective, the black box effect is not merely a technical problem but a legal and evidentiary challenge. Where courts cannot meaningfully reconstruct how an AI system operated, they may struggle to determine whether harm resulted from defects in the system itself, failures in its implementation, or errors by healthcare professionals. Such uncertainty may undermine both legal predictability and the effectiveness of judicial protection.

Contemporary European AI regulation increasingly addresses this problem through requirements concerning explainability, traceability, and logging. The EU AI Act requires providers of high-risk AI systems to maintain technical documentation, ensure traceability of system operations, and implement logging mechanisms that record relevant algorithmic activities.[20] These obligations serve not only regulatory and safety purposes but also important evidentiary functions by facilitating the reconstruction of algorithmic decision-making processes.

In this context, explainability acquires particular legal significance. Access to information about how an AI system functions is often a prerequisite for establishing causation, allocating liability, and effectively challenging harmful outcomes. Consequently, the black box effect raises concerns not only regarding liability but also regarding access to justice and the practical ability of courts to review AI-assisted medical decisions.[21]

For Ukraine, these challenges are especially important because existing liability mechanisms were developed without consideration of algorithmically mediated decision-making. As the use of medical AI expands, the lack of adequate mechanisms to reconstruct algorithmic processes may significantly hinder judicial assessment of causation. This reinforces the need for a differentiated liability framework supported by robust requirements concerning logging, traceability, and access to relevant technical information.

3.3. Procedural Asymmetry and Access to Justice

The use of high-risk AI systems in healthcare creates not only substantive legal challenges but also significant procedural concerns. One of the most important of these is evidentiary and informational asymmetry between the parties to a dispute. Patients and their representatives often lack access to the technical information needed to assess how an AI system functions. At the same time, healthcare institutions, software providers, or developers may control the relevant data, logs, and technical documentation.[22] As a result,

20 Regulation (EU) 2024/1689 (AI Act) (n 2).

21 On the evidential significance of explainability and access to information for judicial review of AI-assisted decisions, see Noë, Bouhouita-Guermech and Zawati (n 5); Richmond and others (n 1).

22 On evidentiary asymmetry and unequal access to information in disputes involving AI-assisted decision-making, see Niamh Kinchin, '"Voiceless": The Procedural Gap in Algorithmic Justice' (2024) 32 International Journal of Law and Information Technology eaae024 <https://doi.org/10.1093/ijlit/eaae024> accessed 18 July 2026; Richmond and others (n 1).

the effective protection of rights increasingly depends on access to information concerning the operation of algorithmic systems.

In traditional medical disputes, courts primarily rely on medical records, expert testimony, and clinical protocols. In AI-assisted medical decision-making, however, much of the relevant evidence may exist within digital infrastructure inaccessible to patients and external experts.[23] Consequently, disputes involving medical AI raise questions not only of liability allocation but also of procedural fairness and access to evidence.

From this perspective, explainability acquires a procedural function. The issue is not merely whether an algorithm can be technically explained but whether parties to a dispute can obtain sufficient information to challenge the validity of an AI-assisted decision, identify the source of an error, and establish a causal connection between system operation and harm. Without such access, judicial review may become largely formal.[24]

These concerns are closely connected with the guarantees of a fair trial protected under Article 6 of the European Convention on Human Rights. The principle of equality of arms requires that each party be afforded a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage compared with the opposing party.[25] In the context of medical AI, this principle may be affected where one party controls the technical information necessary to assess the operation of an algorithm. In contrast, the opposing party has no practical means of obtaining or evaluating such information.

Disputes involving medical AI should not be viewed solely through the lens of substantive liability. They also raise questions about access to evidence, procedural transparency, and courts' ability to review AI-assisted decisions effectively. In this respect, the logging, traceability, and auditability mechanisms required for high-risk AI systems serve not only technical and regulatory functions but also important procedural ones by facilitating access to relevant evidence.[26]

The Estonian experience illustrates how digital accountability mechanisms can support procedural fairness. Estonia's digital health infrastructure incorporates extensive logging and traceability mechanisms that allow reconstruction of healthcare interactions and data

23 On the procedural implications of digital evidence and access to technologically relevant information, see European Committee on Legal Co-operation (n 10).

24 On the evidential significance of explainability and access to information for meaningful review of AI-assisted decisions, see Noë, Bouhouita-Guermech and Zawati (n 5); Richmond and others (n 1).

25 On the principle of equality of arms and procedural fairness, see *Brandstetter v Austria* Apps nos 11170/84, 12876/87 and 13468/87 (ECtHR, 28 August 1991) <https://hudoc.echr.coe.int/eng?i=001-57683> accessed 18 July 2026; *Dombo Beheer BV v The Netherlands* App no 14448/88 (ECtHR, 27 October 1993) <https://hudoc.echr.coe.int/eng?i=001-57850> accessed 18 July 2026.

26 On the procedural significance of logging, traceability, transparency, and auditability mechanisms in high-risk AI systems, see Regulation (EU) 2024/1689 (AI Act) (n 2); Makauskaite-Samuole (n 5); Söderlund (n 8).

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access events. Such mechanisms enhance transparency and provide courts with the evidentiary basis necessary to determine how a particular decision was made and which actors participated in the process.

For Ukraine, the procedural dimension of medical AI disputes may prove as important as the substantive allocation of liability. Even the most sophisticated, differentiated liability model cannot function effectively if courts lack access to the information required to identify who controlled the relevant algorithmic risk. Consequently, access to algorithmically relevant evidence should be regarded as a necessary precondition for implementing differentiated liability in healthcare.

3.4. The Emergence of the Principle of Human Oversight in Contemporary Judicial Practice

Although Ukrainian courts have not yet developed case law concerning civil liability for harm caused by medical AI systems, recent judicial practice demonstrates the gradual emergence of a broader principle of human oversight in the professional use of artificial intelligence.[27]

Several recent decisions of the Supreme Court and appellate courts concerning the use of generative AI in legal proceedings have emphasised that AI systems may serve only as auxiliary tools and cannot replace professional judgement or legal responsibility. In particular, Ukrainian courts have repeatedly stressed that users remain responsible for verifying AI-generated information and that relying on unverified outputs may breach professional duties or procedural obligations.[28]

These decisions do not directly concern medical AI. Nevertheless, they matter because they reveal an emerging judicial approach to allocating responsibility in AI-assisted decision-making. Rather than treating AI systems as autonomous decision-makers, Ukrainian courts continue to link responsibility to the individual who controls the technology and makes the final professional decision.[29]

27 For recent examples of Ukrainian judicial practice addressing the professional use of generative AI and the continuing responsibility of human users, see Case no 925/496/24 (Commercial Cassation Court, Supreme Court of Ukraine, 8 July 2025) <https://reyestr.court.gov.ua/Review/128775966> accessed 18 July 2026; Case no 240/14153/24 (Administrative Cassation Court, Supreme Court of Ukraine, 15 January 2026) <https://reyestr.court.gov.ua/Review/133336040> accessed 18 July 2026; Case no 620/12085/25 (Sixth Administrative Court of Appeal, 26 January 2026) <https://reyestr.court.gov.ua/Review/133574154> accessed 18 July 2026.

28 Case no 925/496/24 (n 27); Case no 240/14153/24 (n 27).

29 On the continuing attribution of responsibility to the human user exercising control over AI-assisted decision-making, see Case no 240/14153/24 (n 27); Case no 620/12085/25 (n 27).

This approach closely resembles the concept of meaningful human oversight embodied in the EU AI Act.[30] Under this principle, high-risk AI systems should be designed and deployed in a manner that enables qualified human users to understand, supervise, and, where necessary, override algorithmic outputs. Human oversight serves not merely as a technical safeguard but also as a mechanism to preserve accountability in increasingly automated environments.

This principle is particularly relevant in healthcare. Clinical decision support systems and other medical AI applications may significantly influence diagnosis, treatment selection, and risk assessment. However, the increasing sophistication of AI systems does not eliminate healthcare practitioners' professional responsibility to evaluate clinical information and exercise independent medical judgement.

For this reason, human oversight should be regarded not only as a regulatory requirement but also as an emerging legal principle that can guide future liability allocation in medical AI disputes.[31] Within a differentiated liability framework, responsibility should remain connected to the actor who possessed the authority, information, and practical ability to supervise the relevant AI-assisted decision-making process.

Beyond judicial practice, Ukraine has also begun developing a broader policy framework for governing artificial intelligence. The Concept for the Development of Artificial Intelligence in Ukraine (2020) initiated the formation of a national AI policy, while the White Paper on Artificial Intelligence Regulation (2024) outlined a gradual approach towards regulatory harmonisation with the EU AI Act. This direction has since been reinforced by the draft National Strategy for the Development of Artificial Intelligence until 2030, sector-specific healthcare initiatives, including the National Health Strategy 2030, and methodological guidance on assessing AI-enabled medical technologies through updated health technology assessment procedures. Together with the Voluntary Code of Conduct on the Ethical and Responsible Use of Artificial Intelligence, these documents demonstrate that Ukraine is progressively moving towards a comprehensive governance framework combining legal regulation, ethical standards, and sector-specific implementation mechanisms. Although these instruments do not yet establish a specialised civil liability regime, they provide an important policy foundation for the future development of differentiated liability in AI-assisted healthcare.[32]

30 Regulation (EU) 2024/1689 (AI Act) (n 2); Andreas Holzinger, Kurt Zatloukal and Heimo Müller, 'Is Human Oversight to AI Systems Still Possible?' (2025) 85 New Biotechnology 59 <https://doi.org/10.1016/j.nbt.2024.12.003> accessed 18 July 2026; Liming Zhu and others, 'Designing Meaningful Human Oversight in AI' (2026) 6 AI and Ethics 286 <https://doi.org/10.1007/s43681-026-01147-7> accessed 18 July 2026.

31 ibid

32 On the development of Ukraine's artificial intelligence governance framework, see Order of the Cabinet of Ministers of Ukraine no 1556-r of 2 December 2020 'Approving the Concept of Artificial Intelligence Development in Ukraine' <https://zakon.rada.gov.ua/laws/show/1556-2020-%D1%80> accessed 18 July 2026; Ministry of Digital Transformation of Ukraine, *White Paper on Artificial*

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4 THE EU AI ACT AND THE EMERGENCE OF A DIFFERENTIATED LIABILITY MODEL IN MEDICAL AI

4.1. The Risk-Based Approach of the EU AI Act

The adoption of the European Union Artificial Intelligence Act (EU AI Act) marks a significant shift in regulating high-risk technologies, including AI systems used in healthcare. Rather than imposing uniform obligations on all participants in developing and deploying AI systems, the AI Act adopts a risk-based approach that calibrates legal duties to an AI system's potential impact on fundamental rights, safety, and human health.[33]

Medical AI systems occupy a central position within this framework and are generally classified as high-risk AI systems.[34] This classification reflects the recognition that algorithmic errors in healthcare may directly affect diagnosis, treatment decisions, and patient safety. As a result, the AI Act imposes extensive obligations on actors who can influence the safety and reliability of such systems.

Intelligence Regulation in Ukraine: Vision of the Ministry of Digital Transformation of Ukraine: Version for Consultation (Expert Committee on the Development of Artificial Intelligence, June 2024) <https://storage.thedigital.gov.ua/files/c/fc/36c4cae89deedfbf3781ec6bceddffcc.pdf> accessed 18 July 2026; Ministry of Digital Transformation of Ukraine, *Draft National Strategy for the Development of Artificial Intelligence until 2030* (*Digital State UA*, 12 November 2025) <https://digitalstate.gov.ua/uk/news/govtech/ukrayina-prezentuvala-draft-stratehiyi-rozvytku-shi-do-2030-roku-fokus-na-praktychne-zastosuvannia-infrastrukturu-ta-vlasni-modeli> accessed 18 July 2026; Order of the Cabinet of Ministers of Ukraine no 34-r of 17 January 2025 'On Approval of the Healthcare System Development Strategy for the Period until 2030 and Approval of the Operational Action Plan for Its Implementation in 2025–2027' <https://zakon.rada.gov.ua/laws/show/34-2025-%D1%80> accessed 18 July 2026; Ministry of Digital Transformation of Ukraine, *Voluntary Code of Conduct for the Ethical and Responsible Use of Artificial Intelligence* (25 December 2024) <https://storage.thedigital.gov.ua/files/0/e0/e9540a11682f3bc1d0472755b09fbe04.pdf> accessed 18 July 2026; Order of the Ministry of Health of Ukraine no 1771 of 21 November 2025 'On Approval of the Guideline on Health Technology Assessment of Medical Devices' <https://moz.gov.ua/uk/decrees/nakaz-moz-ukrayini-vid-21-11-2025-1771-pro-zatverdzhennya-nastanovi-z-derzhavnoyi-ocinki-medichnih-tehnologij-shodo-medichnih-virobiv> accessed 18 July 2026.

33 On the risk-based regulatory approach established by the EU AI Act and its classification of AI systems according to their potential impact on fundamental rights, safety, and health, see Regulation (EU) 2024/1689 (AI Act) (n 2); Şaban İbrahim Göksal, Maria Claudia Solarte Vasquez and Archil Chochia, 'The EU AI Act's Alignment within the European Union's Regulatory Framework on Artificial Intelligence' (2024) 24(2) International and Comparative Law Review 25 <https://doi.org/10.2478/iclr-2024-0017> accessed 18 July 2026.

34 On the classification of medical AI applications as high-risk systems under European AI regulation, see Regulation (EU) 2024/1689 (AI Act) (n 2); Alejandro Bellogín and others, 'The EU AI Act and the Wager on Trustworthy AI' (2024) 67(12) Communications of the ACM 58 3665322 <https://doi.org/10.1145/3665322> accessed 18 July 2026.

A particularly important feature of the AI Act is that it distributes regulatory obligations among different participants in the AI ecosystem according to their respective functions.[35] Providers are responsible for system design, risk management, data governance, technical documentation, and compliance mechanisms. Deployers, including healthcare institutions, are responsible for appropriate implementation and use of AI systems, ongoing monitoring, and maintaining effective human oversight.

From a legal liability perspective, this allocation of obligations matters because it links regulatory responsibility directly to control over algorithmic risk. The EU AI Act assigns legal obligations to actors who can prevent specific categories of risk throughout the AI lifecycle. Providers are responsible for system design, data governance, conformity assessment, and technical documentation because they exercise control over the technological sources of risk. Deployers, including healthcare institutions, are responsible for implementation, operational monitoring, and meaningful human oversight because they control the clinical environment in which AI systems are used.[36] Although the EU AI Act does not establish a comprehensive civil liability regime, its allocation of regulatory obligations reflects a broader normative principle: responsibility should follow the actor's capacity to control and prevent harm. The proposed differentiated liability framework develops this principle in civil liability by linking legal responsibility to where effective control over the algorithmic risk ultimately materialised.[37]

The broader European liability framework further reinforces this approach. In particular, Directive (EU) 2024/2853 on liability for defective products facilitates compensation in situations involving defective AI-enabled products and software. Although the Directive does not establish a specific AI liability regime, it complements the risk-based logic of the EU AI Act by strengthening mechanisms to identify responsible actors and improve access to compensation where technological defects contribute to harmful outcomes.[38]

The requirements concerning human oversight, logging, traceability, and technical documentation are particularly relevant in this respect.[39] These obligations not only promote the safe operation of high-risk AI systems but also facilitate the identification of

35 On the functional allocation of obligations among providers, deployers, importers, distributors, and other actors involved in the AI lifecycle, see Regulation (EU) 2024/1689 (AI Act) (n 2); Söderlund and Larsson (n 3).

36 On the allocation of obligations under the EU AI Act and the relationship between regulatory functions and enforcement mechanisms, see *ibid*.

37 On tort liability for AI systems and differentiated allocation of responsibility, see Regulation (EU) 2024/1689 (AI Act) (n 2); De Bruyne and Ooms (n 15).

38 Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L 2024/2853 <http://data.europa.eu/eli/dir/2024/2853/oj> accessed 18 July 2026.

39 On transparency, traceability, logging, technical documentation, and oversight obligations applicable to high-risk AI systems, see Regulation (EU) 2024/1689 (AI Act) (n 2); Makauskaite-Samuole (n 5); Söderlund (n 8).

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the actor who exercised control over a particular stage of the decision-making process. Consequently, the AI Act contributes to an accountability framework in which responsibility can be allocated according to the actor's capacity to prevent harm rather than merely according to formal participation in a decision-making chain.

For Ukraine, the AI Act's significance extends beyond regulatory harmonisation with European Union law. The Act offers a conceptual model[40] for addressing one of the central challenges of AI-assisted medical decision-making: how to allocate responsibility among multiple actors participating in the creation, deployment, and use of high-risk AI systems. In this sense, the AI Act's risk-based approach provides an important foundation for the transition from traditional joint liability to a differentiated liability model based on control over algorithmic risk.

4.2. The Estonian Model of Digital Accountability and Human Oversight

Among European jurisdictions, Estonia provides a particularly relevant comparative example for examining the future regulation of medical AI in Ukraine. Estonia was selected not only because of its advanced digital infrastructure but also because it shows how legal accountability can be integrated into a highly digitalised healthcare environment.[41] As a post-socialist legal system that has undergone extensive technological transformation, Estonia offers a useful point of comparison for Ukraine's ongoing digitalisation of healthcare services.[42]

A distinctive feature of the Estonian approach is the combination of extensive technological integration with the preservation of human responsibility for final clinical decisions.[43] Although artificial intelligence systems are actively incorporated into healthcare processes, Estonian policy has consistently rejected the idea of autonomous legal responsibility for AI systems.[44] Instead, AI is treated as a decision support tool, while legal responsibility remains attached to human actors exercising control over medical decision-making.[45]

40 Karolina Kiejnich-Kruk, 'The AI Act: Challenges for Justice and Democracy in the Deployment of AI-Based Systems' (2026) 31(1) Białostockie Studia Prawnicze 115 <https://doi.org/10.15290/bsp.2026.31.01.07> accessed 18 July 2026.

41 Kaija Kasekamp and others, '*Estonia: Health System Review 2023*' (2023) 25(5) Health Systems in Transition 1 <https://eurohealthobservatory.who.int/publications/i/estonia-health-system-review-2023> accessed 18 July 2026.

42 On Estonia's development as one of Europe's most advanced digital health ecosystems and its transition towards integrated data-driven healthcare and personalised medicine, see Milani and others (n 4).

43 Kasekamp and others (n 41).

44 On contemporary approaches to AI governance that preserve human responsibility and reject autonomous legal personhood for AI systems, see Regulation (EU) 2024/1689 (AI Act) (n 2); World Health Organization (n 11).

45 Law of the Republic of Estonia of 9 May 2001 on the Organization of Health Services 'Tervishoiuteenuste korraldamise seadus (TTKS)' (amended 3 July 2026) <https://www.riigiteataja.ee/en/akt/

This approach is particularly important for developing differentiated liability. Rather than treating the technology itself as a potential bearer of responsibility, the Estonian model allocates accountability based on each participant's role within the digital healthcare ecosystem. Physicians remain responsible for clinical judgement and treatment decisions, while technology providers bear responsibility for system design, technical reliability, and data quality. In practice, liability follows the location of effective control over the relevant risk.[46]

Estonia's extensive digital accountability infrastructure reinforces the practical significance of this model.[47] Healthcare interactions, access to medical records, and system operations are recorded through traceability and logging mechanisms that make it possible to reconstruct the sequence of events leading to a particular decision.[48] Such mechanisms are especially important in disputes involving AI-assisted medical decision-making because they provide courts with evidence concerning who accessed information, how recommendations were generated, and whether appropriate human oversight was exercised.

From a liability-allocation perspective, the most important lesson of the Estonian experience is not the specific technology employed but the existence of an evidentiary infrastructure capable of supporting judicial review. Logging, traceability, and digital accountability mechanisms transform abstract principles of responsibility into practically enforceable legal standards.[49] Without such infrastructure, it may be difficult to identify which actor controlled the relevant algorithmic risk and should, therefore, bear responsibility for harmful outcomes.

For Ukraine, the Estonian model shows that regulating medical AI successfully requires more than adopting legal norms. Effective differentiated liability depends on creating institutional and technological mechanisms that support transparency, accountability, and evidentiary access. In this respect, Estonia illustrates how digital governance can facilitate the practical implementation of human oversight and control-over-risk principles in healthcare. The relevance of the Estonian experience lies not in transplanting specific technological solutions but in the broader lesson that differentiated liability can function effectively only where an adequate digital accountability infrastructure supports legal responsibility.

502022016002?leiaKehtiv> accessed 18 July 2026; Law of the Republic of Estonia of 26 September 2001 on the Obligations Act 'Võlaõigusseadus (VÕS)' (amended 30 June 2026) <https://www.riigiteataja.ee/en/akt/528032016012?leiaKehtiv> accessed 18 July 2026.

46 Ueda and others (n 9); De Bruyne and Ooms (n 15).

47 Kasekamp and others (n 41).

48 Richmond and others (n 1); Söderlund (n 8).

49 Makauskaite-Samuole (n 5); Richmond and others (n 1).

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4.3. The Significance of the European Approach for Ukraine

The significance of the European approach for Ukraine extends beyond the formal process of legislative approximation to European Union law. More importantly, it provides a conceptual framework for addressing legal challenges that existing Ukrainian civil and medical liability mechanisms do not adequately regulate.

Current Ukrainian legislation lacks specific provisions governing liability for harm caused through AI-assisted medical decision-making.[50] Existing legal frameworks were developed on the assumption that medical decisions are made primarily by healthcare professionals and healthcare institutions. Consequently, Ukrainian law offers limited guidance regarding situations in which harmful outcomes result from the interaction of physicians, healthcare providers, software developers, and algorithmic systems.

This regulatory gap becomes increasingly important as digital technologies are integrated into healthcare practice. Electronic health records, digital diagnostic tools, medical imaging software, and AI-assisted decision support systems are already influencing clinical processes. As a result, disputes concerning algorithmically assisted medical decisions are likely to become more common, while existing liability doctrines may prove insufficient to address complex questions of causation and responsibility.[51]

From this perspective, the European model's principal contribution lies not in creating entirely new forms of liability but in developing mechanisms to allocate responsibility according to control over risk. The EU AI Act demonstrates how legal obligations may be linked to specific functions performed by different actors within an AI ecosystem.[52] This approach provides a useful foundation for future reforms of Ukrainian medical law.

Several aspects of the European framework appear particularly relevant for Ukraine. First, the principle of human oversight provides an important mechanism for preserving professional accountability in increasingly automated clinical environments.[53] Second, requirements concerning logging, traceability, and technical documentation create evidentiary tools capable of supporting judicial assessment of causation. Third, the functional differentiation of obligations among providers, deployers, and other participants offers a possible model for future liability allocation in disputes involving medical AI.

50 Although Ukrainian legislation regulates civil liability and the provision of healthcare services, it does not currently establish a specialised liability framework for harm caused by AI-assisted medical decision-making. See also Ueda and others (n 9).

51 On the challenges that AI-assisted decision-making creates for traditional doctrines of causation and liability, see De Bruyne and Ooms (n 15); Wojtczak and Księżak (n 9).

52 See Regulation (EU) 2024/1689 (AI Act) (n 2); Fraser and Bello y Villarino (n 3); Söderlund and Larsson (n 3).

53 On human oversight, traceability, logging, technical documentation, and the functional allocation of obligations among participants in the AI ecosystem, see Regulation (EU) 2024/1689 (AI Act) (n 2); Holzinger, Zatloukal and Müller (n 30); Söderlund (n 8); Zhu and others (n 30).

At the same time, the European experience suggests that legal reform alone is insufficient. Effective implementation of differentiated liability requires institutional and technological mechanisms that ensure transparency, accountability, and access to algorithmically relevant information. In this respect, the Estonian experience demonstrates how digital accountability infrastructure may complement legal regulation and facilitate practical enforcement.

The European approach matters for Ukraine not merely because it represents a future regulatory obligation associated with European integration, but because it offers practical solutions to legal problems already emerging in the digital transformation of healthcare. It therefore provides an important foundation for developing a modern liability framework that balances patient protection, technological innovation, and legal certainty.

5 A DIFFERENTIATED LIABILITY FRAMEWORK FOR UKRAINE

5.1. The Inadequacy of Traditional Joint Liability in Medical AI Disputes

Contemporary scholarship increasingly recognises that traditional civil liability doctrines are not fully adapted to disputes involving AI-assisted decision-making. Existing research shows that algorithmic opacity, the distributed nature of AI development and deployment, and the separation between technological design and clinical use complicate identifying the actor who should bear legal responsibility for harm. Scholars have argued that conventional concepts of joint liability may provide effective compensation but often fail to allocate responsibility according to each participant's actual capacity to control, prevent, or mitigate algorithmic risk. These developments have stimulated growing academic support for liability models that distinguish between the different functions performed by providers, deployers, and healthcare professionals. Against this background, this article develops the differentiated liability framework within the context of Ukrainian medical law.[54]

The proposed differentiated liability model is also supported by the regulatory architecture established under the EU AI Act. Rather than imposing uniform obligations on all participants, the Regulation assigns legal responsibilities based on each actor's functional role and capacity to manage specific risks. Providers remain responsible for the design, conformity assessment, and post-market monitoring of AI systems. At the same time, deployers assume obligations related to lawful implementation, human oversight, and operational use within healthcare institutions. This functional allocation of regulatory duties provides a normative basis for assigning civil liability according to the sphere of

54 On the limitations of traditional liability doctrines in AI-assisted healthcare and the emerging shift towards function-based allocation of responsibility, see De Bruyne and Ooms (n 15); Shumway and Hartman (n 14); Ueda and others (n 9); Wojtczak and Księżak (n 9).

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effective control over the risk that materialised, thereby reinforcing the rationale for differentiated liability within Ukrainian medical law.[55]

Traditional concepts of joint liability were developed to ensure effective compensation in situations when harm results from the conduct of multiple actors and the precise contribution of each participant cannot be determined. In conventional healthcare relationships, this approach has often protected patients when several healthcare professionals or institutions participated in delivering medical care.

The increasing use of AI-assisted medical decision-making challenges the assumptions underlying these traditional liability models.[56] Unlike conventional medical disputes, responsibility for AI-assisted outcomes may involve healthcare professionals, healthcare institutions, software developers, AI providers, and other participants in the digital healthcare ecosystem. As a result, harmful outcomes may emerge from a complex interaction of technological and human factors rather than from the conduct of a single identifiable actor.[57]

Although joint liability may facilitate compensation in situations characterised by causal uncertainty, it presents several important limitations in the context of medical AI. Most significantly, it does not distinguish between actors who merely participated in a technological process and actors who exercised effective control over the risk that ultimately materialised.[58] Consequently, responsibility may be allocated without adequate consideration of each participant's ability to prevent harm.

This limitation is particularly significant for Ukraine. Existing civil liability mechanisms were developed primarily for disputes involving human decision-makers and offer limited guidance on allocating responsibility in technologically mediated decision-making processes. Ukrainian legislation currently lacks a specialised framework to distinguish between algorithmic defects, system deployment failures, deficiencies in human oversight, and professional medical errors.

As a result, applying traditional joint liability may create legal uncertainty for all participants in AI-assisted healthcare. Healthcare professionals may face liability for failures originating in technological systems beyond their expertise or control. At the same time, technology providers may avoid adequate scrutiny where causal links cannot be clearly established. Such outcomes undermine both fairness and legal predictability.

55 On the allocation of obligations under the EU AI Act and their implications for differentiated responsibility, see Regulation (EU) 2024/1689 (AI Act) (n 2); De Bruyne and Ooms (n 15); Ueda and others (n 9).

56 On the impact of AI-assisted decision-making on traditional concepts of legal liability and professional responsibility, see Shumway and Hartman (n 14); Ueda and others (n 9).

57 On the distributed nature of causation and responsibility in AI-assisted decision-making, see De Bruyne and Ooms (n 15); Wojtczak and Księżak (n 9).

58 On the importance of linking responsibility to control over risk and the ability to prevent harm, see De Bruyne and Ooms (n 15); Ueda and others (n 9).

From a policy perspective, excessive reliance on joint liability may also weaken incentives for risk management. Where responsibility is distributed collectively rather than according to effective control over risk, actors may have reduced incentives to implement safeguards, improve system transparency, or maintain adequate oversight mechanisms.

For these reasons, the growing use of medical AI requires a transition towards a differentiated liability model.[59] Rather than focusing exclusively on participation in a decision-making process, such a model would allocate responsibility according to the actor's function, access to relevant information, capacity to influence system behaviour, and ability to prevent the materialisation of algorithmic risk.

5.2. The Principle of Allocating Liability Through Control Over Risk

A central premise of the proposed differentiated liability model is that legal responsibility should be linked not merely to participation in a medical process but to the degree of control exercised over algorithmic risk.[60] In the context of AI-assisted medical decision-making, the decisive question is not who participated in the operation of the system, but who possessed the practical ability to prevent, mitigate, or manage the risk that ultimately materialised.

This approach reflects a broader tendency within contemporary European AI governance. Although the EU AI Act does not establish a comprehensive liability regime, it distributes legal obligations among different actors according to their functions in ensuring the safety and reliability of high-risk AI systems. The underlying logic is that responsibility should follow control.[61] Actors who possess greater authority over system design, deployment, monitoring, or oversight should bear correspondingly greater responsibility for failures occurring within those domains.

Within such a framework, providers exercise primary control over technological risk. They determine the algorithm's architecture, the quality and representativeness of training data, system design choices, software updates, technical documentation, and compliance mechanisms. Consequently, where harm results from algorithmic defects, inadequate datasets, software malfunctions, or failures of system design, responsibility should primarily rest with the provider because these risks originate within areas under its effective control.[62]

59 For discussions supporting differentiated approaches to responsibility allocation in AI-assisted decision-making, see ibid.

60 On the relationship between legal responsibility, risk governance, and control over algorithmic risk, see ibid.

61 On the functional allocation of obligations according to the actor's capacity to manage and control risks associated with AI systems, see Regulation (EU) 2024/1689 (AI Act) (n 2); Fraser and Bello y Villarino (n 3).

62 On the responsibilities of providers relating to system design, data governance, technical documentation, conformity assessment, and risk management, see Regulation (EU) 2024/1689 (AI Act) (n 2); Göksal, Solarte Vasquez and Chochia (n 33).

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Deployers, including healthcare institutions, occupy a different position within the risk structure. Although they do not control the system's internal architecture, they exercise organisational control over its implementation and use. Their responsibilities include integrating AI into clinical workflows, complying with operating instructions, organising human oversight, monitoring system performance, and responding to dangerous or anomalous system behaviour.

When harm results from improper implementation, inadequate supervision, or failure to respond to evident system deficiencies, responsibility should fall primarily on the deployer.[63]

A separate layer of responsibility remains attached to healthcare professionals. Using AI-assisted systems does not eliminate the professional duty to evaluate clinical circumstances and exercise independent medical judgement. Physicians retain responsibility for decisions falling within their sphere of professional competence, particularly where they disregard obvious clinical indicators, fail to assess AI-generated recommendations critically, or reduce human oversight to a purely formal exercise.[64]

The proposed model does not allocate responsibility according to institutional status alone. Instead, it allocates responsibility based on where effective control over the relevant risk lies. This distinction matters in medical AI because different categories of risk arise at different stages of the technological process and are controlled by different actors.

Importantly, differentiated liability does not exclude concurrent responsibility. In complex cases, harm may result from a combination of algorithmic defects, deployment failures, and professional error. However, even in such situations, courts should not impose liability by automatically applying joint liability. Instead, courts should assess which actor exercised effective control at the critical stage when the relevant risk materialised and allocate responsibility accordingly.

From the perspective of Ukrainian law, the principle of control over risk offers a more coherent and technologically appropriate framework than traditional collective liability. It improves legal certainty, aligns responsibility with actual capacities to prevent harm, and creates stronger incentives for all participants in the AI ecosystem to maintain adequate safety, transparency, and oversight mechanisms.

Accordingly, control over risk should be the central criterion for future liability allocation in disputes involving AI-assisted medical decision-making. This approach aligns with both the structure of contemporary European AI governance and the practical realities of increasingly digitalised healthcare systems.

63 On the obligations of deployers, including implementation, monitoring, human oversight, and compliance with operational requirements, see Regulation (EU) 2024/1689 (AI Act) (n 2); Söderlund and Larsson (n 3).

64 On the continuing professional responsibility of healthcare practitioners despite the use of AI-assisted systems and on the importance of meaningful human oversight, see Holzinger, Zatloukal and Müller (n 30); Ueda and others (n 9); Zhu and others (n 30).

5.3. Legal Gaps in Ukrainian Medical Law Concerning AI-Assisted Medical Decision-Making

Despite the gradual integration of digital technologies into healthcare, Ukrainian legislation currently lacks a specialised legal framework governing liability for harm caused by the use of artificial intelligence systems in medical decision-making. Existing civil and medical liability mechanisms were developed on the assumption that healthcare professionals and institutions make clinical decisions. Consequently, they are only partially suitable for addressing situations in which algorithmic systems significantly influence diagnostic or therapeutic outcomes.

The Civil Code of Ukraine establishes the general principles of tort liability based on the existence of damage, unlawful conduct, causation, and fault.[65] At the same time, the Fundamentals of Ukrainian Legislation on Health Care define the professional duties of healthcare professionals and the general grounds for liability arising from the improper provision of medical care.[66] However, neither of these legislative acts takes into account the specific features of AI-assisted medical decision-making, algorithmic decision support, or the distributed nature of contemporary digital healthcare processes.

In this context, several key legal gaps emerge.

First, Ukrainian legislation does not distinguish between professional medical error and algorithmic error. Traditional models of medical liability assume that diagnostic and therapeutic decisions originate from healthcare professionals. In AI-assisted healthcare environments, however, harm may result from algorithmic defects, biased training data, technical malfunctions, or system integration failures. Existing legislation does not provide clear criteria for determining whether such harm should be attributed to a physician, a healthcare institution, a technology developer, or several actors simultaneously.

Second, no legal mechanism allocates responsibility among participants in the AI ecosystem. The current regulatory framework does not differentiate between the legal status of developers, providers, operators, healthcare institutions, and healthcare professionals using AI systems. As a result, courts may struggle to determine which actor controlled the risk that ultimately caused the harm.

Third, Ukrainian law does not provide specific procedural mechanisms for accessing algorithmically relevant information.[67] Disputes involving medical AI may require the

65 Civil Code of Ukraine no 435-IV of 16 January 2003 (amended 25 May 2026) <https://zakon.rada.gov.ua/laws/show/435-15> accessed 18 July 2026.

66 Law of Ukraine no 2801-XII of 19 November 1992 'Fundamentals of Ukrainian Legislation on Health Care' (amended 11 February 2026) <https://zakon.rada.gov.ua/laws/show/2801-12#top> accessed 18 July 2026.

67 On evidentiary asymmetry, access to technical information, and the procedural challenges arising in AI-related disputes, see European Committee on Legal Co-operation (n 10); Richmond and others (n 1).

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examination of event logs, technical documentation, software version records, algorithmic operating parameters, and other forms of digital evidence. Existing procedural legislation was not designed for such disputes and provides only limited opportunities to overcome evidentiary asymmetry between patients and entities controlling technological information.

Fourth, the current legal framework does not define the scope of human oversight in using AI systems in clinical practice.[68] Although healthcare professionals remain responsible for treatment outcomes, Ukrainian law does not establish criteria for determining when reliance on algorithmic recommendations is justified and when it may constitute professional negligence.

These legal gaps are likely to become increasingly significant as AI-assisted technologies continue to expand within the Ukrainian healthcare system. Without specialised regulation, legal uncertainty will increase for patients, healthcare professionals, healthcare institutions, and technology developers alike.

Accordingly, developing a differentiated liability framework is necessary not only to harmonise with European legal approaches but also to address specific deficiencies in the existing Ukrainian system of medical and legal regulation. Such an approach would provide clearer criteria for allocating responsibility, enhance the predictability of judicial practice, and strengthen the protection of patients' rights in the context of the ongoing digital transformation of healthcare.

5.4. A Proposed Model of Differentiated Liability for Ukraine

The analysis conducted in this study suggests that the future regulation of medical AI in Ukraine should move beyond traditional approaches based on collective or undifferentiated liability. Instead, legal responsibility should be allocated according to the degree of control over algorithmic risk and an actor's ability to prevent harm.[69]

The proposed model is based on the principle that liability should follow control.[70] Different participants in AI-assisted medical decision-making exercise control over different stages of the technological and clinical process and should therefore bear responsibility only within their respective spheres of influence.

68 On meaningful human oversight as a legal and governance requirement for AI-assisted decision-making, see Regulation (EU) 2024/1689 (AI Act) (n 2); Holzinger, Zatloukal and Müller (n 30); Zhu and others (n 30).

69 On the allocation of legal responsibility according to control over risk and the capacity to prevent harm, see De Bruyne and Ooms (n 15); Ueda and others (n 9).

70 On the functional allocation of obligations among actors participating in the AI lifecycle, see Regulation (EU) 2024/1689 (AI Act) (n 2); Söderlund and Larsson (n 3).

At the technological level, AI system providers should bear primary responsibility.[71] Providers control the architecture of algorithms, the quality of training data, software development, system updates, cybersecurity measures, and compliance with technical requirements. Accordingly, where harm results from an algorithmic defect, non-representative data, software malfunction, or deficiencies in system design, liability should primarily rest with the actor controlling those risks.

A separate layer of responsibility should apply to deployers, including healthcare institutions implementing AI technologies in clinical practice.[72] Such entities exercise organisational control over the use of AI systems and are responsible for their proper integration into healthcare processes. Their obligations include staff training, organising meaningful human oversight, monitoring system performance, and responding to identified risks. Consequently, when harm results from improper implementation, inadequate supervision, or the failure to address known system deficiencies, liability should be attributed primarily to the deployer.

Professional liability should remain attached to healthcare professionals. Although AI systems may substantially influence clinical decision-making, physicians continue to exercise professional medical judgement and remain responsible for final decisions about diagnosis and treatment. Where a healthcare professional relies uncritically on algorithmic recommendations, disregards obvious clinical indicators, or fails to exercise adequate professional oversight, liability should arise based on traditional principles of professional negligence.[73]

The proposed framework also recognises mixed-causation cases. In practice, harm may result from a combination of algorithmic defects, organisational deployment failures, and professional error. In such situations, courts should not automatically apply joint-liability mechanisms. Instead, they should determine which actor exercised effective control over the stage of the process at which the relevant algorithmic risk materialised and allocate liability in accordance with each participant's actual contribution to the harm.

Implementing such a model would require appropriate procedural mechanisms. Courts should have access to event logs, technical documentation, audit trails, and other forms of algorithmically relevant evidence. Where such information remains exclusively

71 On the responsibilities of providers relating to system design, data governance, technical documentation, risk management, conformity assessment, and compliance with safety requirements, see Regulation (EU) 2024/1689 (AI Act) (n 2); Göksal, Solarte Vasquez and Chochia (n 33).

72 On the obligations of deployers, including implementation, monitoring, staff training, human oversight, and compliance with operational requirements, see Regulation (EU) 2024/1689 (AI Act) (n 2); Söderlund and Larsson (n 3).

73 On the continuing professional responsibility of healthcare practitioners and the importance of meaningful human oversight in AI-assisted decision-making, see Holzinger, Zatloukal and Müller (n 30); Ueda and others (n 9); Zhu and others (n 30).

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under the control of providers or deployers, courts may consider introducing specific procedural mechanisms to facilitate access to digital evidence or, where justified, partially shifting the burden of proof.

For Ukraine, the proposed model offers several advantages. It enhances legal certainty, aligns liability with actors' actual capacity to prevent harm, encourages compliance with standards of safe AI use, and contributes to the development of an effective system of AI governance in healthcare.

Accordingly, a differentiated liability framework based on the principle of control over algorithmic risk may serve as a conceptual foundation for the future transformation of Ukrainian medical law in the era of AI-assisted medical decision-making.

5.5. Human Oversight as a Legal Duty in the Field of Medical AI

A differentiated liability framework in medical AI cannot function effectively without a clear definition of human oversight. Although human oversight is commonly presented as a technical safeguard designed to reduce the risks associated with high-risk AI systems, its significance extends beyond regulatory compliance. In the context of legal liability, human oversight should be understood as a distinct legal duty that connects technological decision support systems with human accountability.[74]

This principle stems from the fact that AI-assisted medical decision-making remains fundamentally different from fully autonomous decision-making. Even when sophisticated clinical decision support systems influence diagnosis, treatment selection, or risk assessment, medical decisions remain within a professional environment governed by legal and ethical duties. Accordingly, responsibility cannot be transferred entirely to technological systems.[75]

At the same time, meaningful human oversight requires more than the formal presence of a healthcare professional within a decision-making process. Oversight becomes ineffective where users lack sufficient information to understand system outputs, cannot assess the reliability of recommendations, or are deprived of practical opportunities to intervene. In such circumstances, attributing responsibility solely to healthcare professionals would undermine the principle that liability should correspond to actual control over risk.[76]

74 On meaningful human oversight as a mechanism linking AI governance with legal accountability, see Regulation (EU) 2024/1689 (AI Act) (n 2); Holzinger, Zatloukal and Müller (n 30); Zhu and others (n 30).

75 On the continuing responsibility of human decision-makers in AI-assisted environments, see Regulation (EU) 2024/1689 (AI Act) (n 2); Ueda and others (n 9).

76 On the relationship between supervision, risk control, and responsibility allocation, see De Bruyne and Ooms (n 15); Zhu and others (n 30).

For this reason, human oversight should be analysed as a relational concept linking responsibility to the actor's capacity to supervise algorithmic decision-making. The scope of this duty depends on several factors, including the user's professional role, access to relevant information, the level of system explainability, and the practical ability to influence outcomes generated by the AI system.

This approach matters in healthcare because of the well-documented phenomenon of automation bias.[77] Healthcare professionals may develop excessive reliance on algorithmic recommendations, especially where AI systems demonstrate high levels of accuracy or operate within complex clinical environments. However, automation bias does not eliminate professional responsibility. Rather, it reinforces the need to define when reliance on AI-generated outputs remains reasonable and when independent clinical assessment is required.

Recent Ukrainian judicial practice concerning the professional use of AI, although not directly related to healthcare, illustrates an emerging understanding of human oversight as a legal obligation rather than a purely technical recommendation.[78] Ukrainian courts increasingly emphasise that individuals who rely on AI-generated outputs retain responsibility for verifying information and for decisions made based on such outputs. This tendency supports the broader proposition that accountability should remain connected to the human actor exercising supervisory authority over AI-assisted processes.

Within the proposed differentiated liability model, human oversight constitutes a separate layer of legal responsibility. It should neither serve as a mechanism for transferring all responsibility to healthcare professionals nor be reduced to a symbolic requirement that legitimises algorithmic decision-making. Instead, it functions as a criterion for determining whether the actor responsible for supervising an AI-assisted process exercised the level of control reasonably expected under the circumstances.

Accordingly, human oversight should be regarded as a central component of AI accountability in healthcare. It preserves the link between professional judgement and legal responsibility while ensuring liability remains tied to real opportunities for supervision, intervention, and harm prevention.

77 On automation bias and excessive reliance on algorithmic recommendations in professional decision-making, see Florian Kücking and others, 'Automation Bias in AI-Decision Support: Results from an Empirical Study' in Rainer Röhrig and others (eds), *German Medical Data Sciences 2024: Health - Thinking, Researching and Acting Together* (IOS Press 2024) 298 <https://doi.org/10.3233/shti240871> accessed 18 July 2026; Perica Jovchevski, Stefan Buijsman and Mark Neerincx, 'What Is Wrong with Automation Bias?' (2026) 39 Philosophy & Technology 84 <https://doi.org/10.1007/s13347-026-01090-9> accessed 18 July 2026.

78 Case no 925/496/24 (n 27); Case no 240/14153/24 (n 27); Case no 620/12085/25 (n 27).

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5.6. Logging, Explainability, and Digital Evidence in Medical AI Disputes

The practical implementation of differentiated liability in medical AI disputes depends on mechanisms that can identify how algorithmic risk materialised and which actor controlled the relevant stage of the decision-making process. Logging, explainability, and traceability should therefore be regarded not merely as technical features of AI systems but as essential components of an accountability infrastructure.[79] Without reliable information concerning system operation, courts may be unable to distinguish between failures originating in system design, deployment, human oversight, or clinical decision-making. Consequently, differentiated liability requires sufficient technical and evidentiary mechanisms to reconstruct the pathway through which harm occurred.

From a legal perspective, logging, explainability, and traceability transform the principle of control over risk into a practically enforceable standard. Event logs, technical documentation, audit trails, and other forms of algorithmically relevant evidence enable courts to determine which actor controlled the relevant stage of the decision-making process and whether appropriate oversight was exercised. For Ukraine, developing such digital evidentiary infrastructure may become a necessary precondition for effectively implementing differentiated liability in healthcare and for meaningfully assessing causation in disputes involving AI-assisted medical decision-making.

6 CONCLUSIONS

The growing use of high-risk artificial intelligence systems in healthcare challenges traditional approaches to medical liability. AI-assisted medical decision-making no longer rests solely on healthcare professionals; it emerges from the interaction of multiple actors, including algorithm developers, technology providers, healthcare institutions, and medical practitioners. Under such circumstances, traditional models of joint liability increasingly prove inadequate for ensuring a fair and predictable allocation of responsibility. The comparative and doctrinal analysis in this study shows that this transformation cannot be addressed by merely extending traditional concepts of joint liability; instead, it requires a functional allocation of legal responsibility that reflects the governance structure of high-risk AI systems.

This study shows that the EU AI Act is significant not only as a regulatory instrument governing high-risk AI systems but also as a normative and conceptual foundation for developing a differentiated liability model. By functionally allocating obligations among

79 On the evidentiary significance of logging, explainability, traceability, and digital accountability mechanisms in AI-assisted decision-making, see Makauskaite-Samuole (n 5); Richmond and others (n 1); Söderlund (n 8).

providers, deployers, and other participants in the AI ecosystem, the EU AI Act provides a legal basis for transitioning from undifferentiated collective liability to a differentiated liability framework grounded in control over algorithmic risk.

The article argues that differentiated liability better suits disputes involving medical AI than traditional models of collective liability. Legal responsibility should be determined by the degree of control exercised over the relevant risk, access to technically significant information, the ability to influence system operation, and the capacity to prevent harm. Accordingly, control over risk should serve as the central criterion for future liability allocation in disputes arising from AI-assisted medical decision-making.

The study further demonstrates that an effective differentiated liability framework depends on meaningful human oversight supported by an adequate digital evidentiary infrastructure. Explainability, logging, traceability, and access to algorithmically relevant evidence serve important evidentiary functions by helping establish causation and identify the actor responsible at a particular stage of AI-assisted decision-making.

The Estonian experience in digital healthcare shows that an effective liability system depends not only on substantive liability rules but also on integrating digital governance, institutional accountability, and evidentiary infrastructure supported by transparent technological safeguards and an appropriate legal framework. This comparative experience offers valuable guidance for the future development of Ukrainian medical law. At the same time, contemporary Ukrainian judicial practice on the professional use of artificial intelligence indicates the gradual emergence of an approach in which meaningful human oversight is recognised as an independent legal duty linking the use of AI technologies to human responsibility. Taken together, these developments suggest that effective legal regulation of AI-assisted healthcare requires the parallel development of legal accountability and digital governance mechanisms to ensure effective judicial protection.

For Ukraine, the findings of this study demonstrate the need to reconsider traditional liability models developed for exclusively human decision-making environments. Although current legislation does not yet provide a specialised liability regime for medical AI, future legislative reform should establish a differentiated allocation of responsibility among providers, deployers, healthcare institutions, and healthcare professionals according to their respective degree of control over algorithmic risk. Such reform should define each participant's legal responsibilities in the AI-assisted healthcare ecosystem, establish evidentiary rules governing the preservation and disclosure of algorithmically relevant evidence, including logging and traceability, strengthen requirements for meaningful human oversight, and ensure effective judicial access to technically relevant information.

Accordingly, the future development of Ukrainian medical law should transition from formal collective liability to a differentiated liability framework in which legal responsibility

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is allocated according to the degree of control exercised over algorithmic risk. Such a framework would enhance legal certainty, improve responsibility allocation among participants in AI-assisted healthcare, and strengthen the effective protection of patients' rights through an appropriate combination of digital accountability, meaningful human oversight, and access to algorithmically relevant evidence.

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Control Over Risk. – 5.3. Legal Gaps in Ukrainian Medical Law Concerning AI-Assisted Medical Decision-Making. – 5.4. A Proposed Model of Differentiated Liability for Ukraine. – 5.5. Human Oversight as a Legal Duty in the Field of Medical AI. – 5.6. Logging, Explainability, and Digital Evidence in Medical AI Disputes. – 6. Conclusions.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВІД СОЛІДАРНОЇ ДО ДИФЕРЕНЦІЙОВАНОЇ ВІДПОВІДАЛЬНОСТІ: РЕФОРМУВАННЯ МЕДИЧНОГО ПРАВА УКРАЇНИ З УРАХУВАННЯМ АКТА ЄС ПРО ШТУЧНИЙ ІНТЕЛЕКТ ТА ДОСВІДУ ЕСТОНІЇ

Володимир Капустник* та Володимир Курило

АНОТАЦІЯ

Передумови. *Зростання масштабів застосування високоризикових систем штучного інтелекту (ШІ) у сфері охорони здоров'я створює нові виклики традиційним моделям юридичної відповідальності у медицині, зокрема у випадках, коли клінічні рішення формуються внаслідок взаємодії медичних працівників, закладів охорони здоров'я, постачальників програмного забезпечення та алгоритмічних систем. За таких умов встановлення причинно-наслідкового зв'язку та розподіл юридичної відповідальності істотно ускладнюється через непрозорість алгоритмічних процесів, розподілений характер ухвалення рішень та залучення багатьох суб'єктів із різним ступенем контролю над ризиками, пов'язаними із ШІ.*

Методи. *У дослідженні застосовано доктринальний та порівняльно-правовий методи для аналізу трансформації моделей юридичної відповідальності в контексті ухвалення медичних рішень із застосуванням ШІ. Дослідження ґрунтується на нормах цивільного та медичного законодавства України, положеннях Регламенту (ЄС) 2024/1689 «Акт про штучний інтелект» (Акт ЄС про ШІ), стандартах забезпечення права на доступ до правосуддя відповідно до статті 6 Конвенції про захист прав людини і основоположних свобод, а також на естонській моделі цифрового врядування та підзвітності у сфері охорони здоров'я.*

Результати та висновки. *Доведено, що традиційні моделі солідарної відповідальності стають дедалі менш придатними для вирішення спорів щодо застосування високоризикових медичних систем ШІ, оскільки вони не розмежовують суб'єктів за критерієм здійснення фактичного контролю над алгоритмічним ризиком. Обґрунтовано, що Акт ЄС про ШІ забезпечує нормативне й концептуальне підґрунтя для запровадження диференційованої моделі відповідальності, заснованої на засадах функціональної відповідальності, людського нагляду та ризик-орієнтованого управління. Особливу увагу приділено процесуальному значенню пояснюваності (explainability), логування (протоколювання подій) та простежуваності як механізмів, які сприяють встановленню причинного зв'язку, забезпеченню доступу до доказів і здійсненню дієвого судового контролю. Досвід Естонії демонструє, як інфраструктура цифрової підзвітності, підкріплена чітким розподілом інституційних обов'язків та належним нормативно-правовим регулюванням, може сприяти посиленню нагляду за*

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процесом ухвалення медичних рішень із застосуванням ШІ. Виявлено ключові законодавчі прогалини медичного права України у сфері застосування ШІ та запропоновано практичні напрями реформування, включно з моделлю диференційованої відповідальності за критерієм контролю над алгоритмічним ризиком. Зроблено висновок, що такий підхід формує більш послідовну та юридично передбачувану основу для розподілу відповідальності в охороні здоров'я, ніж класичні конструкції колективної відповідальності, та гармонізується з актуальними європейськими підходами до регулювання ШІ та юридичної відповідальності.

Ключові слова: *штучний інтелект, ШІ в медичній сфері, медична відповідальність, солідарна відповідальність, диференційована відповідальність, людський нагляд, пояснюваність, простежуваність, логування (протоколювання), доступ до правосуддя, стаття 6 ЄКПЛ, алгоритмічна підзвітність, цифрові докази, медичне право.*

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A HYBRID MODEL OF EXPERT JUDGEMENT, MEDIATION AND ARBITRATION: A COMPARATIVE STUDY FOR EFFECTIVE CONSTRUCTION CONTRACT DISPUTE RESOLUTION

Meria Utama*, Rizka Nurliyantika, Irsan Irsan and Biyes Nurul Atika

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ABSTRACT

Background: *International construction disputes are inherently complex, involving legal, technical, financial, and cross-border dimensions. While existing mechanisms, such as litigation, mediation, and arbitration, each offer specific advantages, they often fail to simultaneously provide speed, technical reliability, and legal finality in high-value projects. This study addresses this gap by proposing the Expert Judgement, Mediation, Arbitration (EJMA) hybrid model. This tiered architecture is introduced as a novel conceptual framework that integrates technical clarification, consensual settlement, and binding adjudication into a single, coherent procedural sequence specifically designed for the Indonesian legal landscape.*

Method: *This research employs a doctrinal legal approach conducted through four analytical lenses: sociological jurisprudence, conceptual analysis, statutory analysis, and comparative law. The study evaluates the applicable Indonesian legal framework (specifically the Construction Services Law and the Arbitration and ADR Law) and institutional practices of bodies like BANI, alongside comparative international experiences such as FIDIC dispute boards, mandatory adjudication, and Arb-Med-Arb schemes.*

Results and Conclusions: *The findings formulate the design principles and safeguards of the EJMA hybrid model. Key results include the development of a staged filtration process for technical and legal issues, the integration of technical factual records into mediation and arbitration phases, and the establishment of guarantees for confidentiality and due process. Furthermore, the study identifies mechanisms to convert mediated settlements into arbitral consent awards, which significantly enhances legal certainty and reduces the risk of annulment under Indonesian law. The EJMA hybrid model represents a significant theoretical and practical advancement in international dispute resolution. By bridging the gap between technical expertise and legal finality, it offers a more predictable pathway for stakeholders. The study concludes that the normative basis of the EJMA hybrid model should be strengthened through clearer regulations for expert panels and the establishment of an integrated Construction Dispute Resolution Board (CDRB). This hybrid model ultimately improves access to justice and enforceability in both domestic and cross-border construction contexts.*

1 INTRODUCTION

Construction contracts are widely recognized as among the most complex forms of commercial agreements because they simultaneously engage legal, technical, financial, and taxation dimensions within long-term, multi-party, and increasingly cross-border arrangements.[1] This complexity, combined with tight project deadlines and layered risk allocation, makes disputes over time, cost, and quality particularly likely in international projects involving employers, main contractors, subcontractors, and consultants.[2] Unresolved claims and delayed settlements can jeopardize project viability, disrupt cash flow, and hinder the optimal utilization of infrastructure assets, thereby undermining the broader development objectives pursued through large-scale construction programs.[3]

1 Hadi Ismanto and Hardjomuljadi Sarwono, 'Analisis Pengaruh Dewan Sengketa & Arbitrase Terhadap Penyelesaian Sengketa Konstruksi Berdasarkan Fidic Condition of Contract 2017' (2019) 10(1) Konstruksia 73, doi:10.24853/jk.10.1.73-86.

2 Pui-Lam Ng and Audrius Banaitis, 'Construction Mediation and Its Hybridization: The Case of the Hong Kong Construction Industry' (2017) 9(1) Organization, Technology and Management in Construction 1528, doi:10.1515/otmcj-2016-0015.

3 Irsan and others, 'Drafting Extension of Time for Completion to Avoid Time at Large in Construction Contract' (2024) 7(2) Notaire 247, doi:10.20473/ntr.v7i2.58379.

In Indonesia, litigation before the ordinary courts has traditionally been available for construction disputes but is widely perceived as slow, costly, public, and often ill-suited to the technical nature of construction conflicts. Generalist judges may lack sector-specific expertise, while multi-tier appeals and rigid procedural formalism tend to prolong resolution and weaken commercial certainty in time-sensitive projects.[4] As a response, parties increasingly rely on private mechanisms of dispute resolution: arbitration, mediation, conciliation, expert determination, and various forms of dispute boards that promise greater speed, confidentiality, and technical competence, especially where the project has international or hybrid public-private dimensions.[5]

However, each of these mechanisms carries structural limitations when used in isolation. Mediation offers flexibility and the possibility of mutually acceptable, interest-based solutions, but its outcomes remain consensual and depend on voluntary compliance.[6] Stand-alone expert determination or dispute boards can provide rapid, technically informed evaluations; however, their recommendations or interim decisions often require subsequent conversion into an arbitral award or court judgment to achieve full enforceability. Meanwhile, arbitration supplies final and binding decisions that are in principle enforceable under the New York Convention,[7] but it is frequently criticized for high costs, lengthy proceedings, and adversarial, win-lose dynamics that may damage commercial relationships.[8]

Against this background, there is a growing interest both in comparative practice and in Indonesian legal scholarship regarding tiered and hybrid dispute resolution clauses that combine negotiation, expert-based processes, mediation, and arbitration within a single contractual framework. Nevertheless, existing models have not yet produced a stable design that consistently delivers resolutions that are simultaneously fast, cost-efficient, confidential, technically robust, and normatively legitimate in the context of international construction projects.[9] Building on

4 Meria Utama and Irsan Irsan, 'General Overview on Selecting and Drafting Construction Contract Disputes Resolution' (2018) 2(2) Sriwijaya Law Review 152, doi:10.28946/slrev.Vol2.Iss2.129.pp152-169.

5 Meria Utama and others, 'Recognition and Enforcement of Foreign Judgments and Arbitral Awards in Indonesia: Lessons from Singapore and Malaysia' (2026) 7(3) Journal of Law and Legal Reform 1301, doi:10.15294/jllr.v7i3.37235.

6 Nan Cao and Sai On Cheung, 'Mediators' View on Voluntary Construction Dispute Mediation' (2024) 16(1) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 5023005, doi:10.1061/JLADAH.LADR-1004.

7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (adopted 10 June 1958) [1959] UNTS 330/3.

8 Anangga W Roosdiono and Muhamad Dzadit Taqwa, 'Questioning the Validity of the New York Convention 1958 on Recognition and Enforcement of Foreign Arbitral Awards in Indonesia' (2024) 19(2) Pandecta Research Law Journal 583, doi:10.15294/pandecta.v19i2.4099.

9 Paul Taggart, 'Dispute Boards as Pre-Arbitration Tools: Recent Developments and Practical Considerations' (*Kluwer Arbitration Blog*, 28 February 2015) <https://legalblogs.wolterskluwer.com/arbitration-blog/dispute-boards-as-pre-arbitration-tools-recent-developments-and-practical-considerations/> accessed 9 March 2026.

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this gap, the present article addresses two core questions: first, why prevailing mechanisms for construction dispute resolution and litigation, stand-alone expert determination, mediation, arbitration, and dispute boards often fail to satisfy these cumulative demands; and second, how an EJMA hybrid model should be normatively designed, under Indonesian law, to integrate technical clarification, consensual settlement, and a final, binding, and enforceable outcome within a coherent procedural sequence.[10]

Beyond its national focus, this article is also intended to speak to a broader, particularly European, audience. The structural problems that motivate the EJMA hybrid model, the technical and legal complexity of large-scale construction projects, the limitations of fragmented ADR mechanisms, and the risks of delay, cost escalation, and award annulment are not unique to Indonesia, but are likewise encountered in cross-border projects governed by FIDIC-type contracts and arbitrated before European or international fora. By grounding its normative design in Indonesian law while drawing on comparative experiences such as FIDIC dispute boards, statutory adjudication, and Arb-Med-Arb schemes, the proposed EJMA hybrid model framework offers a transferable set of principles and safeguards that may inform ongoing debates on hybrid dispute resolution mechanisms in European jurisdictions and in Europe and Asia infrastructure cooperation.

2 RESEARCH METHOD

This study employs a doctrinal legal research method combined with a socio-legal approach to analyze the design of the EJMA hybrid model mechanism for construction dispute resolution under Indonesian law and in its international context. The research is descriptive analytical and integrates three approaches: a statute approach to map the prevailing regulatory framework; a conceptual approach to clarify key concepts such as hybrid mechanisms, consent awards, and technical legal integration; and a comparative approach to draw lessons from foreign and international practice, including FIDIC-based dispute boards, statutory adjudication regimes, and Arb-Med-Arb schemes.

The analysis is guided by a theoretical framework that treats the balancing of legal values as the benchmark for mechanism design. Gustav Radbruch's idea of law (Rechtsidee),[11] which regards justice, legal certainty, and purposiveness as three values that must be balanced, is used to assess whether a dispute resolution mechanism tilts too far toward any one value and thereby produces a justice deficit. This framework is reinforced by the theory of progressive law, which prioritizes substantive justice and views law as an instrument that must serve human beings (law in action), and by the perspective of sociological

10 *Expansion Joint Manufacturers Association (EJMA)* <https://www.ejma.org/> accessed 1 July 2026.

11 Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) 1(5) Süddeutsche Juristen-Zeitung 105.

jurisprudence, which evaluates legal mechanisms by their capacity to solve social problems and preserve relationships rather than by mere conformity to formal procedure. These three frameworks serve as the normative lens for formulating and testing the design principles of the EJMA hybrid model.

The legal materials are distinguished according to their hierarchy. Primary legal materials comprise legislation, in particular, Law No. 2 of 2017 on Construction Services and its implementing regulations, and Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, together with relevant court decisions on the enforcement and annulment of arbitral awards, and international instruments such as the New York Convention and the UNCITRAL Model Law. Secondary legal materials consist of academic literature, doctrine, and prior studies on construction dispute resolution. This clarification of hierarchy corrects an earlier misclassification, since legislation constitutes a primary, not a secondary, legal source.

To strengthen the socio-legal dimension and connect the normative analysis with practice, the study also draws on secondary practice data from the annual reports of the Indonesian National Board of Arbitration (BANI) for the relevant period.[12] These reports were examined to identify the patterns and trends of construction disputes handled, the volume and types of cases, and the tendencies regarding the settlement and annulment of awards. This data is treated as supporting material that complements the legal sources rather than as free-standing empirical evidence.

The analysis was carried out through deductive reasoning and qualitative prescriptive content analysis. Normative premises drawn from legislation and doctrine were systematically tested against annulment decisions, data from BANI's annual reports, and comparative experience, and were then formulated into the design principles of the EJMA hybrid model. In this way, each design conclusion can be transparently traced back to the legal source or evidence underpinning it. The study produces a normative framework intended to improve efficiency, fairness, and enforceability, while acknowledging its limitation: the proposed model has not yet been tested through primary empirical data in actual construction disputes; therefore benefits described remain theoretical propositions requiring further validation.

12 *Badan Arbitrase Nasional Indonesia (BANI Arbitration Center)* <https://baniarbitration.org/> accessed 1 July 2026.

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3 LIMITATIONS OF EXISTING CONSTRUCTION DISPUTE RESOLUTION MECHANISMS

This section critically assesses why existing construction dispute resolution mechanisms, both litigation and stand-alone ADR, often fail to deliver outcomes that are simultaneously fast, cost-efficient, confidential, and technically dependable. It highlights how the multi-disciplinary nature of construction claims (delay analysis, variation valuation, quality defects, payment certification, and risk allocation) frequently exposes gaps in judicial technical competence, increases transaction costs, and encourages strategic behavior that prolongs settlement.[13] In international projects, these problems are amplified by cross-border enforcement concerns, differing contract standards (e.g., EPC/FIDIC-based arrangements), multi-party interfaces, and cultural or legal diversity, all of which complicate evidence, procedure, and compliance.[14] By mapping these recurring constraints, the section provides the analytical foundation for the subsequent subsections, which detail the governing legal framework, available dispute resolution forms, the roles of key institutions, empirical indications from practice, and the specific performance trade-offs that motivate a staged hybrid approach.

3.1. Legal Framework and Pathways for Construction Dispute Resolution in Indonesia

Law No. 2 of 2017 on Construction Services, together with its implementing regulation Government Regulation No. 22 of 2020 as amended by Government Regulation No. 14 of 2021,[15] forms the primary (lex specialis) framework for construction dispute resolution in Indonesia by requiring parties to stipulate and prioritize non-court mechanisms in their contracts[16], while still leaving litigation as a residual option when agreed ADR cannot be implemented or is absent.[17] Law No. 30 of 1999 on Arbitration and Alternative Dispute

13 Christopher Amoah and Hlatshwayo Nkosazana, 'Effective Management Strategies for Construction Contract Disputes' (2022) 41(6) International Journal of Building Pathology and Adaptation 70, doi:10.1108/IJBPA-01-2022-0004.

14 Dede Amar Udi Ilma and others, 'A Comparative Study of National and International Contracts Document Refers to the FIDIC Standard on Construction Projects in Indonesia' (InCEESS 2020: Proceedings of the 1st International Conference on Economics Engineering and Social Science, 17-18 July 2020, Bekasi, Indonesia) doi:10.4108/eai.17-7-2020.2303003.

15 Law of the Republic of Indonesia no 2 of 2017 'On Construction Services' (adopted 12 January 2017) <https://www.scribd.com/document/561088974/UU-2-2017-Versi-inggris> accessed 9 March 2026; Regulation of the Government no 14 of 2021 'Amendment to Government Regulation Number 22 of 2020 concerning the Implementing Regulation to Law no 2 of 2017 on Construction Services' (adopted 2 February 2021).

16 Dede Amar Udi Ilma and others, 'State of the Art Perselisihan Kontrak Konstruksi Di Indonesia' (2020) 16(2) INERSIA Informasi Dan Ekspose Hasil Riset Teknik Sipil Dan Arsitektur 158, doi:10.21831/inersia.v16i2.36901

17 Lintang Yudhantaka, Yohanes Sogar Simamora and Ghansham Anand, 'Binding Power of Dispute Board Judgment in Construction Dispute Settlement' (2023) 38(1) Yuridika 159, doi:10.20473/ydk.v38i1.42717.

Resolution[18] operates as a general (lex generalis) regime that legitimizes out-of-court settlement efforts, regulates arbitration based on party agreement, and grants arbitral awards final and binding force with a defined enforcement procedure before the courts, thereby supplying the procedural backbone that allows construction-specific ADR pathways under the construction-services regime to culminate in enforceable decisions.

3.2. Forms of Dispute Resolution: ADR and Litigation

Construction disputes in Indonesia are generally channelled through non-litigation (ADR) and litigation pathways; each mechanism presents structural trade-offs that justify the search for a more integrated hybrid design.[19] In practice, negotiation is almost always attempted first because it is simple and inexpensive, yet it tends to stall in complex projects where there are power imbalances, information asymmetries, or multi-issue claims, so that unresolved matters are merely postponed rather than resolved.[20]

Expert judgement or adjudication, whether through ad hoc experts or dispute boards, can quickly clarify technical causation and quantum, thereby narrowing the dispute; however, its effectiveness is reduced when expert outputs are only provisionally binding or easily bypassed, so that parties simply relitigate the same engineering issues in later forums.[21] Arbitration offers confidentiality and a final, binding award with international enforceability; however, in construction practice, it often remains expensive, evidentially heavy, and adversarial, especially when technical issues were not filtered earlier; this can erode its expected advantages over litigation.[22] Litigation before the general courts, finally, operates as a residual pathway but is widely seen as slow, public, and less attuned to sector-specific technical complexity, making it a last resort rather than a preferred solution for time-sensitive construction projects.[23]

18 Law of the Republic of Indonesia no 30 of 1999 'On Arbitration and Alternative Dispute Resolution' (adopted 12 August 1999) <https://www.scribd.com/document/424953489/arbitrationindonesia-pdf> accessed 1 July 2026.

19 Taufik Hidayat and Sami'an, 'Construction Dispute Resolution: Alternative Construction Dispute Resolution, Mediation, and Arbitration' (2025) 8(3) Indonesian Interdisciplinary Journal of Sharia Economics 13002, doi:10.31538/iijse.v8i3.6347.

20 Amila NKK Gamage and Suresh Kumar, 'Review of Alternative Dispute Resolution Methods in Construction Projects' (2024) 9(2) Saudi Journal of Engineering and Technology 75, doi:10.36348/sjet.2024.v09i02.007.

21 Yudhantaka, Simamora and Anand (n 17).

22 Niniek Lannyati and Samian, 'Comprehending Non-Litigative Resolution of Construction Disputes Through Arbitration' (2025) 5(4) Journal of Law, Politic and Humanities 2659, doi:10.38035/jlph.v5i4.1599.

23 Supriyadi Supriyadi, Mohammad Gufron AZ and Kadek Wiwik Indrayanti, 'Juridical Review of Construction Contract Disputes in Indonesia' (2022) 13(3) Jurnal Cakrawala Hukum 325, doi:10.26905/idjch.v13i3.8916.

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3.3. Key Institutions Handling Construction Disputes

Indonesia's construction-dispute landscape is supported by several arbitration and ADR institutions that could serve as hosts for an EJMA hybrid model mechanism. BANI (Badan Arbitrase Nasional Indonesia) functions as the main general commercial arbitration forum and already provides services beyond arbitration, including mediation and other ADR procedures, making it a natural institutional anchor for an integrated expert mediation arbitration pathway. BADAPSKI operates as a construction-focused arbitration and ADR body that emphasizes decision makers with sectoral expertise[24]; therefore, it is particularly relevant for the expert-judgement and technical assessment components of the EJMA hybrid model. In parallel, the Ministry of Public Works and Housing (PUPR) has promoted Construction Dispute Boards (Dewan Sengketa Konstruksi) as preventive and project-embedded mechanisms for early dispute management in works financed by public funds or loans,[25] which can supply the standing expert forum envisaged at the front end of the EJMA hybrid model sequence. For projects with Sharia-based financing or contractual frameworks, BASYARNAS (Badan Arbitrase Syariah Nasional and MUI) provides a specialized forum that could host an EJMA hybrid model design adapted to Islamic legal principles. In the financial-services sphere, LAPS Sektor Jasa Keuangan (LAPS-SJK) offers an institutional ADR framework that, while not construction-specific, illustrates the growing recognition of structured, multi-tier dispute resolution within Indonesia's regulatory architecture and reinforces the feasibility of embedding EJMA-like hybrids in sectoral regimes.

3.4. Why Current Mechanisms Often Fall Short (Time, Cost, Confidentiality, and Technical Reliability)

Construction contract disputes in Indonesia typically combine tightly interwoven technical and legal issues, such as delay and disruption analysis, design changes, progress-payment certification, variation valuation, and workmanship quality, so any forum must be capable of testing engineering facts and contractual consequences in an integrated manner. However, court proceedings tend to be protracted, public, and formalistic, while judges may lack consistent sector-specific expertise; thus, litigation often struggles to handle complex construction evidence efficiently and to provide

24 Rumainur and Eeng Witjaksono, 'Legal Review of the Authority of the Indonesian Arbitration and Construction Dispute Settlement Board (Badapski) as an Alternative for Dispute Settlement in Indonesia' (2025) 8(12) International Journal of Social Science and Human Research 10108, doi:10.47191/ijsshr/v8-i12-106.

25 Jeffery Yuliyanto Waisapi, 'The Role of the Construction Dispute Board in The Settlement of Construction Disputes' (2023) 3(8) Eduvest - Journal of Universal Studies 1498, doi:10.59188/eduvest.v3i8.891.

commercially acceptable outcomes. Stand-alone ADR processes also reveal structural gaps when deployed in isolation: negotiation and mediation may reduce some conflicts but cannot guarantee finality when parties act strategically or refuse to comply with settlements, and expert judgement or adjudication may be bypassed or treated merely as evidentiary input, leading to duplication across forums rather than closure.[26] Even arbitration, which is generally preferred for its confidentiality and final, binding awards, can become expensive, evidentially heavy, and adversarial in large construction cases, especially when technical issues are not filtered early, so that tribunals effectively have to reconstruct the entire engineering narrative from scratch. Against this backdrop, many construction contracts adopt a baseline progression: negotiate, mediate, seek expert input, arbitrate, and only as a last resort, litigate; but this sequence remains fragmented in practice, with weak linkages between stages and no guarantee that the overall pathway will deliver outcomes that are both commercially efficient and legally robust. These recurring shortcomings motivate the normative search for a more integrated, staged mechanism that can stabilize technical facts early, channel them into genuine settlement efforts, and ultimately support an enforceable decision that is less vulnerable to challenge.

3.5. Empirical Indications: Trends, Compliance, and Annulment Risks in Arbitration

Practice indicators show that arbitration, particularly through BANI, has become an increasingly used forum in Indonesian construction disputes, reflecting the industry's preference for a faster, more specialized process than court litigation. This aligns with the normative design of arbitration under Indonesian law, which curbs protracted proceedings through a time ceiling of 180 days from the constitution of the tribunal, extendable only with the parties' consent. Yet the fragility of arbitral finality is illustrated by the Batam District Court Decision No. 147/Pdt.Sus-Arb/2024/PN Btm of 24 June 2024,[27] which annulled BANI Award No. 46013/II/ARB-BANI/2023 of 5 March 2023. The significance of this case lies in its legal basis. Under Article 70 of Law No. 30 of 1999, an arbitral award may be annulled only on narrow grounds: forged documents, concealment of decisive documents, or deceit discovered after the award, rather than on any error in the technical merits.[28] The recurring vulnerability therefore lies not in the substance of the engineering dispute but in the evidentiary integrity of the record underpinning the

26 Amaliyah Noor Indahwati, Sami'an and Sarwono Hardjomuljadi, 'Arbitration in Resolving Construction Cost Claim Disputes Due to Time Extensions: A Study of Contract Law in Indonesia' (2024) 6(2) SIGn Jurnal Hukum 263, doi:10.37276/sjh.v6i2.388.

27 Decision no 147/Pdt.Sus-Arb/2024/PN Btm (PN Batam, 24 June 2024).

28 Setyawati Fitrianggraeni, Eva Fatimah Fauziah and Sri Purnama, 'Dealing with Unsatisfactory Arbitral Awards: Observing the Grounds of Annulment of Arbitral Awards in Indonesia' (2023) 40(6) Journal of International Arbitration 735, doi:10.54648/joia2023030.

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award. This directly justifies the EJMA design: by placing documented, independent expert judgement at the front end and enforcing procedural discipline at the arbitration stage, the model strengthens the evidentiary basis of the eventual award and narrows the grounds on which annulment can succeed.

4 NORMATIVE DESIGN OF THE EJMA HYBRID MODEL FOR EFFECTIVE AND EFFICIENT RESOLUTION

This section formulates the normative design of the Expert Judgement Mediation and Arbitration (EJMA) hybrid model as a tiered dispute resolution architecture tailored to the technical and commercial realities of construction projects. Building on the shortcomings identified in existing mechanisms, the EJMA hybrid model is structured to (i) stabilize and narrow the dispute through an early, expert-driven clarification of technical facts and causation, (ii) convert clarified technical positions into negotiable settlement options through confidential, facilitated mediation, and (iii) preserve legal certainty by providing a final, binding arbitral award when agreement cannot be achieved. The discussion therefore focuses on how the EJMA hybrid model should be designed under Indonesian law, its procedural sequence, escalation triggers, institutional roles, standards of assessment, and safeguards to ensure efficiency and relationship preservation without sacrificing enforceability and alignment.

4.1. Concept and Rationale of the EJMA Hybrid Model

The EJMA hybrid model combines expert judgement, mediation, and arbitration in a single tiered process designed to balance efficiency, substantive justice, flexibility, and legal certainty in construction disputes, particularly in large-scale EPC-type projects.[29] In the first stage, independent experts clarify technical issues and quantify claims, which narrows the dispute and filters out matters that do not warrant full adjudication; mediation then uses this stabilized factual record to facilitate interest-based negotiation and voluntary settlement; and only unresolved, material issues proceed to arbitration, where a final and binding award is rendered, backed by the general framework of the Arbitration and ADR Law. This structure reduces duplication between forums, encourages earlier and more informed settlement, preserves working relationships through the consensual middle stage, and ensures that any ultimate adjudicative outcome remains grounded in technical realities while retaining enforceability. The main advantages of the EJMA hybrid model compared to stand-alone ADR or pure arbitration can be summarized as follows.

29 John Uff, *Construction Law* (8th edn, Sweet & Maxwell 2002).

***Table* 1. Advantages of the EJMA Model**

Aspect	Advantages
Time and cost efficiency	Each stage filters out issues, so only substantial disputes proceed to arbitration.
Substantive justice	Expert opinions ensure that decisions are based on technical facts, not just legal arguments.
Flexibility	The parties may terminate the process at any stage if an agreement is reached.
Legal certainty	Arbitration outcomes remain final and enforceable, without disregarding engineering aspects.

As shown in Table 1, the EJMA hybrid model is designed not merely to combine existing mechanisms, but to sequence them in a way that simultaneously reduces time and cost, strengthens the factual and substantive basis of outcomes, preserves consensual resolution options, and secures a final decision that remains enforceable in line with the Indonesian arbitration framework.

4.2. Design Principles and Safeguards (Efficiency, Fairness, Confidentiality, Due Process, Independence)

Construction disputes require design choices that go beyond a purely textual reading of contract clauses or statutory provisions, because the disputes arise within complex socio-economic relationships among owners, contractors, consultants, and suppliers, often under tight project pressures and unequal bargaining positions. For that reason, the EJMA hybrid model must be built on principles and safeguards that ensure that speed does not erode legitimacy: efficiency (clear sequencing and time limits), fairness (balanced participation and proportional outcomes), confidentiality (to protect commercial information and ongoing projects), due process (a genuine right to be heard and to respond), and independence (neutral decision-makers with robust conflict-of-interest controls). These safeguards also address recurring practical risks in construction disputes: information gaps, technical asymmetry, and power imbalance that can distort outcomes if the process is not carefully structured.[30]

From a sociological jurisprudence perspective, the mechanism should function as an instrument of social problem-solving and relationship repair, not merely a forum for legal victory. In construction projects, where performance must often continue during disputes, safeguards such as structured party participation, non-adversarial

30 Jeffry Yuliyanto Waisapi, 'Analysis of Construction Dispute Resolution Reform Perspective of Law Number 2 of 2017' (2024) 4(6) Journal of Law, Politic and Humanities 2524, doi:10.38035/jlph.v4i6.780.

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communication channels, and confidential facilitated dialogue help prevent project disruption and preserve the continuing relationship.[31] This is why the EJMA hybrid model emphasizes early technical clarification and mediated engagement: they reduce escalation and support restorative and preventive justice by resolving the dispute while maintaining cooperation and project continuity.

From the standpoint of legal philosophy, the EJMA model is designed to reconcile substantive justice with formal legal certainty rather than to treat them as rivals. The rationale for each stage is specific. Expert judgement advances substantive justice because, in construction disputes, material truth resides largely in engineering facts such as the causes of delay, the value of variations, and the quality of works. Stabilizing those facts through an independent expert ensures that the outcome rests on technical reality rather than on litigation skill.[32] Arbitration, in turn, secures formal justice through a final and binding award, since legal certainty is a function of predictability and enforceability, the very values that judicial annulment of arbitral awards places at risk.[33] Mediation bridges the two by converting the stabilized technical truth into an interest-based settlement accepted by the parties themselves. This design is reinforced by two theoretical commitments. First, Rawls' justice as fairness requires procedural equality: both parties must have an equal opportunity to submit technical evidence at the expert stage, to engage in balanced dialogue at mediation, and to receive a due-process-compliant hearing at arbitration, so that outcomes are not dominated by economic power.[34] Second, a progressive conception of law, which holds that law must serve substantive justice rather than rigid procedural form, grounds the requirement that the mechanism remain adaptive in practice (law in action).[35]

Conceptually, these principles translate into a workable safeguard architecture based on three pillars: tiered filtration, technical legal integration, and procedural flexibility. Tiering ensures proportional escalation: technical issues are stabilized early before legal adjudication; integration ensures that expert outputs are usable and transparently carried into mediation/arbitration; and flexibility allows termination at any stage once settlement is reached.[36] To operationalize these safeguards, the EJMA hybrid model should include (i) independence and disclosure rules for experts/mediators/arbitrators (including challenge procedures), (ii) confidentiality undertakings across all stages, (iii) equality of

31 Hansen Seng, 'A Sociolegal Analysis of Land Mafia Practices in Construction Projects' (2023) 15 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 4523021, doi:10.1061/JLADAH.LADR-980.

32 Gamage and Kumar (n 20).

33 Udechukwu Ojiako, 'The Finality Principle in Construction Arbitration: An Evolutionary Perspective' (2023) 15(1) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 4522035, doi:10.1061/(ASCE)LA.1943-4170.0000591.

34 John Rawls, *A Theory of Justice* (rev edn, Harvard UP 1999).

35 Satjipto Rahardjo, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia* (Genta Pub 2009).

36 Waisapi, 'Analysis (n 30).

arms protections (balanced access to documents and the right to respond), and (iv) due process minimums (notice, opportunity to be heard, reasoned outcomes, and an auditable procedural record). These safeguards are consistent with the efficiency and proportionality orientation of out-of-court resolution under Indonesia's ADR framework, including the spirit of Article 6 of Law No. 30/1999, which encourages swift and fair settlement outside the courts. The effectiveness of the EJMA hybrid model ultimately depends on how clearly it is embedded in the parties' arbitration clause, since imprecise or pathological drafting can generate jurisdictional disputes and undermine the very finality that hybrid ADR is meant to secure.[37]

4.3. Party Involvement at Each Stage (Expert Judgement ⟶ Mediation ⟶ Arbitration)

4.3.1. Expert Judgement (Technical Expert Assessment)

At this initial stage, both parties appoint an independent expert or panel of experts, typically senior engineers, quantity surveyors, or construction law specialists, to assess complex technical issues such as delays, variations, quality defects, or cost discrepancies,[38] based on contract documents, progress reports, and site inspections. Although the expert's assessment is not legally binding, it carries significant evidentiary weight and provides the factual foundation for the subsequent mediation and arbitration stages.[39] The resulting report is transparent, accessible to all parties, and does not constitute a confidential communication.

A key design choice in the EJMA model concerns whether the same neutral may act across all three stages. Consistent with established international practice, this article adopts a separation-of-roles approach: the expert, the mediator, and the arbitrator must be different persons in the same dispute. This safeguards two fundamental principles. The first is independence and impartiality (nemo judex in causa sua), which requires that the arbitrator hold no interest or knowledge acquired outside the adversarial context. The second is the confidentiality of mediation (without-prejudice privilege): a neutral who has heard the parties' confidential positions as mediator cannot, in fairness, later decide the same dispute as arbitrator, since that decision could be influenced by information obtained outside the formal proceedings.

This approach aligns with leading comparative frameworks. The SIAC-SIMC Arb-Med-Arb Protocol expressly requires that the arbitrator(s) and mediator(s) be appointed separately

37 Qais Mahafzah and Mohammad Taha Alflaieh, 'Proper Legal Drafting of Arbitration Clauses' (2023) 11(12) Journal of Law and Sustainable Development e1948, doi:10.55908/sdgs.v11i12.1948.

38 Waisapi, 'The Role (n 25).

39 Nurindria Naharista Vidyapramatya and others, 'Authority of the Dispute Council in the Resolution of Construction Disputes in Indonesia' (2023) 19(1) Law Reform 88, doi:10.14710/lr.v19i1.49141.

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and independently,[40] and the FIDIC dispute-board system likewise keeps the technical adjudicator distinct from the arbitral tribunal. Indonesian practice under the BANI Rules 2025 is more permissive, allowing an arbitrator to also act as a mediator where the parties so agree;[41] however, the EJMA model deliberately departs from this permissive stance in favor of clearer procedural legitimacy.

Continuity of understanding across stages is preserved not through the continuity of persons, but through the documented technical record. The expert's reasoned report travels forward as a shared factual basis for both mediation and arbitration, so that each successive neutral inherits an established technical foundation without the parties having to reconstruct the facts from the beginning. This design secures the efficiency benefits of case familiarity while maintaining the independence that separation of roles requires.

4.3.2. Mediation (Facilitation of Peaceful Negotiation)

If the expert opinion does not resolve the dispute, the matter progresses to mediation, where a neutral third-party mediator facilitates discussions between the parties to help them reach a voluntary settlement.[42] At this stage, both parties participate actively in discussions, often presenting their views based on the expert's findings. The mediator assists by exploring common ground and proposing potential solutions, ensuring that the discussions remain focused on resolving the dispute amicably.

4.4. Risks and Weakness

The most fundamental limitation of mediation as a dispute resolution mechanism is its reliance on voluntary participation and good-faith cooperation of all parties. In contrast to arbitrations that end in binding awards that can be enforced under the New York Convention, mediation does not produce an enforceable outcome unless the parties reach and formalize a settlement agreement.[43] In the context of construction contract disputes that often arise between parties who are already in opposite positions after project failure, cost overruns, or defective claims, the conditions for meaningful voluntary involvement can be structurally disrupted from the outset.[44]

40 Singapore International Arbitration Centre, *Annual Report 2024* (SIAC 2025).

41 Badan Arbitrase Nasional Indonesia, *Arbitration Rules* (BANI 2025).

42 Alen Panov and others, 'Alternative Ways of Resolving Disputes in the Field of Contract Law' (2024) 13(76) Revista Amazonia Investiga 258, doi:10.34069/AI/2024.76.04.21.

43 Sen Lin, Keyao Li and Saion Cheung, 'Managing Disputes for a Sustainable Construction: A Perspective of Settlement Facilitating Elements in Negotiations' (2023) 13(10) Buildings 2578, doi:10.3390/buildings13102578.

44 Cao and Cheung (n 6).

In the EJMA model, this risk is structurally mitigated by the sequential design of the mechanism: the existence of prior expert determination (Phase 1) provides an empirical foundation for mediation discussions, narrowing the area of factual dispute and reducing the room for strategic non-engagement. Nevertheless, it is recognized that a deadlock in mediation remains a real possibility, particularly in high-value disputes where the parties may consider that a full arbitration hearing offers a more favorable outcome than the compromise inherent in mediation settlement. To present a balanced analysis, this study is equipped with an evaluative framework that systematically maps the strengths, weaknesses, opportunities and threats (SWOT) of the proposed model. This analysis is not intended to undermine the central thesis of the study, but rather to reinforce its validity by objectively demonstrating the structural limits of the proposed model. This analysis is presented in the following table.

***Table* 2. SWOT Analysis of the Mediation Phase in the EJMA Model**

Strength	**Weakness**
Technical objectivity through independent expert determination, reducing informational asymmetries prior to negotiation. Structured sequential design provides an empirical anchor for mediation discussions, narrowing the zone of factual dispute Facilitates staged amicable settlement before recourse to costly arbitration Enforceability of mediated settlements as consent awards under the New York Convention through the SIAC-SIMC AMA Protocol	Cumulative costs across three phases generate multiple sets of professional fees, potentially exceeding the cost of a single arbitration Expert report functions as a 'factual anchor', narrowing the scope of negotiation and constraining party autonomy Risk of stronger parties exploiting mediation to delay arbitration through bad-faith engagement Expert selection difficulties: disagreement on the appropriate expert may produce an impasse at the first phase.
EXTERNAL FACTORS	
Opportunities	**Threat**
Singapore Convention on Mediation (2020) strengthens enforceability of international mediated settlements on par with arbitral awards	Risk of mediation communications leaking into arbitration if information firewall protocols are not rigorously applied.

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Opportunities	Threat
Growing cross-border construction disputes within BRI and ASEAN corridors increase demand for hybrid model penetration across common law and civil law jurisdictions Compatibility with FIDIC 2017 DAAB, already established as the international standard construction contract, facilitates institutional adoption. Opportunity for codification of the hybrid model as a standard clause by leading arbitral institutions (ICC, SIAC, AIAC, and BANI).	Legal uncertainty in jurisdictions that have not adopted the Singapore Convention or lack specific mediation legislation Risk of arbitral award annulment if an arbitrator is shown to have accessed confidential information from the mediation phase Resistance from parties accustomed to single-mechanism dispute resolution (direct arbitration), perceived as simpler and more certain

This model addresses this structural shortfall through the institutional design of the Arb-Med-Arb SIAC-SIMC protocol (2014, updated 2024), under which any settlement reached during the mediation phase '*shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms*.'[45] Consent awards recorded in this way are accepted as arbitral awards under the New York Convention and can be enforced in more than 170 jurisdictions. This design converts potentially unenforceable contractual settlements into internationally enforceable arbitral awards, thus effectively eliminating the enforceability gap that would otherwise be inherent in the mediation phase.

Nonetheless, it is recognized that the conversion of a mediation settlement into an arbitration consent award requires the affirmative cooperation of the arbitral tribunal and can be opposed by a party on the basis that there was no actual 'dispute' at the time the award was rendered, given that the parties had reached an agreement in the mediation. This challenge of 'no dispute' is an unresolved doctrinal risk in jurisdictions that interpret arbitrability strictly and is an inherent limitation of hybrid model design that cannot be eliminated through contract drafting.[46]

45 Singapore International Arbitration Centre, *Arb-Med-ArbArb-Med-Arb SIAC-SIMC Protocol* (2024) <https://simc.com.sg/Arb-Med-ArbArb-Med-Arb> accessed 1 July 2026.

46 Nurbaedah, 'The Disparity Between Arbitration Award Number 01/LPS-PBJP/01/2024 and Kediri District Court Decision Number 56/Pdt.Sus-Arb/2024/PN Kdr on the Settlement of a Dispute over Green Open Space Land in the Kediri City Square' (2026) 24(1) Al Qidiri: Jurnal Pendidikan, Sosial dan Keagamaan 567, doi:10.53515/alqodiri.v24i1.165.

4.5. Challenges and Implementation

Beyond the structural risks discussed above, the implementation of the mediation phase in the EJMA model faces practical challenges that are particularly relevant in the context of the construction industry. Construction disputes often involve complex technical issues of delays, attribution of defects, and assessment of variances that may require a mediator with specialized knowledge of construction contracts, engineering standards, and project management practices. The scarcity of such specialist construction mediators, particularly in developing jurisdictions, is a significant obstacle to effective implementation.[47]

4.6. Confidentiality of Mediation and Prohibition of Submission of Mediation Records to the Arbitration Panel

Mediation confidentiality and without-prejudice privilege are not mere procedural conventions; they are both substantive principles that underpin the overall benefits of mediation as a dispute resolution mechanism. As stated by the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center: '*confidentiality serves to encourage frankness and openness in the process by assuring the parties that any admissions, proposals, or offers for settlement will not have any consequences beyond the mediation process.*'[48] Without these guarantees, the parties will be forced to hide their true interests, withhold their reservation prices, and engage in strategic behavior rather than problem-solving, thus rendering the mediation process futile.

The mediator and the arbitration panel must be appointed separately from an independent neutral group. No individual acting as a mediator may act as an arbitrator in the same dispute, except with the unanimous written consent of all parties. This principle reflects the institutional design of the SIAC–SIMC Arb–Med–Arb (AMA) Protocol and is treated as a structural feature that cannot be ruled out of the EJMA model.[49]

The EJMA dispute resolution agreement must contain an explicit provision, binding on all parties and their legal representatives, that: (a) all statements, documents, acknowledgements, concessions, and offers made during the mediation phase are protected by without-prejudice privilege; (b) none of such communications are admissible in, or submitted to, the arbitration proceedings; and (c) such prohibition applies regardless of the relevance or evidentiary value of such information to the case in arbitration. This clause

47 Paul Yohanna and others, 'Effectiveness of Mediation in Reducing Dispute Resolution Time in Construction Projects' (2026) 41(1) Revista Ingeniería de Construcción 1, doi:10.7764/RIC.00176.21

48 'What is Mediation?' (*World Intellectual Property Organization (WIPO)*, 2025) <https://www.wipo.int/en/web/amc/mediation/guide/index#whatis> accessed 1 July 2026.

49 MRDP Wijerathna, MARN Kularathna and KGAS Waidyasekara, 'Challenges Encountered by Contractors in the Practice of Construction Arbitration' (2026) 18(3) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 4526022, doi:10.1061/JLADAH.LADR-1525.

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reflects the language of the JAMS Comprehensive Arbitration Rules, Rule 22(f) and the JAMS International Mediation Rules, Rule 11.

At the beginning of the mediation phase, all parties, their legal representatives, and the technical experts present in the mediation must sign a written confidentiality guarantee acknowledging: (a) the binding nature of the mediation's confidentiality obligations; (b) prohibition on relying on mediation communications in any subsequent arbitration or tribunal proceeding; and (c) that such breach of warranty may result in punitive costs, adverse inferences, and orders to exclude evidence in arbitration proceedings.[50]

4.7. Arbitration (Final and Binding Decision)

If mediation does not result in a settlement, the dispute proceeds to arbitration, where an arbitrator (or arbitration panel) makes a final, binding decision. In this stage, the parties submit the relevant documentation, including the expert reports and any admissible evidence presented during the earlier stages, to the arbitrators. Consistent with the confidentiality regime governing the mediation phase, however, communications, offers, and concessions made during mediation are protected by without-prejudice privilege and are not admissible before the arbitral tribunal. Both parties may also present witnesses and expert testimony to support their arguments.

The role of the parties at this stage is to appoint the arbitrators, draft the Terms of Reference for the arbitration, and participate fully in hearings, including providing evidence, answering questions, and cross-examining witnesses.[51] The arbitrators will then render a decision based on the legal and technical arguments presented during the proceedings. While arbitration is the final stage, the earlier expert and mediation stages still influence the decision, as they help frame the technical issues and establish a record of the parties' positions. The arbitrator's decision is legally enforceable, providing a clear and final resolution to the dispute.[52]

Throughout the entire process, party involvement ensures that both sides can present their case, engage in dialogue, and seek a resolution. This structured participation is crucial for maintaining fairness, protecting each party's rights, and ensuring that the dispute is handled efficiently, in line with both technical realities and legal requirements.[53]

50 Ramadurai Venkataraghavan, 'Beyond the Courtroom: The Essential Role of Expert Determination in Alternative Dispute Resolution' (2026) 18(1) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 4525096, doi:10.1061/JLADAH.LADR-1371.

51 Indahwati, Sami'an and Hardjomuljadi (n 26).

52 Muhammad Imam Dani Putra and Hengki Andora, 'Position of Dispute Board in Construction Dispute Resolution in Indonesia' (2023) 10(6) International Journal of Multicultural and Multireligious Understanding 344, doi:10.18415/ijmmu.v10i6.4796

53 Ng and Banaitis (n 2).

The transition from mediation to arbitration is the most legally sensitive intersection in the hybrid model. The transition formally begins with the mediator's statement that the mediation process has ended without resulting in a binding settlement agreement. This statement is designed to be as narrow in scope as possible: it only notes the final result of the failure to reach a settlement without disclosing the position of each party, the issues that cannot be resolved, the settlement offers submitted or rejected, or the mediator's own facilitative observations during the process.

This restriction reflects the absolute scope *of the without-prejudice privilege* as recognized in Article 9 of the UNCITRAL Model Law on International Commercial Mediation (2018).[54] Any disclosure that goes beyond a simple statement of mediation failure would violate this privilege and potentially be the basis for an exception to the mediator's own statement in subsequent proceedings. The arbitration panel is further established through a completely independent appointment process, which is administered by a designated arbitration body. Panel members must meet the requirements of applicable standards of impartiality and independence under relevant institutional rules including, as applicable, the ICC Arbitration Rules 2021 (Article 11),[55] and the SIAC Rules 2025 (Rule 14).[56] It is a condition that cannot be ruled out in this model that no person who has participated in Phase 1 as a designated expert, nor in Phase 2 as a mediator or co-mediator, can be appointed as an arbitrator in the same dispute.

Finally, the expert assessment report from Phase 1 is officially resubmitted back to the arbitration panel as one of the items of documentary evidence in the early stages of the arbitration trial. This resubmission is procedurally different from the submission of the report to the parties that was originally carried out. The arbitral tribunal shall have full discretion in assessing the weight to be given to the report, and may, where it deems appropriate, exercise its authority under Article 6 of the same Rules to appoint *tribunal-appointed experts* to supplement or test the findings of the Phase 1 report.

54 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use (2018)* (UN 2022).

55 International Chamber of Commerce, *Rules of Arbitration* (ICC 2021) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> accessed 1 July 2026.

56 Singapore International Arbitration Centre, *Arbitration Rules* (7th edn, SIAC 2025) <https://siac.org.sg/siac-rules-2025> accessed 1 July 2026.

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5 ENFORCEABILITY DESIGN: FROM MEDIATION OUTCOMES TO BINDING RESULTS (CONSENT AWARD) AND THE ROLE OF EXPERT OPINION

The enforceability of outcomes in the EJMA hybrid model is critical to ensuring that the process results in definitive, legally binding resolutions. A unique feature of this hybrid model is how it bridges the non-binding stages (Expert Judgement and Mediation) with the final, enforceable decision made in Arbitration. This ensures that the entire process maintains legal certainty while preserving flexibility, encouraging parties to participate in settlement discussions at earlier stages with the confidence that any agreement reached will be upheld.[57]

5.1. From Mediation Outcomes to Binding Results (Consent Award)

While mediation results are typically non-binding, the EJMA hybrid model includes provisions that transform successful mediation outcomes into legally enforceable agreements. When the parties reach an agreement during the mediation phase, the mediator prepares a settlement agreement that outlines the terms of the resolution. Importantly, this agreement can be formalized as a consent award. A consent award is a formally recognized legal instrument within the arbitration process, and once it is signed by both parties, it can be registered with the relevant court (e.g., the District Court) for enforcement purposes.[58]

This approach effectively improves the enforceability of mediated agreements, which are typically difficult to enforce unless there is a subsequent agreement to make them binding. The consent award ensures that mediation outcomes are not merely advisory but are given the same weight as an arbitration decision, providing a clear path for enforcement if one party fails to comply with the settlement terms. Thus, the mediation stage, which focuses on maintaining business relationships and reaching a win-win solution, is made legally enforceable, offering both parties the assurance that their negotiated settlement will be upheld in a court of law.[59]

57 Cao and Cheung (n 6).

58 Yaraslau Kryvoi and Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement' (2015) 40(3) Brooklyn Journal of International Law 827.

59 Suprihantosa Sugiarto, 'Online Dispute Resolution (ODR) Sebagai Alternatif Penyelesaian Sengketa Di Era Modernisasi' (2019) 3(1) Qawānïn Journal of Economic Syaria Law 50, doi:10.30762/q.v3i1.1484.

5.2. Role of Expert Opinion in Enforceability

The role of expert opinion is pivotal in strengthening the enforceability of the entire process. In the Expert Judgement stage, the independent technical assessment provided by the expert panel serves as a critical reference point for both mediation and arbitration. The expert's findings are not only important for clarifying the technical aspects of the dispute, such as delays, quality defects, or variations, but they also carry significant evidentiary weight in subsequent stages of the dispute resolution process.

Expert opinions provide a solid factual basis for mediation discussions, helping to shape realistic and acceptable settlement terms. If the dispute proceeds to arbitration, the expert's findings become important evidence for the arbitrators to consider when making the final decision. This linkage between expert opinion and enforceability is one of the key strengths of the EJMA hybrid model: it allows technical issues to be resolved and preserved at every stage, ensuring that the arbitral award is grounded in accurate and mutually accepted technical facts rather than legal argument alone. Because the expert's findings are impartial and integrated from the outset, they also strengthen the eventual award against annulment based on alleged factual inaccuracy, ensuring that both technical and legal dimensions rest on a firm foundation.[60] The enforceability design in the EJMA hybrid model thus not only preserves flexibility during mediation but also ensures that a successful mediated settlement is translated into a binding outcome through the consent award.

6 COMPARATIVE LESSONS SUPPORTING EJMA HYBRID MODEL (FIDIC DAB, MALAYSIA CIPAA 2012, SINGAPORE ARB-MED-ARB)

In selecting the comparative references for this study, this article deliberately focuses on three influential models: the FIDIC Dispute Adjudication Board (DAB), Malaysia's Construction Industry Payment and Adjudication Act (CIPAA) 2012, and Singapore's Arb-Med-Arb protocol. The FIDIC DAB is examined because it operates as a de facto global standard in many international construction projects, including in Europe, and represents a mature form of dispute board practice. CIPAA 2012 is chosen as a statutory adjudication regime in a developing Asian jurisdiction that faces structural challenges similar to those of Indonesia in managing payment disputes and cash-flow risks in construction. The Arb-Med-Arb framework in Singapore is included as one of the most prominent hybrid mechanisms recognized in international arbitration practice. Together, these three models provide complementary building blocks for the design of the EJMA hybrid model informing its tiered filtration of issues, the use of consent awards to strengthen enforceability, and the structured integration of expert judgement, mediation, and arbitration into a single coherent sequence.

60 Ng and Banaitis (n 2).

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The design of the EJMA hybrid model is informed by successful comparative practices from other countries that have implemented hybrid dispute resolution systems in construction. These systems, though differing in procedural details, share core features namely, the integration of expert judgement, mediation, and arbitration to resolve disputes efficiently while maintaining fairness and legal certainty.

6.1. The United Kingdom and the FIDIC System

The Dispute Adjudication Board (DAB) system, as applied in FIDIC contracts, has proven to be effective in managing disputes in international construction projects.[61] DAB decisions are binding unless revised, meaning that the parties must implement the decision immediately unless there is a subsequent settlement or arbitration ruling. The DAB mechanism ensures project continuity, prevents work stoppages, and provides efficiency by resolving issues quickly through provisional decisions that must be followed until further revision. These practices align well with the EJMA approach, where expert assessments provide the technical foundation, followed by mediation, and concluding with arbitration if necessary. The efficiency of DAB offers a useful comparative model for incorporating expert and arbitration stages within a hybrid framework, reducing time and cost for the parties involved.

6.2. Malaysia and the Construction Industry Payment and Adjudication Act (CIPAA) 2012

Malaysia's CIPAA 2012 introduces a fast adjudication process that must be exhausted before escalating to arbitration or litigation.[62] This mandatory adjudication for construction payment disputes aims to provide a swift resolution (typically within 100 days) and ensures that payments are made promptly, thus maintaining the financial flow of construction projects. Like the FIDIC model, CIPAA's adjudication decisions are provisional and binding, offering enforceability unless revised in arbitration or court. This system mirrors aspects of the EJMA's hybrid model, where technical issues are resolved first through expert judgement and, if necessary, proceed to mediation or arbitration. CIPAA's focus on rapid adjudication enhances the efficiency and certainty of dispute resolution, ensuring that disputes are addressed without unduly delaying project completion.[63] This system is particularly relevant to the EJMA hybrid model, as it emphasizes fast resolution and certainty, helping to prevent project delays.

61 Jeremy Glover, 'FIDIC Dispute Adjudication Boards' (2014) 12 Fenwick Elliott, International Quarterlies <https://www.fenwickelliott.com/knowledge-hub/international-quarterlies/issue-12/fidic-dispute-adjudication-boards/> accessed 1 July 2026.

62 Asian International Arbitration Centre, *Construction Industry Payment and Adjudication Act 2012* (AIAC 2018) <https://www.aiac.world/Adjudication-Adjudication> accessed 1 July 2026.

63 Tay Zi Keng and Kong Sio Kah, 'Effectiveness of Construction Industry Payment and Adjudication Act (CIPAA) In Remedying Payment Issues Among Sub-Contractors' (2018) 2(5) INTI Journal-Built Environment 1.

6.3. Singapore and the Arb-Med-Arb Protocol

In Singapore, the Arb-Med-Arb protocol integrates arbitration, mediation, and arbitration in a seamless process. Under this protocol, disputes are initially filed as arbitration cases with the Singapore International Arbitration Centre (SIAC), but the arbitration process is suspended to allow mediation at the Singapore Mediation Centre (SMC) or Singapore International Mediation Centre (SIMC). If the mediation is successful, the settlement agreement is converted into a consent award by the arbitration tribunal, which carries the same enforceability as a standard arbitration award. If mediation fails, the dispute automatically proceeds to full arbitration, ensuring that a final decision is made. This integration of mediation as an intermediary step provides a structured process to encourage settlement while maintaining legal certainty.[64] The EJMA hybrid model incorporates a similar philosophy, where expert judgement precedes mediation, and arbitration ensures finality when necessary. The Singapore model's use of consent awards adds a layer of enforceability to the mediation stage, which can be directly applied in the EJMA hybrid model through the formalization of mediation outcomes into binding awards.

To highlight the main comparative lessons, Table 3 below summarizes the key normative principles found in the United Kingdom (FIDIC DAB), Malaysia (CIPAA 2012), and Singapore (Arb-Med-Arb), and indicates how these can inform the Indonesian design of the EJMA hybrid model.

***Table* 3. Normative Principles That Indonesia Can Adopt Based on Comparative Law of Other Countries**

Aspect	UK (FIDIC DAB)	Malaysia (CIPAA 2012)	Singapore (Arb-Med-Arb)	Implications for Indonesia
Type of Mechanism	Dispute Adjudication Board	Fast adjudication	Integrated Mediation Arbitration	Combination of all: Hybrid Expert Mediation Arbitration
Nature of the Decision	Provisionally binding (binding unless revised)	Provisionally binding	Mediation may result in a consent award	May be arranged as a provisional decision that must be implemented

64 Peter Pettibone, John S Siffert and Angela Zhu, 'An Examination of Institutional Arb-Med-ArbArb-Med-Arb Protocols and Practices' (2022) 76(1) Dispute Resolution Journal 99.

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Aspect	UK (FIDIC DAB)	Malaysia (CIPAA 2012)	Singapore (Arb-Med-Arb)	Implications for Indonesia
Main Purpose	Ensuring the continuity of the project	Ensuring payment and smooth progress of the project	Accelerating completion and efficiency	Ensuring the sustainability, fairness, and efficiency of the project
Implementing Agency	DAB/FIDIC	AIAC (Asian International Arbitration Centre)	SIAC + SIMC	BANI + LPJK + PUPR
Processing Time	Relatively quick (depending on the contract)	±100 days	Flexible, integrated	Recommended 60–120 days per stage
Execution Strength	Binding unless revised	Enforceable by the High Court	Mediation outcome = consent award	Requires legal basis for enforcement under the Supreme Court

As shown in Table 3, each jurisdiction offers a distinct element provisionally binding decisions supporting project continuity (FIDIC DAB), rapid statutory adjudication to secure payment (CIPAA), and enforceable mediated settlements through consent awards (Arb-Med-Arb) which, if combined and adapted, can underpin EJMA as a hybrid mechanism that is both practically workable and normatively grounded in the Indonesian context.

7 IMPLEMENTATION STRATEGY IN INDONESIA: INSTITUTIONS, CONTRACT CLAUSES, AND REGULATORY REFORM

The operationalization of the EJMA hybrid model in Indonesia requires a pragmatic strategy that prioritizes project continuity above all else. Indonesia, although not yet explicitly regulated through a single hybrid ADR framework, has the opportunity to reform its construction governance by adopting the British principle 'pay now, argue later'. This principle, rooted in the FIDIC DAB system, ensures that infrastructure development remains uninterrupted by requiring parties to execute expert decisions immediately, while reserving the right to challenge such decisions in later arbitration.[65]

65 Sarwono Hardjomuljadi, 'Use of Dispute Avoidance and Adjudication Boards' (2020) 12(4) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 3720004, doi:10.1061/(ASCE)LA.1943-4170.0000431.

To avoid institutional overlap, the proposed strategy distinguishes between the technical-preventive role of the Construction Dispute Resolution Board (CDRB) and the adjudicative-final role of BANI. The establishment of a CDRB under the oversight of the Ministry of Public Works (PUPR) and the Construction Services Development Board (LPJK) is proposed not as a substitute for arbitration, but as a mandatory technical filter. Unlike BANI, which focuses on rendering a final legal award, the CDRB functions as a front-end mechanism designed to stabilize technical facts during the project lifecycle.[66]

By mandating that disputes must pass through a CDRB-led expert judgement and mediation phase before entering the arbitral tribunal, the system ensures that BANI only receives cases that are purely legal in nature and have failed all settlement attempts. This gatekeeper role prevents BANI from being overburdened with complex engineering fact finding, thereby optimizing the duration and cost efficiency of the entire dispute ecosystem.[67] To ensure that this strategy is enforceable, two specific regulatory actions are required:

1) Legislative Amendment: Reforming Law No. 2 of 2017 to explicitly recognize the interim binding status of CDRB decisions. This provides the statutory basis for the 'implement-first' rule, where refusal to implement a CDRB technical decision can be categorized as a breach of statutory duty.[68]

2) Procedural Integration via PERMA: To ensure that the filter is effective, a Supreme Court Regulation (PERMA) should be issued to recognize CDRB- mediated settlements as consent awards. This bridges the institutional gap between the CDRB and the judiciary, ensuring that agreements reached at the filter stage carry the same weight as a court-sanctioned arbitral award.[69]

The implementation must be finalized through the standardization of dispute clauses in all state-owned EPC contracts. These clauses must clearly delineate the EJMA hybrid model sequence, providing specific triggers and strict timelines. This structural clarity prevents parties from bypassing the CDRB filter, ensuring that Justice as Fairness is upheld by providing a fast, merit-based resolution for all actors, including smaller subcontractors who are most vulnerable to project delays.

66 Putra and Andora (n 52).
67 Waisapi, 'Analysis (n 30).
68 Putra and Andora (n 52).
69 Hardjomuljadi (n 65).

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8 SUBSTANTIVE JUSTICE AS THE NORMATIVE ANCHOR OF EJMA'S NOVELTY VIS-A-VIS THE FIDIC TIERED STRUCTURE

Both FIDIC's multi-tiered dispute resolution structure and the EJMA model rest on a filtration logic: disputes are screened stage by stage so that only genuinely intractable issues reach arbitration. Within FIDIC's rainbow suite, the 1999 Edition (Clause 20) sets out three tiers: the Engineer's determination, referral to a Dispute Adjudication Board (DAB), and then arbitration, while the 2017 Edition separates claims (Clause 20) from disputes (Clause 21) and rebrands the DAB as a Dispute Avoidance/Adjudication Board (DAAB), adding an explicit dispute avoidance function.[70] Functionally, the Engineer's determination corresponds to EJMA's Expert Judgement stage, and arbitration is final in both models. The decisive difference lies in the middle tier: FIDIC places adjudication (DAB/DAAB), whereas EJMA places mediation.

***Table* 4. Comparison of Dispute Resolution Stages in FIDIC and EJMA**

Function	FIDIC 1999/2017	EJMA	Note
Upstream technical clarification	Determined Engineer (Cl. 3.5 / 3.7)	Expert Assessment (Phase I)	Both place technical assessment as the first gateway
Interim adjudication	DAB / DAAB (Cl. 20 / 21)	(no direct equivalent)	This is where EJMA differs
Consensual settlement	Amicable settlement negotiation (Cl. 20.5 / 21.5)	Structured mediation (Phase II)	FIDIC refers to negotiation; EJMA formalizes it into mediation and a consent award
Final adjudication	Arbitration (ICC)	**Arbitration** (Phase III)	The same

Viewed through the theory of substantive justice, this difference is consequential. Substantive justice requires that the outcome of a process reflect material truth and the merits of the case, rather than mere compliance with form; it is distinct from formal justice, which emphasizes certainty and adherence to procedure. The classic tension in procedural law is that overly rigid procedure may yield outcomes that are formally valid yet substantively unjust: *summum ius, summa iniuria*. Radbruch's idea of law (Rechtsidee)

70 Cyril Chern, 'Time-Bar Clauses, Special Situations and Pitfalls' in Cyril Chern, *Chern on Dispute Boards: Practice and Procedure* (4th edn, Routledge 2020) ch 16.

frames justice, legal certainty, and purposiveness as three values to be balanced; an imbalance tilting too far toward any one of them produces a justice deficit.[71]

On this analysis, two weaknesses of the FIDIC structure can be read as failures of substantive justice. First, the textual tension in the FIDIC 1999 Edition, between the mandatory language of Sub-Clause 20.2 (shall refer disputes to the DAB) and the latitude of Sub-Clause 20.8, under which a dispute may be referred directly to arbitration where there is 'no DAB in place… whether by reason of the expiry of the DAB's appointment or otherwise', has generated divergent judicial interpretations. In Peterborough City Council v Enterprise Managed Services Ltd (2014) EWHC 3193 (TCC), the English court held the DAB tier to be mandatory and stayed proceedings to allow adjudication to proceed, while the Swiss Federal Supreme Court (Decision 4A-124/2014 of 7 July 2014) likewise treated the DAB as a mandatory precondition, permitting only a narrow good faith exception.[72] The very need for such litigation illustrates the problem: the parties' energy is diverted from the merits to a jurisdictional quarrel over whether the adjudication tier must be exhausted, so that the certainty of procedural form comes at the expense of a substantive resolution of the merits. Second, the binding but not final principle ('pay now, argue later') mandates enforcement of an interim decision that is deliberately left potentially erroneous; substantive finality is deferred to arbitration, so that the party that is in fact correct may first bear a burden under a decision later shown to be wrong.[73]

EJMA reorders the relationship between substantive and formal justice rather than opposing them. Expert judgement first stabilizes technical truth – as the core of substantive justice in construction disputes indeed lies in engineering facts such as the causes of delay, the value of variations, and the quality of works – which guarantees that any decision is built on technical reality rather than litigation skill. Mediation then converts that technical truth into an interest-based settlement agreed by the parties themselves, the highest form of substantive justice because the outcome is accepted as fair by both sides rather than imposed. The consent award then clothes that substantively fair outcome with formal certainty as a final and enforceable award. EJMA thus sequences the two forms of justice: substance is stabilized first through expert judgement and mediation, and only then wrapped in formal certainty through a consent award or arbitral award, the inverse of FIDIC, which front loads an interim formal decision whose substance is left suspended.[74]

71 Ramdani Husein Renngur, 'Deconstruction of Gustav Radbruch's Basic Legal Idea of Zweckmäßigkeit' (2026) 10(1) Refleksi Hukum: Jurnal Ilmu Hukum 23, doi:10.24246/jrh.2025.v10.i1.p23-44.

72 'Adjudication Ordered in £1.3m Dispute between Council and Solar Business' (*Local Government Lawyer*, 13 October 2014) <https://www.localgovernmentlawyer.co.uk/property/404-property-news/20368-adjudication-ordered-in-p13m-dispute-between-council-and-solar-energy-business> accessed 1 July 2026.

73 Yudhantaka, Simamora and Anand (n 17).

74 Rahardjo (n 35).

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This substantive justice framework accurately delineates the novelty of the EJMA model. Its contribution lies not in inventing new components but in resequencing the function of the middle tier, from adjudicative (DAB/DAAB) to consensual (mediation), coupled with an enforceability bridge (the consent award) and an interphase confidentiality firewall not expressly regulated in the FIDIC regime. For balance, FIDIC's 'pay now, argue later' principle is not without substantive justification; it protects contractors, especially smaller ones, from payment delays that damage cash flow. EJMA is therefore positioned not as an absolutely superior replacement, but as a rebalancing of priorities better suited to complex, high value disputes within the Indonesian enforcement context. This claim of substantive advantage remains a plausible theoretical proposition supported by comparative experience, not an empirically measured result.

9 CONCLUSIONS

Indonesia's current landscape for resolving construction disputes remains fragmented and suboptimal for complex, high-value projects. Litigation is generally slow, public, and often ill-equipped to address dense engineering and quantum questions, while stand-alone ADR mechanisms, negotiation, mediation, expert determination, and dispute boards frequently fail to deliver definitive outcomes because they depend on voluntary compliance or produce determinations that are easily bypassed. Even arbitration, although confidential and formally final, can become costly, evidentially heavy, and vulnerable to annulment when technical issues are not stabilized early and when procedural safeguards are not sufficiently robust. As a result, the existing progression from negotiation to mediation, expert involvement, arbitration, and only ultimately litigation has not yet evolved into an integrated system that reliably combines efficiency, technical reliability, and legal certainty in international construction disputes.

In response, this article develops the Expert Judgement Mediation Arbitration (EJMA) hybrid model as a structured hybrid mechanism that sequences early technical clarification by independent experts, confidential and interest-based settlement efforts through mediation, and, where necessary, a final and binding arbitral award grounded in a strengthened factual record. The EJMA hybrid model's normative design rests on a limited set of safeguards — tiered filtration of issues, integration of expert outputs into subsequent stages, confidentiality, and minimum due-process guarantees — that are consistent with Indonesia's construction-services regime and the general framework of the Arbitration and ADR Law, while also drawing on comparative lessons from dispute boards, statutory adjudication, and arb–med–arb schemes. The model is intended to reduce duplication between forums, enhance compliance with settlements, and lower annulment risks, thereby improving substantive outcomes and access to justice for both public and private construction stakeholders. These benefits, however, should be read within the study's scope: as a doctrinal-normative work, its claims are theoretical

propositions derived from statutory analysis, case law, and comparative practice rather than results validated through primary empirical data, and the novelty asserted is confined to the procedural re-sequencing of established mechanisms rather than the invention of new ones. Empirical testing of the model in actual construction disputes therefore remains an essential agenda for future research.

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***Keywords*:** *international contract law, dispute settlement, comparative law, construction contract.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ГІБРИДНА МОДЕЛЬ ЕКСПЕРТНОЇ ОЦІНКИ, МЕДІАЦІЇ ТА АРБІТРАЖУ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ ЕФЕКТИВНОГО ВРЕГУЛЮВАННЯ СПОРІВ, ЩО ВИНИКАЮТЬ ІЗ ДОГОВОРІВ БУДІВЕЛЬНОГО ПІДРЯДУ

Меріа Утама*, Різка Нурліянтіка, Ірсан Ірсан та Бієс Нурул Атіка

АНОТАЦІЯ

Передумови. *Міжнародні будівельні спори за своєю природою є складними, оскільки охоплюють правові, технічні, фінансові та транскордонні аспекти. Хоча наявні механізми — судовий розгляд, медіація та арбітраж — мають певні переваги, вони часто не дають змоги одночасно забезпечити оперативність, технічну обґрунтованість та юридичну остаточність рішення під час реалізації високовартісних проєктів. З метою подолання цієї проблеми у дослідженні запропоновано гібридну модель «Експертна*

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оцінка — Медіація — Арбітраж» (EJMA). Ця поетапна структура є новою концептуальною моделлю, що інтегрує технічне з'ясування обставин, консенсуальне врегулювання та обов'язкове врегулювання спору в єдину послідовну процедуру, спеціально адаптовану до правового середовища Індонезії.

Методи. *Дослідження проведено із застосуванням доктринального правового підходу за чотирма аналітичними напрямами: соціологічної юриспруденції, концептуального аналізу, нормативно-правового аналізу та порівняльного правознавства. Проаналізовано відповідне законодавство Індонезії (зокрема Закон про будівельні послуги та Закон про арбітраж і альтернативне вирішення спорів), інституційну практику таких органів, як BANI, а також міжнародний порівняльний досвід, зокрема досвід функціонування рад з врегулювання спорів (Dispute Boards) у практиці FIDIC, обов'язкової ад'юдикації та моделі «арбітраж – медіація – арбітраж» (Arb-Med-Arb).*

Результати та висновки. *За результатами дослідження сформульовано принципи побудови та процесуальні гарантії гібридної моделі EJMA. До ключових результатів належать: розроблення поетапного механізму розмежування та попереднього опрацювання технічних і правових питань, інтеграція документально зафіксованих технічних та фактичних даних у процедури медіації та арбітражу, а також закріплення гарантій конфіденційності й належної правової процедури. Крім того, визначено механізми оформлення врегулювання, досягнутого під час медіації, у формі арбітражних рішень на узгоджених умовах (consent awards), що значно підвищує рівень правової визначеності та зменшує ризик скасування такого рішення за законодавством Індонезії. Гібридна модель EJMA є вагомим теоретичним і практичним внеском у сфері міжнародного врегулювання спорів. Поєднання фахової технічної експертизи з юридичною остаточністю арбітражного рішення забезпечує сторонам більш передбачуваний механізм врегулювання спорів. У висновках зазначено, що нормативну базу моделі EJMA доцільно посилити за допомогою чіткішого нормативного регулювання діяльності експертних груп та створення інтегрованої Ради з врегулювання будівельних спорів. Запропонована гібридна модель сприяє ефективному доступу до правосуддя та забезпечує виконання рішень як у національному, так і в транскордонному контексті будівництва.*

Ключові слова: *міжнародне договірне право, врегулювання спорів, порівняльне правознавство, договір будівельного підряду.*

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Research Article

CARTEL CRIMINALIZATION: LEGITIMACY FOR ECONOMIC INTEGRITY IN THE WESTERN BALKANS?

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ABSTRACT

Background: *Cartel enforcement constitutes an important part of competition law. The European Union has largely harmonized the administrative enforcement of competition law. However, important differences remain between Member States regarding the criminalization of cartel conduct. These differences are also evident between the Western Balkan countries, where the EU accession process has aimed at aligning national competition law with EU standards. This article first examines whether administrative enforcement is enough and where criminal enforcement of competition law is needed. Second, this paper examines whether the existing enforcement mechanisms in the Western Balkans (WB) are effective in fighting serious competition law infringements.*

Method: *The study applied a doctrinal legal research methodology combining desk-review with comparative legal analysis. The desk-review examines the EU competition law framework, national legislation, and academic literature to identify the foundations of administrative and criminal enforcement. The comparative analysis evaluates the legal*

frameworks of the Western Balkan countries and selected EU Member States, identifying similarities, differences, and possible trends concerning cartel criminalization.

Results and Conclusions: *The analysis demonstrates that, although administrative sanctions for undertakings are largely aligned with EU standards among Member States and across the Western Balkans, significant disparities remain regarding the criminal liability for cartel conduct. The article concludes that a harmonized hybrid enforcement model, combining administrative sanctions with criminal penalties for the most serious competition law infringements, would provide a more balanced and effective enforcement framework.*

1 INTRODUCTION

Cartel agreements represent the most severe form of competition violations. They undermine market integrity, distort prices, limit innovation, harm other actors in the market, and ultimately harm consumers. Different jurisdictions around the world have opted for various deterrence schemes against cartels, ranging from administrative fines to criminal sanctions, or a combination of both. Within the EU, the applied sanctions are administrative monetary fines, as introduced by Regulation 1/2003[1] and other instruments, as will be discussed in this article. However, several Member States have chosen to complement administrative penalties with criminal sanctions targeting individuals who conduct cartel activity.

As part of the EU integration process, WB countries (such as Albania, Kosovo, Montenegro, North Macedonia, and Serbia) have taken measures to align, *inter alia*, competition law enforcement with European standards. The EU *acquis* does not impose any obligations on WB countries regarding cartel criminalization. These countries share a communist past, which, despite their differences, has contributed to distorting the free market and economy. Considering the need for a comprehensive economic integrity of these countries, should they rely on administrative penalties only, or complement them with criminal sanctions? While criminalization is often advocated for its deterrent effects, it also raises questions of proportionality and capacity, especially in legal systems like those in WB countries undergoing important reforms.

This article explores the features of cartel criminalization in the WB in light of EU practices and selected Member State experiences. First, it focuses on the advantages and disadvantages of criminal and administrative enforcement of competition law. Second, it provides a report on the relevant EU secondary legislation and enforcement models in Member States such as Germany, France, Greece, and Croatia. Finally, it analyses the legal

1 Council Regulation (EC) no 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 <http://data.europa.eu/eli/reg/2003/1/oj> accessed 20 June 2026.

frameworks in WB countries, assessing their alignment with EU law and their approach towards cartel criminalization. The article concludes by considering which enforcement model is most suitable for the WB, assessing the positive and negative aspects of each jurisdiction, and taking into consideration the legal traditions, institutional capacities, and their European aspirations.

2 METHODOLOGY

This paper combines doctrinal legal research with comparative legal analysis. The research design was selected to analyze the legal and policy framework governing cartel enforcement in the EU and the Western Balkans in the context of the region's European integration process.

The first component of the methodology consists of a *desk review of primary and secondary legal sources*. Primary sources include the Treaty on the Functioning of the European Union, EU secondary legislation regarding competition law, the case law of the Court of Justice of the European Union concerning the enforcement of competition law, national legislation of selected Member States and Western Balkan countries, and policy documents and guidelines. Secondary sources include academic literature, articles, and books addressing the criminal and administrative enforcement of competition law.

The second component of the methodology consists of a *comparative legal analysis*. The analysis compares the legal frameworks of five Western Balkan jurisdictions (Albania, Kosovo, Montenegro, North Macedonia, and Serbia), and four European Union Member States representing different approaches to cartel enforcement (Germany, France, Greece, and Croatia). The latter jurisdictions were selected because they illustrate a range of enforcement models, from systems relying primarily on administrative sanctions to hybrid regimes combining administrative penalties with criminal liability for individuals. Germany and France were selected as two of the leading EU members in competition law enforcement, whereas the analysis of Greece and Croatia is relevant as these two EU countries are part of the Western Balkan region. The comparison focuses on the legal basis for cartel sanctions, the scope of criminal liability, the relationship between administrative and criminal enforcement of competition law, the treatment of natural and legal persons, and the role of deterrence and legal certainty within each system. The comparative analysis aims to identify convergences, divergences, and regional trends in competition law enforcement, and suggest solutions for better enforcement and harmonization of competition law.

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3 CRIMINAL PROSECUTION V. ADMINISTRATIVE FINES IN CARTEL ENFORCEMENT. THE LEGITIMACY OF CRIMINAL SANCTIONS

Today, debates on competition law frequently centre on the dilemma of which sanctioning instrument – criminal prosecution of individuals or administrative fines against businesses – most effectively prevents hardcore cartels. Most legal scholars accept that the fundamental objective of price-fixing laws is deterrence: that is, to minimize the future formation of new cartels or recidivism by previous cartel violators.[2] This stance was confirmed by the CJEU jurisprudence in the *Musique Diffusion Française* case.[3]

Supporters of *criminal sanctions* for cartel activity highlight the unique deterrent effect of imprisonment on company executives. The threat of imprisonment is considered effective precisely because it imposes a personal and non-transferable risk on individual managers responsible for engaging in cartel behaviour.[4] Empirical evidence supports this view, particularly a study conducted by the Office of Fair Trading in 2010. The findings indicated that potential criminal penalties significantly exceeded administrative fines in their ability to discourage deliberate cartel participation.[5]

However, other academics stand against excessive criminalization, arguing that economic behaviours, such as cartel arrangements, may be perceived by many stakeholders as ethically neutral or purely business-driven decisions rather than inherently malicious fraud or corruption. Consequently, the extensive use of criminal sanctions could blur the distinction between clearly criminal activities and complex economic practices, potentially undermining the perceived legitimacy of competition enforcement.[6]

A key element to be considered when discussing cartel criminalization is its impact on some of the sharpest tools of public enforcement of competition law: *leniency programmes*. Connor and Lande argue that imprisonment could improve the operation of public antitrust leniency programmes because, by shifting corporate officers' expectations towards high personal penalties, top executives of cartel participants are more likely to seek the immunity from prosecution that accompanies awards of corporate amnesty.[7] In the authors' view,

2 John M Connor, *Price-Fixing Overcharges* (rev 3rd edn, Purdue University 2014) 16 <https://dx.doi.org/10.2139/ssrn.2400780> accessed 20 June 2026.

3 Joined cases 100/80 to 103/80 *SA Musique Diffusion française and others v Commission of the European Communities* (CEU, 7 June 1983) ECR 1825, para 108 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61980CJ0100> accessed 20 June 2026.

4 Florian Wagner-von Papp and others, 'Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges' (2016) 2 Concurrences Review 41 <https://ssrn.com/abstract=2782090> accessed 20 June 2026.

5 Andreas Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalization' (2017) 37(4) Legal Studies 624 <https://doi.org/10.1111/lest.12165> accessed 20 June 2026.

6 Wagner-von Papp and others (n 4) 41.

7 John M Connor and Robert H Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34(2) Cardozo Law Review 437 <https://dx.doi.org/10.2139/ssrn.1917657> accessed 20 June 2026.

criminal prosecution could have a dual effect on leniency programmes. These programmes rely on undertakings voluntarily disclosing their involvement in cartels in exchange for reduced penalties. However, these programmes do not guarantee that whistleblowers would receive the same lenient treatment if they are criminally charged. Therefore, authorities must exercise considerable caution to ensure that criminal sanctions do not inadvertently compromise the overall efficacy of anti-cartel enforcement mechanisms.

Systems that rely only on *administrative fines* offer procedural advantages, such as flexibility and efficiency in sanctioning cartels. Administrative fines can be substantial without the standards required in criminal prosecutions, such as proof '*beyond reasonable doubt*'. This is important, considering that human and financial resources are not unlimited.

The logic of applying administrative fines often includes imposing large fixed amounts irrespective of the cartel's duration, explicitly designed to deter firms from entering into anti-competitive arrangements. The Commission's Fining Guidelines introduce an additional amount (the so-called 'entry fee'), ranging from 15% to 25% of the value of sales regardless of the duration of the infringement, with the explicit objective of deterring undertakings from entering into cartel agreements.[8] Nevertheless, it can be argued that administrative fines have limitations in their deterrence capacity. Companies, especially big corporations, can regard administrative fines as 'standard operating costs' as long as they do not exceed expected profits from cartel activity.

When comparing criminal prosecution to administrative fines, it becomes clear that each approach features distinctive advantages and limitations. Criminal prosecution offers powerful individual deterrence and strongly emphasizes societal condemnation of cartel behaviour. However, criminal procedures tend to be slower and inflexible in nature, tending to prove an infringement 'beyond reasonable doubt' and applying prosecutorial standards. There is some scope for a discord between the protections required by European human rights law in a criminal setting and the protections actually faced by an accused cartelist in an administrative setting.[9]

Moreover, the choice between administrative or criminal enforcement is not only a matter of 'effectiveness'. More importantly, the legitimacy of cartel criminalization depends on whether the criminal sanctions are necessary and proportionate to address conduct that can threaten fundamental economic interests. Consequently, while it is evident that severe infringements, such as cartels or bid-rigging, cause sufficient economic and social harm, other less serious infringements may be more appropriately sanctioned through administrative measures.

8 Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation no 1/2003 [2006] OJ C 210/2, para 25 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2006_210_R_0002_01> accessed 20 June 2026.

9 Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal and Practical Challenges* (OUP 2014) 140-1.

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Conversely, administrative fines enable quicker enforcement, higher procedural efficiency, and compatibility with the leniency policy discussed above. However, they must be well-calculated to have a deterrent effect. Consequently, neither approach alone reliably achieves optimal deterrence across all contexts. Researchers and practitioners thus increasingly advocate integrating the strongest elements of both criminal and administrative sanctions.[10]

Hybrid enforcement strategies can rely on criminal prosecution in severe or repeated offences, thus exerting strong immediate deterrent pressure. Administrative fines, on the other hand, should be imposed at a level that reflects the severity and duration of the infringement and ensures a sufficient deterrent effect.[11] Such combined strategies are recommended to optimize deterrence, maintain enforcement credibility, and achieve proportionality in penalties.

4 EU AND MEMBER STATE POLICIES ON CARTELS' SANCTIONING

4.1. EU Secondary Legislation

The EU has developed a strong framework for the public enforcement of competition law, which has been amended several times. Public enforcement of EU competition law is focused on the effective implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) by EU institutions, particularly the Commission, which also provides guidance for the authorities of the Member States.[12] The public enforcement of competition law in the EU is governed by Regulation 1/2003, which replaced the previous Regulation 17,[13] introducing an *ex-post* control of anti-competitive agreements and abuse of dominant position, as compared to the previous *ex-ante* control.[14]

EU public enforcement of competition law relies exclusively on administrative measures to address anti-competitive behaviour in general and cartel activity in particular. Specifically, the Commission imposes monetary fines as provided in Regulation 1/2003 and the Commission Guidelines on the Method of Setting Fines.[15] Regulation 1/2003 stipulates that for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed *10% of its total turnover* in the preceding business

10 See also, Stephan (n 5) 634-5.

11 Guidelines on the Method of Setting Fines (n 8) paras 4, 19–25.

12 Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C 326/47 <http://data.europa.eu/eli/treaty/tfeu_2012/oj> accessed 20 June 2026.

13 Council Regulation (EC) no 1/2003 (n 1); EEC Council Regulation no 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ P 13/204 <http://data.europa.eu/eli/reg/1962/17/oj> accessed 20 June 2026.

14 Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases and Materials* (7th edn, OUP 2019) 878 <https://doi.org/10.1093/he/9780198824657.001.0001> accessed 20 June 2026.

15 Guidelines on the Method of Setting Fines (n 8).

year.[16] Statistical analysis and assessments of the Commission decisions show that a significant use is made of the aggravating and mitigating circumstances listed in the Guidelines on the Method of Setting Fines to adjust the basic amount of the fine, as well as of the leniency and cartel settlement procedures.[17] In addition, the Guidelines emphasize the importance of deterrence, as reflected in Recital 4, which calls for a 'necessary deterrent effect'. Nevertheless, the Commission still retains wide discretion regarding the setting of administrative penalties.[18] It has become evident that the Commission is able to impose substantial fines that achieve a significant deterrent effect without resorting to criminal charges.[19] However, these fines are applicable to undertakings, not individual parties involved in cartels.

While the EU public enforcement system imposes only monetary fines on cartel infringements, it leaves Member States free to introduce criminal sanctions for cartel infringements. Regulation 1/2003 explicitly provides that national courts shall have the power to apply Articles 101 and 102 of the Treaty,[20] enabling them to introduce criminal law mechanisms, should they choose to do so. The approach adopted in Regulation 1/2003 reflects the traditional deference of the European institutions to national procedural autonomy.[21] A similar approach has been adopted by the OECD. In its Recommendation concerning Effective Action against Hard Core Cartels, the OECD calls on member countries to 'effectively halt and deter hard core cartels' through effective sanctions for firms and individuals and strengthening enforcement procedures.[22] Notably, however, the Recommendation does not expressly advocate the adoption of criminal sanctions.

16 Council Regulation (EC) no 1/2003 (n 1) art 23.

17 Damien Geradin and Katarzyna Sadrak, *The EU Competition Law Fining System: A Quantitative Review of the Commission Decisions between 2000 and 2017* (TILEC Discussion Paper 2017-018, Tilburg University 2017) 1 <https://dx.doi.org/10.2139/ssrn.2958317> accessed 20 June 2026.

18 Case C-289/04P *Showa Denko KK v Commission of the European Communities* (CEU, 29 June 2006) ECR I-5859, para 36 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62004CJ0289> accessed 20 June 2026.

19 See, for instance, Case COMP/E-1/37.512 *Vitamins*, decision 2003/2/EC, C(2001) 3695 (EC, 21 November 2001) [2003] OJ L 6/1 <http://data.europa.eu/eli/dec/2003/2(1)/oj> accessed 20 June 2026; Case COMP/E-1/38.823 *Elevators and Escalators*, C(2007) 512 final (EC, 21 February 2007) [2008] OJ C 75/19 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2008_075_R_0019_01> accessed 20 June 2026; Case AT.39824 *Trucks*, C(2016) 4673 (EC, 19 July 2016) [2017] OJ C 108/6 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2017_108_R_0005> accessed 20 June 2026; Case AT.39740 *Google Search (Shopping)*, C(2017) 4444 (EC, 27 June 2017) [2018] OJ C 9/11 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2018_009_R_0008> accessed 20 June 2026.

20 Council Regulation (EC) no 1/2003 (n 1) art 6.

21 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) 256.

22 OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels* (adopted 25 March 1998, rev 2019) para I A <https://www.oecd.org/en/publications/review-of-the-1998-oecd-recommendation-concerning-effective-action-against-hard-core-cartels_58c38ceb-en.html> accessed 20 June 2026.

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4.2. Legal Framework on Cartel Criminalization. Policies Applied by Some EU Member States

The criminalization of cartel activity in the EU has developed unevenly among Member States, with each jurisdiction adopting its own legal instruments. Even though EU competition law provides a harmonized basis for administrative enforcement against cartels through Articles 101 and 102 of the TFEU, the question of criminal sanctions remains a matter of national discretion. While some Member States have a long history of competition enforcement and culture, others (especially the former communist states) are still trying to raise awareness among businesses. [The latter] may (wisely) wish to see a 'competition culture' develop in their respective countries before experimenting with criminal sanctions.[23] However, introducing criminalization of competition infringements should be associated with additional guarantees, in accordance with the principle of legitimacy, fairness, and proportionality. In those Member States whose national law allows the imposition of criminal sanctions on natural persons for violations of Articles [101] or [102] EC or for related offences, the stricter case law of the European Court of Human Rights is of course applicable to the corresponding investigations by national competition authorities.[24]

This section examines how several EU Member States – Germany, France, Greece, and Croatia – have dealt with the issue of criminalizing cartel behaviour, most opting for a hybrid system of administrative and criminal sanctions, depending on the severity and/or consequences of the competition infringements.

4.2.1. Germany

Germany operates in the continental European legal system, like most other European jurisdictions. Rules on competition are mainly laid down in the German 'Act against Restraints of Competition'.[25] The Act largely reflects EU competition law as provided in Articles 101 and 102 of the TFEU. The above law provides for *administrative fines* for anti-competitive conduct (including cartel activity). Under section 81 (4)(2) GWB, the maximum fine for substantive competition law offences by undertakings or associations of them is 10% of the total turnover achieved in the business year preceding the authority's decision, if the offence is committed intentionally. For negligent offences, the maximum fine is capped at half of this amount, section 17 (2) OWiG, i.e., 5% of the total turnover achieved in the business year preceding the authority's decision. Fines for procedural breaches are

23 Whelan, *The Criminalization* (n 9) 175.

24 Wouter PJ Wils, *Principles of European Antitrust Enforcement* (Hart, Bloomsbury 2005) 139.

25 German Act against Restraints of Competition of 26 August 1998 'Gesetz gegen Wettbewerbsbeschränkungen (GWB)' [2013] BGBl I 1750, 3245, as amended by Art 1 of the Act of 25 October 2023 [2023] BGBl I 294 <https://www.gesetze-im-internet.de/englisch_gwb/index.html> accessed 20 June 2026.

provided under sections 54-62 GWB in conjunction with the general provisions on administrative procedure of the Federal Republic or the competent Bundesland.[26] Moreover, the above infringements are recorded in a 'competition register'. Public contracting authorities are required to check the competition register before awarding a contract, and an entry in the competition registry may lead to exclusion from a contract.[27] This 'black list' mechanism extends the consequences of competition breaches beyond monetary fines, prohibiting undertakings from accessing procurement opportunities, and could serve as a valuable example for other European legal frameworks.

The German legal framework recognizes only *one criminal offence* concerning competition law. Section 298 of the German Criminal Code[28] sanctions *bid-rigging*. Under this provision, individuals who limit competition through agreements in public tendering procedures can be punished with a criminal fine or imprisonment for up to five years. As usual in criminal procedure, the enforcement of this offence is reserved only for prosecution authorities, excluding competition authorities. Furthermore, the current German enforcement framework attempts to balance voluntary compliance with harsh sanctions for law infringers. So far, this seems to be working quite well. However, it seems fair to expect that the development of competition law *sanctions is not yet complete and that further changes are likely to follow.*[29]

4.2.2. France

Cartel enforcement remains a priority for French competition authorities, which enforce competition law and contribute to drafting the legal framework. The successful implementation of all the components of the French leniency programme has made the French competition authority more like a regulator.[30]

France is one of the EU Member States that provide *criminal sanctions* for substantive violations of the antitrust law, along with administrative fines. In France, criminal fines

26 Carsten Koenig and Fernanda Luisa Bremenkamp, 'Competition Law Sanctions in Germany' in Tihamér Tóth (ed), *The Cambridge Handbook of Competition Law Sanctions* (CUP 2022) 382.

27 Sergej Bräuer and Dimitra Karakioulaki, 'Germany' in Euan Burrows and Denis Fosselard, *Cartels: Enforcement, Appeals and Damages Actions* (13th edn, Global Legal Insights 2025) 89.

28 German Criminal Code of 13 November 1998 'Strafgesetzbuch (StGB)' [1998] BGBl I 3322, as amended by Art 2 (2) of the Act of 7 November 2024 [2024] BGBl I 351 **<**https://www.gesetze-im-internet.de/englisch_stgb/index.html**>** accessed 20 June 2026.

29 Koenig and Bremenkamp (n 26) 405.

30 Marc Lévy and Natasha Tardif, 'France: Cartel Regulation' in Pallavi Guniganti and others (eds), *The European, Middle Eastern and African Antitrust Review 2017: A Global Competition Review Special Report* (GCR 2016) 122; Sarah Subrémon S, David Reingewirtz D and Luca Nicco L, 'France' in Euan Burrows and Denis Fosselard, *Cartels: Enforcement, Appeals and Damages Actions* (13th edn, Global Legal Insights 2025) 77 <https://globalcompetitionreview.com/review/europe-middle-east-and-africa-antitrust-review-archived/the-european-middle-eastern-and-african-antitrust-review-2017> accessed 20 June 2026.

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and imprisonment may be imposed against individuals whose acts were crucial to the conception, organization, and implementation of the prohibited practices.[31] Consequently, the French system adopts a *hybrid* enforcement model by combining administrative liability for undertakings with criminal liability for individuals responsible. In this regard, if the offender is not an undertaking, the maximum amount of the penalty shall be 3 million Euros[32] or imprisonment in cases of designing, organizing, or implementing cartel agreements, abuse of dominance, or abuse in the grocery retail sector.[33] On the other hand, the maximum amount of the penalty for an undertaking shall be 10% of the highest global pre-tax turnover made during the closest financial year.[34] The latter provision reflects the EU standards addressing administrative competition law enforcement. Concerning individual responsibility, the French legal framework has adopted a *hybrid (administrative and criminal) sanctioning* system. However, unlike the German approach, its criminal liability has a broader scope, as it extends beyond bid-rigging to include a broader range of anti-competitive behaviour.

4.2.3. Greece

Greece has been added to the list of jurisdictions providing for custodial sanctions for horizontal anti-competitive agreements.[35] The Greek competition law regime is enshrined primarily in Law 3959/2011 (the 'Greek Competition Act'),[36] which prohibits agreements and concerted practices that restrict competition[37] and abusive practices by dominant undertakings[38], and establishes a mandatory pre-closing filing for all concentrations meeting the relevant turnover thresholds.[39] Moreover, Article 1A of the Competition Act aims to capture offences such as tacit collusion and price signalling by explicitly prohibiting any invitation to collude or announcement of future pricing intentions for products and services between competitors.

31 French Commercial Code 'Code de commerce' (amended 29 May 2026) art L420-6 <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/2026-05-28> accessed 20 June 2026.

32 ibid, art L464-2.

33 ibid, art L420-6.

34 ibid, art L464-2(i).

35 Vasiliki Brisimi and Maria Ioannidou, 'Criminalizing Cartels in Greece: A Tale of Hasty Developments and Shaky Grounds' (2011) 34(1) World Competition: Law and Economics Review 157 <https://doi.org/10.54648/woco2011008> accessed 20 June 2026.

36 Law of the Hellenic Republic 3959/2011 on the Protection of Free Competition 'Greek Competition Act' [2011] Government Gazette A 93, as amended by Law 5317/2026 [2026] Government Gazette A 108 <https://www.epant.gr/en/legislation/protection-of-free-competition.html> accessed 20 June 2026.

37 ibid, art 1.

38 ibid, art 2.

39 ibid, arts 5–10.

A major reform to the Greek Competition Act is the newly added Article 1A, which prohibits two distinct types of unilateral conduct: the invitation to the conclusion of an unlawful agreement and the announcement of future pricing intentions between competitors ('price signalling'), making these two unilateral practices self-standing antitrust infringements under Greek law as of 1 July 2022. Article 1A, however, applies only to undertakings with a turnover of at least EUR 50 million and at least 250 employees and does not apply where the conduct in question falls under Articles 101 or 102 TFEU (or Articles 1 and 2 of Greek Competition Act). On 1 February 2023, the Hellenic Competition Commission issued guidelines on the application of Article 1A but significant legal uncertainty remains.[40]

In Greece, cartels are investigated and sanctioned by the Hellenic Competition Commission (HCC) through an administrative law procedure whereby *administrative fines* are imposed on undertakings and individuals in accordance with the Competition Act.[41] In addition, the Competition Act also provides for the imposition of *criminal sanctions*, including jail sentences, on individuals involved in cartel infringements. The Greek approach to criminalizing cartels closely resembles the French model, as it provides for the criminal prosecution of a broad range of serious competition infringements.

4.2.4. Croatia

Croatia is the newest EU Member State and is close to the neighbouring WB candidates for EU membership. Croatian competition rules are provided in the Competition Act of 2009,[42] amended in 2013 and 2021. The Croatian Competition Act applies to all forms of anti-competitive behaviour where they have effect in the Croatian territory.

Under Croatian competition law, cartel agreements are prohibited and are considered null and void: 'agreements between undertakings..., explicit or tacit agreements, coordinated practice... which have as their object or effect distortion of competition are prohibited, in particular those by which undertakings determine directly or indirectly purchase or sale prices, or other commercial terms'.[43]

Administrative sanctions for cartel activity in Croatia are governed by Article 61 of the Croatian Competition Act, which provides for fines of up to 10% of total annual turnover of the undertaking in the financial year preceding the decision. In line with the practices of

40 Anastasia S Dritsa, Konstantinos V Sidiropoulos and Vasiliki Labrinoudi, 'Greece: An Introduction to Competition/European Law' (*Chambers*, 8 April 2025) <https://chambers.com/content/item/6425> accessed 20 June 2026.

41 Greek Competition Act (n 36) art 25B.

42 Croatian Competition Act [2009] Official Gazette 79, as amended [2013] Official Gazette 80; [2021] Official Gazette 41 <https://www.aztn.hr/en/competition/legal-framework/> accessed 20 June 2026.

43 ibid, art 9.

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other jurisdictions, Croatian law distinguishes between 'serious' and 'less serious' violations, with cartel conduct, as expected, classified among the most serious infringements.

In addition to administrative measures, Croatia is among the EU Member States that *criminalize cartels*. The Croatian Criminal Code provides that *'whoever in a legal entity ... enters into an agreement or performs an action by which a legal person or the consumers are limited or restrained with regard to the free circulation of goods and services or their access to the market, ... shall be punished by imprisonment for six months to five years*'.[44] Unlike some Member States (such as Germany) that criminalize only specific aspects of anti-competitive conduct, the Croatian legislation adopts a broader approach by criminalizing not only agreements, but also (unilateral) actions that restrain competition. This approach, in the authors' view, could amount to legal uncertainty as to whether an act or agreement should be treated as an administrative infringement or a criminal misdemeanour.

4.3. Comparative Analysis on the Four Member States - Beyond Administrative Fines

In general, Germany, France, Greece, and Croatia have introduced criminal liability for serious infringements of competition law. This approach is consistent with the prevailing scholarly view (discussed above) that effective competition enforcement requires punitive and deterrent sanctions, provided that criminalization is reserved as an ultima ratio measure, in accordance with the legitimacy principle. However, there are significant differences in how this principle is implemented.

Germany presents an interesting model through the introduction of the Competition Register, which enables the exclusion of competition infringers from participating in public contracts. Although this does not constitute a criminal sanction, it enhances the punitive and deterrent effects of administrative measures while preserving the proportionality of the sentence. This diversified enforcement model, combined with the criminalization of only one particular offence (bid-rigging), demonstrates that a balance between administrative and criminal measures can achieve effective deterrence.

In contrast, the *French* model has adopted a broader approach, extending criminal liability beyond hardcore cartels by including the abuse of dominance. Although this approach may reinforce deterrence, it raises questions regarding proportionality and necessity.

Another legislative model is offered by *Greece*, which introduces criminal liability for cartels through its competition legislation rather than the criminal code. Although this approach may be practical from the enforcement point of view, it may also raise concerns regarding legal certainty, as criminal offences are expected to be easily identifiable in the legal framework, thus potentially affecting the legitimacy of cartel criminalization.

44 Croatian Criminal Code of 26 October 2011 [2011] Official Gazette 125, art 288, as amended <https://natlex.ilo.org/dyn/natlex2/r/natlex/fe/details?p3_isn=111330> accessed 20 June 2026.

A different form of legal uncertainty is evident in *Croatia*, where the broad wording of the Croatian Criminal Code risks confusing administrative infringements with criminal offences. Such ambiguity may weaken the legitimacy of criminal enforcement, contrary to the principle that criminal offences need to be defined with precision.

5 WESTERN BALKANS' COUNTRIES POLICIES IN SANCTIONING CARTELS

5.1. Practices in Western Balkan (WB) Countries

5.1.1. Albania

The most important piece of legislation governing competition in Albania is the Law 'On protection of competition',[45] alongside the additional regulatory framework issued by the Albanian Competition Authority. The above law is the cornerstone national legal instrument that regulates the material and some procedural aspects of competition law.[46]

The Albanian Law on Protection of Competition and the Competition Authority's Regulation 'On fines and their Leniency'[47] closely mirror EU competition law on fines, providing for *administrative sanctions for undertakings* that infringe competition law. Article 74(1) of the Law on Protection of Competition establishes a maximum fine limit for 'serious violations' which is 10% of the company's turnover of the previous financial year, for each participating company.

Nevertheless, Albanian competition law diverges from EU provisions concerning *individual sanctions* for competition law violations. While Regulation 1/2003 does not provide for individual (administrative) sanctions arising from competition infringements, Article 78 of the Albanian competition law stipulates that the competition authority can impose fines of up to five million ALL (approximately fifty thousand Euros) on individuals who, intentionally or negligently, provide incorrect, incomplete, or false data in response to the request or decision of the authority, *take part in cartels,* or abuse their dominant position. Do these sanctions help deter anti-competitive behaviour? Despite the substantial nature of the amount of fine (which can be considered a large amount for an individual, given the average income of an Albanian citizen), a part of academia believes that individual fining

45 Law of the Republic of Albania no 9121 of 28 July 2003 'On Protection of Competition', as amended by Law no 10317 of 16 September 2010 <https://caa.gov.al/en/laws/law-no-9121-dated-28-07-2003/> accessed 20 June 2026.

46 Mirela Bogdani and Monika Canco, 'The Right to Access the File in Competition Preceedings: Albanian and Western Balkans Challenges in their European Path' (2024) 23 Balkan Social Science Review 34 <https://doi.org/10.46763/BSSR242323023b> accessed 20 June 2026.

47 Decision Competition Authority of the Republic of Albania no 684 of 9 September 2020 'Regulation on Fines and Leniency'.

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does not serve as an adequate deterrent. For instance, Whelan argues that companies can relatively easily compensate their agents in advance for taking the risk of being fined and/or indemnifying them ex-post when they have to pay the fine.[48]

The Albanian Criminal Code[49] provides a foundation for *prosecuting competition violations* under certain circumstances. This code specifies that competition infringements during the exercise of commercial activity, exhibited through threats or violence, are punished with imprisonment from one to four years. When the competition infringements are directed towards activities financed fully or partly or in any way by the state or by the public entities, the sentence of imprisonment is increased by one–third.[50] This is a noteworthy article in several aspects. First, since the criminal sanction entails imprisonment, it addresses natural persons engaged in the infringement, rather than undertakings as legal persons. Second, the criminalization of competition infringements is not linked to a certain (more serious) form of infringement, such as a cartel. On the contrary, it is exclusively linked to the use of threat or violence, which is punishable independently by the Albanian Criminal Code. Consequently, the authors of this paper believe that, despite the existence of this article, Albania lacks a substantial legal framework to criminalize cartels *per se*. In 2025, Albania introduced a draft Criminal Code, proposing, inter alia, the criminalization of additional forms of anti-competitive conduct. However, the draft is still subject to amendments.

5.1.2. Kosovo

The primary legal framework regulating competition in Kosovo is the Law on Protection of Competition.[51] Adopted in 2022 and replacing the former 2010 law, this is a recent legal instrument that aims to further align with the EU standards. Similar to the EU and Albanian practices, Articles 57 and 58 of the above law delineate *administrative sanctions* for competition infringements. Similar to the EU and Albanian legislation, violations are classified according to their severity, with cartels categorized as 'serious violations'.[52] Article 57 of the law establishes that serious infringements (including cartels) are punishable by a fine of up to 10% of the total turnover it has achieved worldwide in the last year for which the financial report was completed. Moreover, this law also allows for the imposition of periodic penalty payments.[53] All the above procedural actions, from the moment of the

48 Peter Whelan, 'Antitrust Criminalization as a Legitimate Deterrent' in Tihamér Tóth (ed), *The Cambridge Handbook of Competition Law Sanctions* (CUP 2022) 101 <https://doi.org/10.1017/9781108918015.007> accessed 20 June 2026.

49 Criminal Code of the Republic of Albania no 7895 of 27 January 1995 (amended 2024) <https://www.refworld.org/legal/legislation/natlegbod/1995/73471> accessed 20 June 2026.

50 ibid, art 170/b.

51 Law of the Republic of Kosovo no 08/L-056 of 13 May 2022 'On Protection of Competition' [2022] Official Gazette 14 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=59498> accessed 20 June 2026.

52 ibid, art 57.

53 ibid

initiation of the investigation until the final receipt of the [Competition Authority]'s decision, are administrative in nature and must take place in accordance with the Law on Administrative Procedure of the Republic of Kosovo.[54] However, the implementation of these administrative measures in practice has faced challenges, particularly regarding the competition authority's reasoning and assessment of evidence as well as the limited experience of the judiciary in competition law when reviewing the Authority's decisions.[55]

Kosovo's competition law provides for *individual sanctions* applied to natural persons. Unlike the Albanian practice, which restricts such penalties to specific cases of infringements, Kosovo's legal framework applies them to all types of competition violations. This may be perceived as excessively punitive, given that the individual sanctions may be imposed even for smaller, procedural infringements. However, the maximum value of individual fines is capped at 4000 Euros,[56] which is lower (less than one-tenth) than the amount stipulated by the Albanian law. The authors of this study consider that this amount is insufficient to contribute to a deterrent effect.

Kosovo's Criminal Code contains several provisions targeting *serious competition infringements.* Under the title 'Abuse of monopoly position', the criminal code provides that the responsible person who carries out one or more of the economic activities that abuse a monopolistic or dominant position in the market or in a substantial part of the market, by engaging in one or more of the activities, shall be punished by imprisonment for up to 3 years.[57] Participation in cartel activity is subject to harsher penalties, including one to five years of imprisonment and a fine equal to 25% of the value of the goods sold by his business organization, which was the subject of the joint agreement.[58] Kosovo's Criminal Code also addresses bid-rigging, stipulating that anyone who, through an invitation to tender for commercial goods or services, makes an offer based on an unlawful agreement and the purpose of such an offer is for the organizer to accept a specific offer, shall be punished by a fine or imprisonment for up to five years.[59]

Kosovo represents a comprehensive approach to the full criminalization of competition law, establishing sanctions for all kinds of serious competition violations and prosecuting all core competition offences: cartels, abuse of dominance, and bid-rigging. Could this

54 Orhan M Çeku, 'Competition Law in Kosovo: Problems and Challenges' (2015) 8(11) Yearbook of Antitrust Regulatory Studies 114 <https://press.wz.uw.edu.pl/yars/vol8/iss11/5> accessed 20 June 2026.

55 See also, Avdylkader Mucaj, 'Competition Law Framework in Kosovo and the Role of the EU in Promoting Competition Policies in Other Countries and Regions Wishing to Join the Block' (2020) 13(22) Yearbook of Antitrust and Regulatory Studies 101-2 <https://doi.org/10.7172/1689-9024.YARS.2020.13.22.4> accessed 20 June 2026.

56 Law of the Republic of Kosovo no 08/L-056 (n 51) art 59.

57 Criminal Code of the Republic of Kosovo no 04/L-082 of 23 November 2018 [2019] Official Gazette 2, art 295(1) <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18413> accessed 20 June 2026.

58 ibid, art 295(2).

59 ibid, art 303.

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approach be regarded as excessively punitive? The authors of this paper believe that this may be the case. The administrative fines of a maximum of 10% of the annual turnover would be added to the criminal fine of 25% of the value of goods sold under the cartel, while the natural persons involved would face administrative fines, as well as imprisonment. This situation would very probably lead to the bankruptcy of an entity, which is not the final aim of competition regulation.

5.1.3. Montenegro

Montenegro's Law on Protection of Competition[60] serves as the main legal instrument governing competition in the country. The law's section titled 'Penal Provisions' provides *fines* of 1% to 10% of aggregate annual turnover in the preceding financial year if the company: takes part in prohibited agreements (like cartels); engages in the practice of abuse of a dominant position; implements prohibited concentration; does not suspend implementation of concentration until the Agency adopts decision approving intended concentration; or does not comply, fully or partially, with the measures, conditions, and time limits imposed by decisions [of the competition authority].[61] These violations are deemed 'penal misdemeanours'. These infringements are established in a competition legal instrument (rather than the Criminal Code) and prescribe only fines as sanctions, resembling in description and amount the administrative sanctions applied in the EU, Albania, and Kosovo legal framework. However, they are not of an administrative nature, but more of a criminal one, as the Montenegrin Competition Authority does not have the competence to impose them, only to propose them. Periodic penalty payments are also applicable, provided under Article 60 of the above law.

The same article of the Montenegrin law specifies *individual sanctions*, mandating that a fine in the amount of 1000 to 4000 Euros shall also be imposed on the responsible person in an undertaking, as well as on the responsible person in a public body, state administration body, local administration body, and local self-government body, if such body acts as an undertaking, for the above misdemeanours.[62] Again, it is noteworthy that these penalties are modest and likely lack the deterrent effect, as they can be easily covered by the undertakings or the individuals, taking into consideration that the expected profits from cartel activity are substantial.

In contrast with practices in Albania and Kosovo, the Montenegrin Criminal Code does not address any competition law infringements. This may stem from the fact that the misdemeanours established in the Law on Protection of Competition are considered penal. Consequently, it can be concluded that competition violations in Montenegro are only

60 Law of Montenegro no 44/12 of 26 July 2012 'On Protection of Competition' [2012] Official Gazette 44, as amended [2018] Official Gazette 13; [2021] Official Gazette 145.

61 ibid, art 67(1).

62 ibid, art 67(2).

subject to monetary fines, regardless of the severity of the infringement. Since hardcore cartels and bid-rigging remain punishable solely by administrative fines under Montenegrin law, questions arise as to whether fines alone are capable of achieving an effective deterrent effect. The authors believe that for very serious offences, this is not enough.

5.1.4. North Macedonia

The primary legal framework governing competition in North Macedonia is the Law on Protection of Competition.[63] In line with other WB legislations, this law is classified into two main categories: 'serious misdemeanours' and 'procedural misdemeanours', both subject to *administrative penalties*. According to Article 62, serious infringements like participating in cartels, may result in fines up to 10% of the sum of the aggregate annual turnover calculated in absolute and nominal amount of each member of the association acting on the relevant market. The law provides that the amounts of the fine shall be determined with regard to aggravating and mitigating circumstances. In proceedings before the Commission for Protection of Competition, the rules of the Misdemeanour Law and the Law on General Administrative Procedure are applied as subsidiary rules to the Law on Protection of Competition, which leads to problems in their interpretation and increases legal uncertainty.[64]

Notably, North Macedonian competition law regulates the liability of *natural persons* engaging in *cartel activity or other serious misdemeanours*. In addition to financial penalties, individuals may face a ban on the performance of an occupation, activity, or duty for a duration of 3 to 15 or 30 days, depending on the severity of the offence.[65] However, this provision does not contribute to legal security, as the amount of fine is not mentioned in this article. In addition, a short-term performance ban of only 15 days does not have a deterrent effect.

Further enforcement is provided by the North Macedonian Criminal Code. It *criminalizes only core competition infringements like cartels*, stipulating that 'the responsible person in the legal entity who shall conclude an agreement or shall participate in the concluding of an agreement, decision or agreed behaviour, prohibited by law, and aiming to prevent, limit or cause competition disorder, and thus the legal entity obtains property benefit of greater extent or causes damage of greater extent, shall be sentenced to imprisonment of one to ten years'.[66] The maximum sentence of ten years of imprisonment is the highest in

63 Law of the Republic of North Macedonia no 145/2010 'On Protection of Competition' [2010] Official Gazette 145, as amended [2011] Official Gazette 136.

64 Dijana Marković-Bajalović, 'Competition Enforcement Models in the Western Balkans Countries – The Rule of Law Still Terra Incognita?' (2020) 13(22) Yearbook of Antitrust and Regulatory Studies 54 <https://doi.org/10.7172/1689-9024.YARS.2020.13.22.2> accessed 20 June 2026.

65 Law of the Republic of North Macedonia no 145/2010 (n 63) art 63(1) and (2).

66 Criminal Code of the Republic of North Macedonia of 23 July 1996 [1996] Official Gazette 37, art 283, as amended <https://www.refworld.org/legal/legislation/natlegbod/1996/124105> accessed 20 June 2026.

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the WB, which indicates a strong emphasis on deterrence. Interestingly, the second paragraph of the above article introduces leniency policy to criminal infringements of competition law, granting immunity from the criminal sanctions to natural persons who contribute to the discovery of the infringement.

5.1.5. Serbia

As in other WB countries, the Serbian competition regime is regulated by the Law on Protection of Competition.[67] This law attempts to correct the issues that characterized the previous laws on competition in Serbia, being more aligned with EU legislation.[68] Regarding *administrative sanctions*, the law stipulates that, for serious offences including cartel activity, the measure for protection of competition is in the form of an obligation to pay a monetary sum in the amount up to 10% of the total annual turnover generated on the territory of the Republic of Serbia.[69] In contrast, procedural infringements are sanctioned with daily fines ranging from 500 EUR to 5,000 EUR per day, for each day of such infringement.[70]

In contrast to most WB jurisdictions, Serbia's competition legislation does not specify *individual sanctions* directed at natural persons engaged in cartel conduct. Fines and other [administrative] sanctions under Serbian law can only be imposed on undertakings, thus excluding the personal liability of the responsible individuals.[71] Nevertheless, as seen below, individuals are sanctioned by criminal penalties for engaging in cartel activity, which introduces a separate deterrent effect.

In addition to administrative penalties, Serbia *criminalizes cartel activity*, establishing that whoever in a business entity concludes a restrictive agreement where the prices are determined, production or sales is restricted, that is, market is divided, shall be punished with imprisonment of six months to five years and fined.[72] Similar to other jurisdictions in the region, Serbia has adopted a hybrid enforcement model, targeting individuals who participate in cartels.

67 Law of the Republic of Serbia no 51/2009 'On Protection of Competition' [2009] Official Gazette 51, as amended [2013] Official Gazette 95 <https://www.paragraf.rs/propisi/law-on-protection-of-competition-serbia.html> accessed 20 June 2026.

68 Elizabeta Tosheva and Branko Dimeski, 'The Competition Policy in Western Balkan Countries: How Far Have They Come on the EU Accession "Road?"' (2019) 14 Balkan Social Science Review 44 <https://js.ugd.edu.mk/index.php/BSSR/article/view/3338> accessed 20 June 2026.

69 Law of the Republic of Serbia no 51/2009 (n 67) art 68.

70 ibid, art 70.

71 Alexandr Svetlicinii, 'The New Serbian Law on the Protection of Competition: A Critical Assessment' (2009) 12(4) Legal Life: Journal for Legal Theory and Practice of the Jurists Association of Serbia 577 <https://ssrn.com/abstract=1520667> accessed 20 June 2026.

72 Criminal Code of the Republic of Serbia [2005] Official Gazette 85, art 229(1), as amended 2026 <https://www.paragraf.rs/propisi/krivicni-zakonik-2019.html> accessed 20 June 2026.

5.2. WB Policies on Cartel Criminalization: Their Path to a Greater Harmonization with European Member States Best Practices

As discussed above, most WB countries have introduced a mixed system of administrative and criminal sanctions for cartel infringements. While the administrative monetary penalties in WB are *well-aligned* with the EU secondary legislation, the scope and nature of criminal sanctions *vary significantly* across WB jurisdictions. For instance, Albania limits criminalization to competition infringements involving threats or violence. Kosovo extends criminal accountability to a large range of infringements, including cartels, abuse of dominance, and bid-rigging. Montenegro prosecutes only serious competition infringements, such as cartels, but the applicable penalties are only monetary fines. North Macedonia and Serbia criminalize prohibited agreements more broadly, with North Macedonia providing the harshest maximum sentence of 10 years of imprisonment. A more detailed comparative overview of the administrative and criminal enforcement of competition law across WB jurisdictions is provided in Appendix 1 to this paper.

Given the ongoing challenges that WB countries face in transitioning to fully functioning economies, considering the need for legal certainty, as well as the sometimes-fragile conditions where businesses operate, it is important to establish a *foundation of trust* between the private sector and public authorities. This needs to be done *without compromising the deterring effect* of sanctions on competition violations and at the same time guaranteeing the *legitimacy* of criminal sanctions in terms of proportionality and consistency. To achieve this, WB countries need to *harmonize a regional approach* to cartel prosecution. As mentioned in this article, the EU does not mandate cartel criminalization or its alignment between candidate members. However, following similar paths towards EU integration and having closely interconnected economies, the WB would benefit from pursuing a more consistent (albeit not identical) approach to criminal enforcement.

Relying only on administrative monetary fines may be insufficient to achieve a deterrent effect, considering that cartel activity may involve large companies in the region that can afford fines. Especially in cases of abuse of public funds, such as bid-rigging, or cartel activity with grave social or economic consequences, fines alone may not reflect the gravity of the offence.

However, the criminalization of all anti-competitive agreements could undermine the effectiveness of leniency policies in the region. Leniency policy, introduced by almost all systems of public enforcement of competition law around the globe, has been perfected by the EU. It concerns offering (full or partial) immunity to the first cartelist who reports the cartel to competition authorities. This policy has played a crucial role in cartel discovery in the EU. Although WB countries have introduced leniency policy into their national systems, they have not reached comparable levels of cooperation. Excessive criminal prosecution of involved individuals could further discourage whistleblowers from coming forward.

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In their path towards European Union accession and the strengthening of their competition enforcement regimes, WB countries can benefit from adopting best practices of EU Member States in criminalizing cartels. As discussed above, several Member States, such as Germany, France, Greece, and Croatia, have developed hybrid enforcement systems that combine administrative fines with criminal sanctions, particularly in cases involving serious infringements, such as bid-rigging or repeated cartel behaviour. This approach could be beneficial to take into consideration by WB countries.

In light of these considerations, the authors of this article advocate for the adoption of a *hybrid deterrence model* for competition infringements in WB. This model would be founded on a *primary enforcement mechanism of administrative monetary punishments* (imposed separately for undertakings and individuals). Criminalization, on the other hand, could be reserved for the most serious cases of violations, such as hardcore cartels (as introduced by the French, Croatian, and Greek models) and bid-rigging (as established in the German legal framework). The latter is especially severe, as it not only distorts competition but also misuses public funds. For this reason, the authors recommend the application of a hybrid system: primarily administrative fines (substantial to reach the deterrence level) applied to the companies involved and criminal sanctions to the individuals involved in these severe cases of competition violations. As regards the conception of a successful leniency policy within a hybrid enforcement model, the authors argue that when hybrid enforcement systems that incorporate criminal sanctions for serious competition infringements are adopted, participation in a leniency programme should also be recognized as a mitigating circumstance in the criminal proceedings of the individuals concerned.

In addition, the effectiveness and legitimacy of competition enforcement in WB will largely depend on strengthening the institutional capacity of enforcement institutions. In this aspect, some measures to be taken by the WB policymakers include increasing the staffing level of competition authorities, ensuring diversified funding (as also provided in the ECN+ Directive),[73] and promoting specialized training for personnel.

6 CONCLUSION

This article has attempted to explore the most appropriate models to enforce competition law, particularly regarding cartel conduct, in the developing economies of WB countries. While administrative measures are regulated by EU secondary law and the accompanying guidelines, the criminalization of competition violations remains at the discretion of each

73 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to Empower the Competition Authorities of the Member States to be More Effective Enforcers and to Ensure the Proper Functioning of the Internal Market [2019] OJ L 11/3 <http://data.europa.eu/eli/dir/2019/1/oj> accessed 20 June 2026.

state's legal framework. In this regard, WB countries have demonstrated a creative range of approaches. The analysis of cartel enforcement legislation in the Western Balkans is seen in comparison with EU Member States practices. While the Member States' jurisdictions analyzed in this paper impose administrative sanctions, only some extend these measures to include criminal liability for individuals involved in cartel conduct. Germany reserves criminal penalties for bid-rigging, while France, Greece, and Croatia have introduced broader criminal provisions targeting cartel behaviour. Interestingly, this study revealed that while the *administrative fines towards competition violations are applied uniformly in all WB* (reflecting the Commission's guidelines on Fines) of up to 10% of the annual turnover, the *criminalization* of these infringements differs at many levels.

Albania has demonstrated a *commitment to align* its legislation with EU competition law, particularly regarding the implementation of monetary fines. However, its approach to criminalization is *underdeveloped*. The only criminalized violation of competition law involves threats or violence. The latter are treated separately as offences in the Albanian Criminal Code. As such, the actual criminal provisions do not contribute significantly to effective cartel deterrence.

Kosovo has a relatively *comprehensive legal framework*, with clear provisions for both administrative and criminal sanctions. This clarity can improve the level of predictability and legal certainty among businesses. However, this approach may become *overly punitive*: criminal penalties apply to cartels, abuse of dominance, and bid-rigging regardless of the consequences or severity, raising concerns over proportionality and possible overdeterrence.

Montenegro has adopted a model of imposing *only monetary fines*. However, there is ambiguity regarding the legal nature of the sanctions: they are classified as 'penal misdemeanours' without clear grounding in the Criminal Code. In addition, the fines are imposed not by the competition authority, but by a court. This duality can jeopardize legal certainty. In addition, monetary fines may be *insufficient in deterring* serious competition violations, especially when imposed on financially powerful undertakings.

North Macedonia presents a *focused model by criminalizing* only the most serious competition infringements: prohibited agreements. This targeted criminalization helps to reach *efficiency in enforcement*. However, the criminal sanctions imposed on individuals engaging in cartels are among *the harshest in the region*, with imprisonment sentences of up to 10 years, raising questions about proportionality.

Serbia is a positive example of *alignment with EU rules* on administrative fines against undertakings. However, its enforcement system is weakened by the absence of administrative sanctions for individuals. Instead, it only imposes criminal sanctions, which may be disproportionate, limiting the flexibility of enforcement authorities.

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This article argues in favor of harmonized enforcement in WB countries, given their common EU integration background and interconnected economies. In this context, various enforcement models of several EU Member States have been explored. Considering the economic and legal context of the region, the adoption of a hybrid enforcement model appears to be the most appropriate solution. This system would primarily rely on administrative monetary sanctions, while reserving criminal sanctions only for cartel cases with severe consequences and bid-rigging. There is little evidence of convergence towards a common enforcement model in WB. Even though these jurisdictions are under no obligation to align their competition enforcement regimes, their shared aspiration towards European integration serves as a rationale for greater alignment. In addition to the common European path, alignment is important given the economic interdependence in WB countries, where undertakings conduct business in multiple WB jurisdictions. Divergent enforcement models could increase compliance costs and legal uncertainty. Against this background, policymakers need to strengthen regional cooperation to align enforcement frameworks. While complete uniformity is not necessary, more convergence in the principles governing administrative and criminal enforcement would both support EU integration of the region and the development of a stable regional market.

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APPENDIX

***Table* 1. Sanctioning cartels in WB Countries**

	EU Regulation 1/2003	Albania	Kosovo	Montenegro	North Macedonia	Serbia
Administrative sanctions / AS for companies engaging in cartels	Yes, the Regulation provides fines up to 10% of the annual turnover of the company.	Yes, the Law on Protection of Competition provides fines up to 10% of the annual turnover.	Yes, the Law on Protection of Competition establishes fines up to 10% of the annual turnover.	No, the sanctions are not considered administrative (even though criminal sanctions are limited exclusively to fines / monetary fines).	Yes, the Law on Protection of Competition provides fines up to 10% of the sum of the aggregate annual turnover of each member and performance ban of 3-30 days.	Yes, the Law on Protection of Competition provides fines up to 10% of the total annual turnover generated on the territory of the Republic of Serbia.
Administrative sanctions / AS for individuals engaging in cartels	No - it does not provide fines for individuals, but each Member State had approved their national rules on the matter.	Yes, the law provides fines up to 5,000,000 ALL (approx. 50,000 EUR).	Yes, the law provides fines from 1000 EUR to 4000 EUR.	Yes, it provides fines from 1000 EUR to 4000 EUR.	Yes, the law provides fines and performance ban of 3 to 15 or 30 days, depending on severity of offence.	No.
Criminal sanctions for individuals engaging in cartels	No, the Regulation does not provide criminal sanctions but they are regulated at a national level in Member States.	Partially covered, only if competition is distorted through violence or threat (up to 4 years of imprisonment).	Yes, the law sanctions: cartels (up to 5 years) abuse of dominant position (up to 3 years) and bid-rigging (up to 5 years) and fines.	Yes, the law on competition provides for 'penal misdemeanours' but they are sentenced only by fine and not mentioned in the Criminal Code.	Yes, prohibited agreements that distort competition are sentenced by imprisonment of 1 to 10 years.	Yes, prohibited agreements that distort competition are sentenced by imprisonment of 6 months to 5 years and fined.

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КРИМІНАЛІЗАЦІЯ КАРТЕЛІВ: ЛЕГІТИМНІСТЬ КРИМІНАЛЬНО-ПРАВОВИХ ЗАСОБІВ ЗАБЕЗПЕЧЕННЯ ЕКОНОМІЧНОЇ ДОБРОЧЕСНОСТІ В КРАЇНАХ ЗАХІДНИХ БАЛКАН?

Моніка Цанко* та Мірела Богдані

АНОТАЦІЯ

Передумови. *Протидія картелям є одним із ключових напрямів конкурентного права. Європейський Союз значною мірою гармонізував адміністративне правозастосування у сфері захисту конкуренції, проте між державами-членами ЄС зберігаються істотні розбіжності щодо криміналізації картельних змов. Такі розбіжності характерні і для країн Західних Балкан, де в межах процесу європейської інтеграції триває адаптація національного законодавства до стандартів ЄС. У статті досліджено, чи є адміністративні санкції достатніми для забезпечення ефективного правозастосування, визначено межі необхідності застосування кримінально-правових засобів, а також оцінено ефективність наявних механізмів протидії серйозним порушенням конкурентного права в країнах Західних Балкан.*

Методи. *У дослідженні використано доктринальний та порівняльно-правовий методи. Доктринальний аналіз охоплює нормативно-правову базу ЄС, законодавство окремих країн і наукову літературу щодо засад адміністративної та кримінальної відповідальності. Порівняльно-правовий аналіз застосовано для зіставлення правових систем п'яти країн Західних Балкан (Албанії, Косова, Чорногорії, Північної Македонії та Сербії) та чотирьох держав-членів ЄС (Німеччини, Франції, Греції та Хорватії) з метою виявлення тенденцій у сфері криміналізації картелів.*

Результати та висновки. *Дослідження засвідчує, що попри гармонізацію адміністративних штрафів для суб'єктів господарювання відповідно до правил ЄС,*

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підходи до встановлення індивідуальної кримінальної відповідальності за картельні змови на Західних Балканах суттєво відрізняються. Автори доходять висновку, що поєднання дієвих адміністративних штрафів для суб'єктів господарювання з кримінальними санкціями щодо фізичних осіб за найбільш тяжкі порушення конкурентного права в межах гібридної моделі могло б забезпечити більш збалансоване та ефективне правозастосування, зокрема щодо «hardcore»-картелів та спотворення результатів публічних закупівель.

Ключові слова: *Картелі, криміналізація, Західні Балкани, європейська інтеграція, конкурентне право, адміністративні штрафи, правозастосування.*

PËRMBLEDHJE NË SHQIP*

Artikull Kërkimor

KRIMINALIZIMI I KARTELEVE: LEGJITIMITET PËR INTEGRITETIN EKONOMIK NË BALLKANIN PERËNDIMOR?

Monika Canco*, Mirela Bogdani

ABSTRAKT

Sfondi*. Implementimi i rregullave kundër karteleve përbën një pjesë të rëndësishme të legjislacionit të konkurrencës. Bashkimi Europian ka harmonizuar kryesisht zbatimin administrativ të legjislacionit të konkurrencës. Megjithatë, mbeten dallime të rëndësishme midis Shteteve Anëtare të BE në lidhje me kriminalizimin e karteleve. Këto dallime janë gjithashtu të dukshme midis vendeve të Ballkanit Perëndimor, ku procesi i anëtarësimit në BE ka synuar përafrimin e legjislacionit kombëtar të konkurrencës me standardet e BE-së. Ky artikull së pari shqyrton nëse zbatimi administrativ është i mjaftueshëm dhe kur është i nevojshëm zbatimi penal i legjislacionit të konkurrencës. Së dyti, ky punim shqyrton nëse mekanizmat ekzistues të zbatimit në Ballkanin Perëndimor janë efektivë për të luftuar shkeljet serioze të rregullave të konkurrencës.*

Metodat. *Studimi zbatoi një metodologji kërkimore ligjore doktrinare duke kombinuar desk-review me analizën ligjore krahasuese. Desk-review shqyrton kornizën e ligjit të konkurrencës të BE-së, legjislacionin kombëtar dhe literaturën akademike për të identifikuar themelet e zbatimit administrativ dhe penal. Analiza krahasuese vlerëson kuadrin ligjor të vendeve të Ballkanit*

* The publication metadata in Albanian is presented as submitted by the authors.

Perëndimor dhe disa Shteteve Anëtare të BE-së, duke identifikuar ngjashmëritë, ndryshimet dhe tendencat e mundshme në lidhje me kriminalizimin e karteleve.

Rezultatet dhe Përfundimet. *Analiza tregon se, megjithëse sanksionet administrative për ndërmarrjet janë kryesisht në përputhje me standardet e BE-së midis Shteteve Anëtare dhe në të gjithë Ballkanin Perëndimor, mbeten dallime të konsiderueshme në lidhje me përgjegjësinë penale për pjesëmarrjet në kartele. Artikulli arrin në përfundimin se një model i harmonizuar hibrid i zbatimit, që kombinon sanksionet administrative me dënimet penale për shkeljet më të rënda të ligjit të konkurrencës, do të ofronte një kuadër zbatimi më të balancuar dhe efektiv.*

Fjalët kyçe: *Kartele, Kriminalizim, Ballkani Perëndimor, Integrimi Europian, e Drejta e Konkurrencës, Gjobat Administrative, Zbatimi i Ligjit.*

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Research Article

PERSONAL DATA PROTECTION IN VIETNAM'S PUBLIC ADMINISTRATION: A COMPARATIVE ANALYSIS WITH THE EU GENERAL DATA PROTECTION REGULATION

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ABSTRACT

Background: *The expansion of data-driven governance has intensified personal data protection within public administration. Although contemporary data protection regimes share common principles, their operation in the public sector remains uneven. This study examines how the General Data Protection Regulation (GDPR) and Vietnam's Law No. 91/2025/QH15 regulate personal-data processing by public authorities and what their differences imply for institutional accountability and individual rights.*

Method: *The study assesses normative architecture, institutional responsibilities, and compliance frameworks in the two legal systems. It combines systematic comparative legal analysis of primary legal instruments with thematic analysis of secondary sources, allowing for both structural comparison and contextual interpretation across jurisdictions. The doctrinal analysis identifies formal legal*

requirements, while observations concerning implementation are derived from secondary literature and are not presented as original empirical findings.

Results and Conclusions: *The findings demonstrate that robust legal frameworks do not ensure effective protection. The two systems show partial convergence in general data-protection principles but significant differences in public-sector processing, impact assessment, internal compliance functions, supervisory independence, and enforcement. Differences in administrative capacity, organizational culture, oversight arrangements, and digital governance strategies identified in the secondary literature may influence compliance. Accordingly, formal convergence should not be interpreted as institutional or functional equivalence. The research concludes that meaningful personal data protection in public administration depends on the alignment of law, institutions, and governance practices. Context-sensitive harmonization, supported by effective oversight and administrative capacity, is essential to safeguarding individual rights and enhancing trust in data-driven public governance.*

1 INTRODUCTION

The swift digitization in the field of public administration has transformed the way governments obtain, process, store, and disseminate personal information. Data collection has become the centrepiece of public service delivery and regulatory enforcement as governments implement e-governance systems, interoperable databases, digital identification technologies, and algorithmic tools. The promise of digital administration includes options for the government to operate more efficiently and in ways that provide better service to the public. However, the potential for unlawful data collection and retention, function creep, and unlawful surveillance becomes much more pronounced. As such, data collection and surveillance have become the centrepiece of public administration and regulatory compliance, and the same can be said for the significant impact this has on the private sector and the non-consensual collection and processing of personal data and the use of data in vertical administration. Data-driven technologies and automated decision-making have transformed the public sector and are reshaping administrative actions.[1] As personal data protection becomes more prioritized, emerging regulations have framed the protection of personal data as a fundamental, or quasi-fundamental, right.

1 Zaheer Allam and Zaynah A Dhunny, 'On Big Data, Artificial Intelligence and Smart Cities' (2019) 89 Cities 80 <https://doi.org/10.1016/j.cities.2019.01.032> accessed 20 April 2026; Irina Pencheva, Marc Esteve and Slava Jankin Mikhaylov, 'Big Data and AI – A Transformational Shift for Government: So, What Next for Research?' (2020) 35(1) Public Policy and Administration 24 <https://doi.org/10.1177/0952076718780537> accessed 20 April 2026.

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The EU's General Data Protection Regulation (GDPR)[2] is a milestone in the development of a comprehensive pan-European framework for balancing the protection of rights, with accountability obligations imposed on data controllers.[3] Furthermore, the GDPR has had significant extraterritorial influence and has served as a benchmark for new data protection regimes globally.[4] The spread of GDPR-inspired data protection laws has revealed friction. Although laws can appear to be converging, divergent conditions of administrative ability, legal culture, and design of institutions often render protective frameworks largely ineffective. Such friction often shows itself more on the surface of data protection law that intersects with public administration and the protection of the public interest and the administrative efficiency of the governance system.[5]

This study is theoretically positioned within comparative public law and the rights-based theory of data protection. It draws from the work of the contextual and functional approach to comparative law as expounded by Samuel.[6] This approach posits that legal provisions should be understood in relation to the issues they seek to solve and the specific context (here, *institutional*) within which they operate. Consequently, the study examines legal provisions related to the protection of personal data as legal instruments that are situated within the context of public administration. Additionally, the study views the protection of personal data through the prism of human dignity, the right to self-determination, and democracy. Despite the expansion of literature on data protection and digital governance, there are a number of notable gaps. The literature seems to be concerned with the regulation

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 <http://data.europa.eu/eli/reg/2016/679/oj> accessed 20 April 2026.

3 Chris Jay Hoofnagle, Bart van der Sloot and Frederik Zuiderveen Borgesius, 'The European Union General Data Protection Regulation: What It Is and What It Means' (2019) 28(1) Information & Communications Technology Law 65 <https://doi.org/10.1080/13600834.2019.1573501> accessed 20 April 2026; M Laxmi Jagannadh and S Sumitra, 'Comparative Analysis of Data Protection and Privacy Laws' (2025) 23(s6) Lex Localis – Journal of Local Self-Government 8565 <https://doi.org/10.52152/51h4tr43> accessed 20 April 2026.

4 Suk Kyoung Kim, Min Jae Park and Jae Jeung Rho, 'Does Public Service Delivery Through New Channels Promote Citizen Trust in Government? The Case of Smart Devices' (2019) 25(3) Information Technology for Development 604 <https://doi.org/10.1080/02681102.2017.1412291> accessed 20 April 2026; Cedric Ryngaert and Mistale Taylor, 'The GDPR as Global Data Protection Regulation?' (2020) 114 American Journal of International Law 5 <https://doi.org/10.1017/aju.2019.80> accessed 20 April 2026.

5 Kornraphop Kawintiranon and Yaguang Liu, 'Towards Automatic Comparison of Data Privacy Documents: A Preliminary Experiment on GDPR-Like Laws' (*arXiv*, 1 May 2021) arXiv:2105.10117 [cs.CL] <https://doi.org/10.48550/arXiv.2105.10117> accessed 20 April 2026; Christopher Kuner, 'Protecting EU Data Outside EU Borders under the GDPR' (2023) 60(1) Common Market Law Review 77, <https://doi.org/10.54648/cola2023004> accessed 20 April 2026.

6 Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Bloomsbury Publishing 2014).

of the private sector, while the position of public authorities is undertheorized.[7] In comparative research, there is a tendency to focus on regulatory convergence and the GDPR, while other highly relevant factors, including compliance, administrative rationale, institutional capacity, and the regulation of biopolitics, remain overlooked. Moreover, research on emerging and transitional legal systems is often too descriptive, documenting legal reforms while lacking a robust analysis of the underlying institutional framework and the potential practical ramifications of such reforms.[8] Accordingly, this study asks: How do the GDPR and Vietnam's Law No. 91/2025/QH15[9] regulate personal-data processing by public authorities, and what do their differences imply for institutional accountability and individual rights?

Addressing these gaps, this study contributes to the literature in three ways. First, it reconceptualizes the problem of personal data protection as a problem of administrative law and public governance, rather than as a descriptive problem of legal compliance. It shifts the focus to public administration and reveals the ways in which data protection obligations interact with administrative frameworks, professional cultures, and routines of decision making. Second, it merges systematic comparative legal scholarship with qualitative thematic analysis in line with the methodological guidance provided by Braun and Clarke.[10] Such a blend of approaches allows for the recognition of patterns, tensions, and normative propositions in a legal system, and analytical transparency and rigor. Third, its original contribution is a focused examination of Vietnamese public-sector processing, particularly the relationship between formal legal convergence and differences in institutional accountability, oversight, and implementation. The study concludes that personal data protection in public administration requires both the adoption of more sophisticated legal frameworks and the embedding of these frameworks within administrative practice. By

7 Sean Sirur, Jason RC Nurse and Helena Webb, 'Are We There Yet? Understanding the Challenges Faced in COmplying with the General Data Protection Regulation (GDPR)' (*arXiv*, 22 August 2018) arXiv:1808.07338 [cs.CY] <https://doi.org/10.48550/arXiv.1808.07338> accessed 20 April 2026; Ewa Wanda Ziemba, 'The Contribution of ICT Adoption to the Sustainable Information Society' (2019) 59(2) Journal of Computer Information Systems 116 <https://doi.org/10.1080/08874417.2017.1312635> accessed 20 April 2026.

8 Bach Thi Nha Nam and Nguyen Ngoc Phuong Hong, 'Addressing the Challenges of Data Privacy Protection Law in Vietnam' (2023) 39(1) VNU Journal of Science: Legal Studies 30 <https://doi.org/10.25073/2588-1167/vnuls.4413> accessed 20 April 2026; Nguyen Ho Bich Hang, 'Addressing Fragmentation in Vietnam's Data Protection Laws: Recommendations for a Unified Legal Framework' (2024) 11(2) Vietnamese Journal of Legal Sciences 14 <https://doi.org/10.2478/vjls-2024-0008> accessed 20 April 2026; Tố Trang Lâm, 'Some Legal Aspects of Personal Data Protection in the World: Experience for Vietnam' (2024) 10(1) Cogent Social Sciences 2414872 <https://doi.org/10.1080/23311886.2024.2414872> accessed 20 April 2026.

9 Law of the Socialist Republic of Vietnam no 91/2025/QH15 'On Personal Data Protection' (adopted 26 June 2025) <https://english.luatvietnam.vn/dan-su/law-on-personal-data-protection-law-no-91-2025-qh15-405135-d1.html> accessed 20 April 2026.

10 Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (SAGE 2021).

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making a systematic comparison of how the GDPR and Vietnam's legal framework regulate and enforce data protection in the public sector, the study seeks to explore the strengths and weaknesses of data protection reforms in a contemporary data state.

2 METHODS

This research employs a systematic comparative legal research design, informed by the conceptual approach developed by Samuel.[11] Comparative analysis is used to examine how the European Union and Vietnam regulate personal data protection in public administration when confronted with similar governance challenges. Rather than relying on a purely textual comparison of legal provisions, the study adopts a functional and contextual perspective. This allows the analysis to account for institutional settings, administrative structures, and regulatory objectives that shape the operation of data protection norms within each legal framework.[12] The comparison is organized around the following analytical dimensions relevant to public-sector data processing: legal bases and public-sector exceptions, data-subject rights, the distribution of controller and processor responsibilities, impact assessment, internal compliance functions, oversight, breach notification, cross-border transfers, sanctions, and AI-related processing.[13] Primary legal instruments were examined doctrinally and compared under each dimension. The analysis draws on secondary sources, including scholarly publications, policy documents, and authoritative reports. Sources were included where they directly addressed public-sector data protection, institutional accountability, or implementation in the EU or Vietnam.

In addition, the study applies thematic analysis to secondary materials, following the methodological guidance provided by Braun and Clarke.[14] This method is used to identify recurring themes and interpretive patterns related to administrative capacity, rights protection, and regulatory effectiveness. Coding is conducted iteratively through initial coding, comparison of recurring patterns, and review and definition of the principal themes. Legal propositions derived from primary instruments are treated as doctrinal findings. Statements concerning administrative practice or regulatory effectiveness are derived from secondary sources and are not presented as original empirical findings; no interviews, surveys, or observational data were collected.[15] By integrating thematic analysis with comparative legal reasoning, the research moves beyond descriptive comparison and

11 Samuel (n 6).
12 ibid
13 Regulation (EU) 2016/679 (n 2); Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European Data Governance and amending Regulation (EU) 2018/1724 (Data Governance Act) [2022] OJ L 152/1 <http://data.europa.eu/eli/reg/2022/868/oj> accessed 20 April 2026; Law of the Socialist Republic of Vietnam no 91/2025/QH15 (n 9).
14 Braun and Clarke (n 10).
15 ibid

offers interpretive insight into the underlying assumptions and tensions within data protection governance. Together, the methods distinguish formal legal requirements from literature-based observations about their implementation.

3 RESULTS AND DISCUSSION

3.1. Normative Architecture for the Protection of Personal Data in the Public Sector

The normative legal structure for the protection of personal data in the public sector administration reflects the underlying constitutional, administrative, and regulatory traditions that govern the exercise of public power in a given jurisdiction. This architecture determines the normative status of data protection, the obligations imposed on public authorities and the enforceable rights available to individuals.[16] For the purposes of this study, the comparison is specifically between the GDPR framework applicable to public authorities in the European Union and Vietnam's Law on Personal Data Protection, Law No. 91/2025/QH15, together with its implementing Decree No. 356/2025/ND-CP.[17] Both Vietnamese instruments took effect on 1 January 2026. Constitutional protection may take the form of an autonomous data-protection right or broader guarantees concerning privacy and confidentiality. In the legal framework of the EU, the protection of personal data is recognized as an autonomous fundamental right under Article 8 of the Charter of Fundamental Rights[18] and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU)[19], separate from, but closely associated with the right to respect for private and family life under Article 7 of the Charter. By contrast, Article 21 of Vietnam's Constitution[20] protects private life, personal and family secrets, and the confidentiality of communications but does not expressly formulate an autonomous right to personal-data protection. Such constitutional recognition influences the interpretation of the GDPR,

16 Cong Tran Quoc Le, Viet Dung Tran and Dao Phuong Thuy Nguyen, 'Global Norms and Regional Innovation: GDPR, Evolution of Data Protection in ASEAN and the Legal Trajectory of AI in Vietnam' (2025) 15(3) TalTech Journal of European Studies 250 <https://doi.org/10.2478/bjes-2025-0039> accessed 20 April 2026.

17 Decree of the Socialist Republic of Vietnam no 356/2025/ND-CP 'Detailing Certain Provisions and Measures for Implementing the Law on Personal Data Protection' (adopted 31 December 2025) <https://vanban.chinhphu.vn/?pageid=27160&docid=216387> accessed 20 April 2026.

18 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2012_326_R_0391_01> accessed 20 April 2026.

19 Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C 326/47 <http://data.europa.eu/eli/treaty/tfeu_2012/oj> accessed 20 April 2026.

20 Constitution of the Socialist Republic of Vietnam (adopted 28 November 2013) <https://www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2013> accessed 20 April 2026.

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limits the exercise of public power and enables individuals to seek administrative and judicial protection.[21] Public authorities are, therefore, not merely subject to general privacy expectations; they exercise legally bounded powers when collecting, using, sharing, and retaining personal data.

The absence of an autonomous constitutional data-protection right does not, by itself, determine whether a legal framework is coherent or effective. The legal protection of data is often scattered among a variety of sector-specific laws, administrative rules, and guidelines that are internal to certain public authorities. Even if such legal frameworks include a certain data-protection principle, their effectiveness depends on statutory hierarchy, institutional design, administrative discretion, and available remedies. The scattering of data protection norms may create a lack of clarity about the legal grounds for processing data, the breadth of administrative discretion, and the lack of action on the part of the administration to protect the rights of individuals.[22] Within this context, fragmentation may reduce legal clarity and enforceability; however, its effects must be assessed within the particular legal system. Vietnam previously relied on a more fragmented combination of sector-specific legislation and Decree No. 13/2023/ND-CP.[23] That decree represented an important initial consolidation of personal-data rules, but it operated at the level of delegated legislation rather than a dedicated statute. The enactment of Law No. 91/2025/QH15 and Decree No. 356/2025/ND-CP has since established a more unified statutory framework. Decree No. 356/2025/ND-CP replaced Decree No. 13/2023/ND-CP from 1 January 2026, although the former decree remains historically relevant to understanding Vietnam's regulatory development.

A key element of the normative structure pertains to the articulation, as well as the legal standing, of fundamental principles of data protection. The principles of lawfulness, purpose limitation, data minimization, accuracy, storage limitation, integrity, confidentiality, and accountability have gained acceptance across most contemporary data protection frameworks. However, the differences in their expression and legal effect are significant. Under Article 5 GDPR, these principles are expressly codified as binding processing requirements. They apply to both public and private data controllers, subject to context-specific provisions, restrictions, and exceptions. This consistency fosters legal certainty and settles the compliance obligations of public authorities in the processing of

21 Hoofnagle, van der Sloot and Borgesius (n 3); Thomas Streinz, 'The Evolution of European Data Law' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 902, <https://doi.org/10.1093/oso/9780192846556.003.0029> accessed 20 April 2026.

22 Nguyen (n 8); Tong Thi Phuong Thao, 'Laws on Personal Data Protection in Vietnam Today' (2025) 14(1) International Journal of Engineering Inventions 47 <https://www.ijeijournal.com/v14-i1.html> accessed 20 April 2026.

23 Decree of the Socialist Republic of Vietnam no 13/2023/ND-CP 'Protection of Personal Data' (adopted 17 April 2023) <https://vanban.chinhphu.vn/?pageid=27160&docid=207759> accessed 20 April 2026.

personal data, irrespective of the sectorial context.[24] In addition, the principles are more than interpretive aids; they are prescriptive, and, thus, sufficiently_solid to sustain administrative and judicial oversight. Vietnam establishes its own principles under Article 3 of Law No. 91/2025/QH15, but their wording and structure are not identical to Article 5 GDPR. Vietnam's 2025 Law similarly establishes enforceable rights and obligations, including rights to information, consent or refusal, withdrawal of consent, access, rectification, deletion, restriction, objection, complaint, litigation, and compensation under Article 4. It imposes statutory responsibilities on controllers and processors under Article 37. The two frameworks converge in recognizing legally enforceable protection, but differ in how particular obligations and public-sector exceptions are structured.

The principle of legality plays an essential role within the regulatory structure of the protection of personal data in the public administration sector. Under Articles 5(1)(a) and 6(1) GDPR, every controller, whether public or private, must identify a lawful basis for each processing operation.[25] The public-sector distinction is not that only public authorities require a legal basis. Rather, public authorities commonly rely on processing that is necessary to comply with a legal obligation under Article 6(1)(c), or to perform a task carried out in the public interest or in the exercise of official authority under Article 6(1)(e). Article 6(3) further requires the basis for such processing to be established in Union or Member State law. In addition, public authorities may not rely on the legitimate-interests ground in Article 6(1)(f) when processing data in the performance of their public tasks.[26] Consent is not legally excluded from public-sector processing, but it will frequently be inappropriate where a significant imbalance of power means that the individual cannot freely refuse without adverse consequences. EU public authorities should rely on consent only where the conditions of freely given, specific, informed and unambiguous agreement can genuinely be satisfied. In most mandatory administrative relationships, Articles 6(1)(c) and 6(1)(e) provide more appropriate legal bases.

24 Reece Iriye, 'The European Union General Data Protection Regulation' (*Stimson Center*, 24 September 2024) <https://www.stimson.org/2024/the-european-union-general-data-protection-regulation/> accessed 20 April 2026; Christina Tikkinen-Piri, Anna Rohunen and Jouni Markkula, 'EU General Data Protection Regulation: Changes and Implications for Personal Data Collecting Companies' (2017) 34(1) Computer Law & Security Review 134 <https://doi.org/10.1016/j.clsr.2017.05.015> accessed 20 April 2026.

25 Frederik J Zuiderveen Borgesius and Wilfred Steenbruggen, 'The Right to Communications Confidentiality in Europe: Protecting Privacy, Freedom of Expression, and Trust' (*arXiv*, 9 October 2025) arXiv:2510.08247 [cs.CY] <https://doi.org/10.48550/arXiv.2510.08247> accessed 20 April 2026; Hoofnagle, van der Sloot and Borgesius (n 3).

26 Bach and Nguyen (n 8); Dao Kim Anh, Pham Xuan Phong and Phan Duong Quang, 'Enhancing the Responsibilities of Data Controllers in Vietnam: Insights from the European General Data Protection Regulation' (2024) 40(1) VNU Journal of Science: Legal Studies 90 <https://doi.org/10.25073/2588-1167/vnuls.4610> accessed 20 April 2026; Tu Thien Huynh, 'Everyone is Safe Now: Constructing the Meaning of Data Privacy Regulation in Vietnam' (2024) 11(4) Asian Journal of Law and Society 530 <https://doi.org/10.1017/als.2024.36> accessed 20 April 2026.

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Acknowledging this asymmetry, many data-protection frameworks limit the use of consent in administrative situations and instead focus on a legal basis of statutory power, public interest, or legal obligation. Nonetheless, not all legal systems provide this clarity. In some places, it is still possible to use consent to describe a situation that is, in fact, not voluntary, which is contrary to the intention of data protection law.[27] The normative architecture includes structures related to the distribution of responsibilities within public administration. Modern data-protection regimes increasingly require public authorities to document processing, assess risks, implement technical and organizational safeguards and establish internal compliance arrangements. Under the GDPR, accountability requires controllers not only to comply with the principles in Article 5(1), but also to demonstrate compliance under Article 5(2). Public authorities must ordinarily designate a data protection officer under Article 37(1)(a). High-risk processing may require a data protection impact assessment under Article 35. These provisions are particularly relevant to automated decision-making, systematic monitoring, large-scale databases and the processing of sensitive information.[28] Vietnam's framework similarly requires agencies and organizations to designate a qualified personal-data-protection unit or responsible personnel under Article 33(2), while Article 21 provides for personal-data-processing impact-assessment dossiers. Conversely, Vietnamese internal personnel or units should not be presented as functionally equivalent to GDPR DPOs: Articles 38 and 39 GDPR expressly regulate the DPO's organizational position, resources, absence of instructions, protection from dismissal and advisory and monitoring functions, whereas Article 33 of the Vietnamese Law does not reproduce all of those guarantees. Yet, Article 21(6) exempts competent state agencies from the statutory impact-assessment requirement. This is an important point of divergence from the GDPR and should not be obscured by a general statement that the two systems impose equivalent accountability duties. The Vietnamese exemption may reduce administrative burdens for state bodies, but it possibly raises questions about how risks arising from large-scale governmental processing are assessed and documented through alternative mechanisms.

27 Pusp Raj Joshi and Shareeful Islam, 'E-Government Maturity Model for Sustainable E-Government Services from the Perspective of Developing Countries' (2018) 10(6) Sustainability 1882 <https://doi.org/10.3390/su10061882> accessed 20 April 2026; Magdalena Jurczuk and Maria Suprunowicz, 'Consent in Data Privacy: A General Comparison of GDPR and HIPAA' (2024) 16 Przegląd Prawniczy Uniwersytetu Im Adama Mickiewicza 173 <https://doi.org/10.14746/ppuam.2024.16.07> accessed 20 April 2026.

28 Malang BS Bojang, 'Challenges and Successes of E-Government Development in Developing Countries: A Theoretical Review of the Literature' (2019) 3(4) International Journal of Research and Innovation in Social Science 410 <https://rsisinternational.org/virtual-library/papers/challenges-and-successes-of-e-government-development-in-developing-countries-a-theoretical-review-of-the-literature/> accessed 20 April 2026; Paul Voigt and Axel von Dem Bussche, 'Practical Implementation of the Requirements under the GDPR' in Paul Voigt and Axel von Dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 245 <https://doi.org/10.1007/978-3-319-57959-7_10> accessed 20 April 2026.

As reported in the secondary literature, the integration of accountability requirements and obligations within administrative law is patchy. In legal systems that have a well-established culture of managerial discretion or hierarchical command, the protection of rights through procedures is viewed as a burden. This can turn compliance systems into a box-ticking exercise that is overly focused on documentation, as opposed to the identification and mitigation of risks. These are literature-based observations about implementation rather than doctrinal findings derived from the legal instruments. This institutional problem may arise under either framework and should be distinguished from differences in the legal texts themselves. Enforcement and remedies comprise yet another important element of the normative framework.[29] The effectiveness of data-protection rights depends on accessible complaint procedures, meaningful corrective powers and judicial remedies. Under Articles 51 and 52 GDPR, Member States must establish supervisory authorities that act with complete independence. Article 58 grants those authorities investigative and corrective powers, while Articles 77–79 provide rights to lodge complaints and seek effective judicial remedies. Vietnam adopts a structurally different oversight model. Article 33 identifies the specialized personal-data-protection authority within the Ministry of Public Security as part of the personal-data-protection force, and Article 36 designates the Ministry of Public Security as the principal body responsible to the Government for state management of personal-data protection. This model does not reproduce the GDPR requirement of a structurally independent supervisory authority. Nevertheless, Article 4 of the Vietnamese Law expressly grants data subjects rights to complain, report violations, initiate legal proceedings and claim compensation in accordance with applicable law.[30] The relevant comparative issue is not the complete absence of oversight or remedies, but the difference between independent regulatory supervision in the EU and executive state-management supervision in Vietnam.

Data-protection law must operate together with administrative-law safeguards. Requirements concerning transparency, reasoned decision-making, access to information, complaint procedures and judicial review convert abstract rights into practical protection. When a public authority informs an individual why and under what legal authority data are processed, the individual is better able to assess the legality of that processing and challenge it where necessary. Otherwise, where procedures are inaccessible or exceptions are drafted too broadly, statutory data-protection rights may remain difficult to exercise. A comparative perspective further underscores the impact of

29 Bojang (n 28); Guangwei Hu and others, 'The Influence of Public Engaging Intention on Value Co-Creation of E-Government Services' (2019) 7 IEEE Access 111145 <https://doi.org/10.1109/ACCESS.2019.2934138> accessed 20 April 2026.

30 Kuner (n 5); Sirur, Nurse and Webb (n 7).

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digital governance on normative formation.[31] The reliance of the public sector on automated, data-driven, and interoperable database decision-making systems poses a challenge to normative traditions. The GDPR addresses some of these risks through the principles of necessity, proportionality, data protection by design, impact assessment, and restrictions on solely automated decisions. Article 23 permits legislative restrictions on certain rights only when the restriction respects the essence of fundamental rights and is necessary and proportionate to a recognized public objective.

Secondary literature identifies continuing challenges concerning algorithmic transparency, collective data, and systemic risks. While some jurisdictions have optimized their systems to address these challenges, others remain reliant on administrative systems designed for their analogue predecessors.[32] This gap raises concerns about the sustained effectiveness of outdated administrative systems. These implementation-related observations should be supported by the relevant secondary sources and should not be presented as conclusions derived solely from the statutory comparison. The normative structure on the protection of personal data in public administration is intricate and composed of various elements. This structure consists of the elements of the constitution, the design of the statute, the mechanisms of enforcement, and the traditions of administration. Although paradigm shifts around the core principles of data protection have occurred, widespread variations continue in terms of legal consistency, institutional coherence, and the synergy of practical enforcement. These variations have important consequences on how individual rights are recognized and the legitimacy of data-driven public administration. Hence, the need to comprehend the structure is critical for evaluating both the robust and frail facets of the contemporary data protection mechanisms in the administrative state.

3.2. The Architecture of Institutional Accountability and the Oversight Frameworks for the Governance of Data Protection in the Public Sector

The effectiveness of data protection in the public sector depends partly on how legal and institutional frameworks allocate responsibilities among public authorities, internal compliance personnel, and external oversight bodies. These frameworks determine the accountability of public administrators, how responsibilities are to be operationalized, and the capacity of oversight and accountability bodies to monitor, investigate, and

31 Maribel González Pascual, 'Public Administrations and Data Protection' in Karl-Peter Sommermann, Adam Krzywoń and Cristina Fraenkel-Haeberle (eds), *The Civil Service in Europe: A Research Companion* (Routledge 2025) 649 <http://dx.doi.org/10.4324/9781003458333-40> accessed 20 April 2026; Dennis Rosenberg, 'Use of E-Government Services in a Deeply Divided Society: A Test and an Extension of the Social Inequality Hypotheses' (2019) 21(2) New Media & Society 464 <https://doi.org/10.1177/1461444818799632> accessed 20 April 2026.

32 Luca Nannini and others, 'Beyond Phase-In: Assessing Impacts on Disinformation of the EU Digital Services Act' (2024) 5(2) AI and Ethics 1241 <https://doi.org/10.1007/s43681-024-00467-w> accessed 20 April 2026; Pencheva, Esteve and Mikhaylov (n 1).

respond to unlawful activities associated with data processing. Secondary literature reviewed in this study suggests that variations in institutional design often account for the disparate outcomes that can be observed in different jurisdictions despite the imposition of the same legal rules. A public authority acts as a controller where it determines, alone or jointly, the purposes and means of processing; depending on the arrangement, it may instead act as a processor or joint controller. This role comes with legal obligations, including the protection of data, the implementation of administrative safeguards, and cooperation with the competent data-protection authority. Under the GDPR, these obligations apply to both public and private controllers, while certain institutional duties apply specifically to public authorities. In Vietnam, the corresponding responsibilities are principally governed by Law No. 91/2025/QH15 and its implementing Decree No. 356/2025/ND-CP.[33] Public authorities are expected to include data protection as part of their usual administrative duties and not as an external obligation. The distribution of duties in public administration is diverse. In some cases, responsibility for data protection is spread out, with individual public authorities retaining responsibility for their own processing activities. This model promotes data-protection compliance, but it can lead to uneven practices across administrative bodies. Conversely, some jurisdictions have adopted centralized models, leading to greater consistency across public authorities and a more coherent implementation of the administrative framework. Although centralization may improve compliance in some areas, it may be less responsive to the operational needs of particular administrative sectors.[34]

One of the most striking aspects of recent developments in data protection is the emergence of internal compliance functions in public authorities. The assignment of specific personnel or units within public administrations to deal with data protection issues is symptomatic of a shift towards more preventive and organizationally accountable forms of data protection. The idea is to internalize data protection-related expertise to help public authorities comply with the law. Under Article 37(1)(a) GDPR, a data protection officer must generally be designated where processing is carried out by a public authority or body, except for courts acting in their judicial capacity. Article 33 of Vietnam's Law similarly requires agencies and organizations to designate qualified personal-data-protection personnel or units, or to engage a qualified service provider. Nonetheless, these Vietnamese personnel or units should not be presented as functionally equivalent to GDPR DPOs. Articles 38 and 39 GDPR expressly protect the DPO's organizational position, resources, freedom from instructions and monitoring, and advisory functions, whereas Article 33 of the Vietnamese Law does not reproduce all of those guarantees. Secondary literature indicates that internal

33 Hoa Thanh Ha and Tuan Van Vu, 'Potential Conflicts in Personal Data Protection under Current Legislation in Vietnam Compared with European General Data Protection Regulation' (2024) 7(3) Access to Justice in Eastern Europe 505 <https://doi.org/10.33327/ajee-18-7.3-a000304> accessed 20 April 2026; Hoofnagle, van der Sloot and Borgesius (n 3).

34 González Pascual (n 31).

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compliance functions are likely to be more effective when they are structurally supported by organizations or public authorities and are provided with the necessary resources and an organizational culture that enables them to influence compliance practices. Compliance personnel may have limited capacity to identify or act on unlawful processing where they lack sufficient resources, access to decision-making, or organizational independence.[35] The role of external oversight is as important as internal compliance functions. Independent authorities are crucial for effective oversight and the protection of the rights and freedoms of data subjects. Their responsibilities include supervising compliance, processing of complaints, conducting inquiries, and adopting enforcement measures. Under Articles 51 and 52 GDPR, Member States must establish supervisory authorities that act with complete independence, while Article 58 grants them investigative and corrective powers.[36] This is especially necessary in the public domain where the imbalance of power between citizens and the public authority is more pronounced.

Vietnam adopts a different institutional model. Article 33 of Law No. 91/2025/QH15 places the specialized personal-data-protection authority within the Ministry of Public Security, while Article 36 identifies the Ministry of Public Security as the principal body responsible to the Government for state management of personal-data protection, subject to the respective responsibilities of the Ministry of National Defense, other ministries, and provincial People's Committees. Unlike the GDPR, the Vietnamese Law does not expressly establish a supervisory authority with complete institutional independence from the executive.[37] This difference should not be understood as the presence of oversight in the EU and its absence in Vietnam. Rather, it reflects a distinction between the GDPR's independent supervisory-authority model and Vietnam's executive state-management model. Judicial control is equally important in data protection governance systems. Courts offer an indispensable venue for the interpretation of data protection standards, the resolution of conflicts and the clarification of the boundaries of administrative discretion. In situations where judicial oversight is possible and efficient, it reinforces accountability by allowing individuals whose personal data were unlawfully processed to challenge the system and obtain compensation. The existence of formal rights and accountability mechanisms is insufficient if judicial protection is not easily available due to procedural obstacles, the high cost of litigation, or rules of standing that limit access. The relationship between courts and supervisory bodies may determine whether formal accountability mechanisms provide effective protection in practice.[38]

In addition to formal oversight organizations, mechanisms of political and administrative accountability deserve attention. Data protection governance through oversight of administrative activities and responses to persistent problems can be influenced by

35 Voigt and von Dem Bussche (n 28).
36 Kuner (n 5).
37 Sirur, Nurse and Webb (n 7).
38 Streinz (n 21).

parliamentary committees, audit institutions, and offices of the ombudsman. Although these bodies may not possess specialized data-protection expertise, their involvement is particularly important where public-sector processing is connected with policy implementation, public expenditure, and the exercise of statutory powers.[39] The following observations concerning technological coordination, outsourcing, and institutional culture are derived from secondary literature rather than primary legal instruments. Oversight responsibilities and institutional accountability have been made more complex by new digital technologies and the sharing of data across sectors. Responsibility for compliance and accountability has been diffused by the use of interoperable systems and databases across multiple administrative systems. In such a situation, overlapping responsibilities and ill-defined accountability may create governance gaps. Some jurisdictions have created enhanced coordination mechanisms across supervisors and specific accountability in the instances of collective data processing. In contrast, others have stuck to compartmentalized institutional frameworks that have become ineffective in dealing with current data governance issues.[40] The interface between the public and private sectors presents institutional challenges. Public authorities have a growing dependence on private providers for the supply of digital infrastructure, data analytics, and service provision. Although contractual frameworks may allocate responsibilities between public supervisors and private contractors, effective oversight still requires public authorities to possess the legal and technical capacity to audit contractors, obtain relevant information, and enforce contractual obligations. Outsourcing does not remove the public authority's accountability for personal-data processing.[41] Furthermore, institutional culture is a crucial factor in shaping the oversight of institutional mechanisms. Where legal frameworks exist, if supervisory bodies adopt a collaborative or deferential stance towards public administration, enforcement may be slow and selective.

A culture that prioritizes oversight may increase compliance, even in the absence of wide-ranging enforcement. These factors may not be adequately captured by a purely doctrinal approach, but they are vital in explaining the mechanisms in place to ensure compliance with data protection.[42] Ultimately, the impact of institutional responsibilities and oversight mechanisms hinges on the transparency of the processes and the involvement of the public. Trust and legitimacy are fostered through access to information, reporting

39 Marijn Janssen and others, 'Trustworthiness of Digital Government Services: Deriving a Comprehensive Theory Through Interpretive Structural Modelling' (2018) 20(5) Public Management Review 647, <https://doi.org/10.1080/14719037.2017.1305689> accessed 20 April 2026.

40 Pencheva, Esteve and Mikhaylov (n 1).

41 Danny S Guamán and others, 'Automated GDPR Compliance Assessment for Cross-Border Personal Data Transfers in Android Applications' (2023) 130 Computers & Security 103262 <https://doi.org/10.1016/j.cose.2023.103262> accessed 20 April 2026.

42 Nam Giang Do and Khoi Trong Dao, 'More than Just Privacy: Latent Policies for the Codification of Vietnamese Personal Data Protection Law' (2025) 15(3) International Data Privacy Law 268 <https://doi.org/10.1093/idpl/ipaf013> accessed 20 April 2026; Huynh (n 26).

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mechanisms of the supervisory bodies, and active engagement of the public in the complaint mechanisms. When oversight mechanisms are unclear and difficult to navigate, people are less likely to assert their rights. The secondary literature reviewed in this study suggests that oversight mechanisms focusing on transparency are more likely to increase compliance and strengthen the protective side of the data protection law in the public administration.[43] Accordingly, although the GDPR and Vietnamese law both establish internal compliance and external oversight arrangements, they differ principally in the institutional independence and location of the supervisory function. These differences are directly relevant to the balance between administrative efficiency, accountability, and the protection of individual rights.

3.3. Administrative Implementation and Compliance in Public-Sector Data Protection Frameworks

Administrative implementation concerns the process through which legal data-protection norms are translated into the everyday practices of public authorities. Unless expressly attributed to a primary legal instrument, the implementation-related observations in this section are derived from secondary literature and are not presented as original empirical findings. This process is neither immediate nor uniform. It is dependent on organizational capacity, professional culture, techno-legal infrastructure, and tensions between legal requirements and operational demands. This is why public authorities can operate under similar normative frameworks but still achieve compliance differently. These differences demonstrate that the implementation of data-protection rules is as important as their formal legislative design. A characteristic trait of administrative implementation is the formulation of internal frameworks that put into practice the principles of data protection. Increasingly, public authorities turn to internal policies, handbooks, ethical guidelines, and standard operating procedures that direct staff on how to lawfully handle personal data. They act as vital links between the statutes and routine administrative choices. They are particularly important in data-heavy sectors, such as taxation, social security, and population databases. Frontline staff routinely deal with large amounts of personal data, often under time and performance pressures.

Comparative studies, however, show that internal rules vary in legal and operational quality because of uneven institutional awareness, legal knowledge, and management commitment.[44] Policies that merely restate legal provisions without explaining how they apply to administrative tasks have limited practical value. Training and capacity building

43 Liang Ma and Yueping Zheng, 'National E-Government Performance and Citizen Satisfaction: A Multilevel Analysis Across European Countries' (2019) 85(3) International Review of Administrative Sciences 506 <https://doi.org/10.1177/0020852317703691> accessed 20 April 2026.

44 Andreea Buruiana, 'Personal Data Protection in the Digitalization Process of the Public Administration' (2024) 11(2) European Journal of Law and Public Administration 15 <https://doi.org/10.18662/eljpa/11.2/227> accessed 20 April 2026; Tong (n 22).

are another important aspect of administrative compliance. Legal requirements are of little value if public employees do not have a practical working understanding of the principles of data protection for everyday tasks. In environments with systematic and ongoing data protection training, data protection is likely to be viewed as part of a professional ethos, and not a burden from an external regulatory body. Such training combines examples from specific sectors, thus empowering employees to identify data protection issues associated with everyday administrative tasks. By contrast, environments with training that is infrequent, limited to upper management, or excessively theoretical typically have compliance that is reactive and shallow. This is evident in data-heavy environments, such as healthcare, social services, and digital identity, where operational imperatives often take precedence over data-subject rights.[45]

Compliance outcomes can be shaped by documentation and records-management practices. Current frameworks require public authorities to record data processing, legal grounds, their protections, and the sharing of data. These obligations are intended to improve transparency, support internal and external oversight, and enable supervisory authorities to evaluate compliance. Under Articles 5(2) and 30 GDPR, public authorities must be able to demonstrate compliance and, subject to limited exceptions, maintain records of processing activities. Vietnam's Law No. 91/2025/QH15 likewise imposes compliance responsibilities on controllers and processors and requires personal-data-processing impact-assessment documentation under Articles 21 and 37. The two frameworks recognize documentation as an accountability mechanism, although their specific requirements and public-sector exceptions differ. Operational compliance in Vietnam includes cross-border-transfer requirements under Article 20, breach notification under Article 23, and sanctions under Article 8. These provisions operate alongside the Data Law, Decree No. 165/2025/ND-CP, the Law on Electronic Transactions, and the Law on Artificial Intelligence. Compliance-focused documentation can promote learning and the management of institutional risks.[46] For this reason, the practice typically leads to a growing perception of documentation activities as burdensome. This perception is more frequent in publicly funded bodies constrained in their resources. Where documentation requirements focus solely on producing evidence of formal compliance, there is a risk that records will become disconnected from substantive administrative decision-making. The secondary literature reviewed indicates that, in many cases, 'paper compliance' does very little to reduce risks to individual rights.[47]

45 Sohail Raza Chohan and Guangwei Hu, 'Strengthening Digital Inclusion Through E-Government: Cohesive ICT Training Programs to Intensify Digital Competency' (2022) 28(1) Information Technology for Development 16, <https://doi.org/10.1080/02681102.2020.1841713> accessed 20 April 2026; Janssen and others (n 39).

46 Le Vinh Chau, Nguyen Xuan Quang and Ngo Khanh Tung, 'Processing of Children's Personal Data: A Comparative Study of the EU Legal Framework and Vietnamese Law' (2025) 15(2) TalTech Journal of European Studies 56 <https://doi.org/10.2478/bjes-2025-0020> accessed 20 April 2026.

47 Sirur, Nurse and Webb (n 7).

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Impact assessments demonstrate both promise and pitfalls. Impact assessments are meant to encourage public bodies to understand and mitigate risks to specific rights before they start processing or using new technologies. Impact assessments could reinforce system design, proportionality and accountability, if done properly. A significant legal difference arises between the two frameworks. Article 35 GDPR requires a data protection impact assessment where processing is likely to result in a high risk to individual rights and freedoms, including when processing is undertaken by a public authority. Article 21 of Vietnam's Law requires a personal-data-processing impact-assessment dossier but exempts competent state agencies from this requirement under Article 21(6). This exemption is particularly relevant to evaluating risk management in Vietnamese public administration and should be distinguished from the GDPR approach.[48] Another aspect of administrative implementation is transparency and communication with data subjects. Public authorities have an obligation to inform the public in a clear, timely, and accessible manner regarding data processing, individual rights, and their questions and concerns. However, the obligation to be transparent is in conflict with communication processes that tend to be bureaucratic and prioritize legal concerns, protections to the organization, and technical completeness over communication. Hence, Article 12 GDPR expressly requires information to be provided in a concise, transparent, intelligible, and easily accessible form. Article 4 of Vietnam's Law recognizes the rights to information, access, rectification, deletion, restriction, objection, complaint, litigation, and compensation. The practical comparison concerns not simply whether rights are formally recognized, but whether public authorities establish accessible procedures through which rights can be exercised.[49]

When data subjects exercise their rights, they reveal the operational limitations of public administration. Rights such as access, rectification, erasure, and objection require public authorities to develop internal processes to respond in accordance with the applicable legal procedures and time limits. In public administrations marked by decentralized data systems, legacy databases, and divided organizational units, finding and amending personal data is often complex and resource-consuming. Delays, incomplete replies, and inconsistent responses are frequent. These problems are particularly pronounced where multiple organizations are involved in joint processing or where information is retained in outdated or incompatible systems. These challenges highlight the need for organizational structures, information systems, and legal requirements to be aligned.[50] The growing dependence of public authorities on external service providers impacts compliance practices. The outsourcing of digital infrastructure, cloud services, and data analytics adds new layers of legal and operational complexity.

48 Voigt and von Dem Bussche (n 28); Pencheva, Esteve and Mikhaylov (n 1).

49 Huynh (n 26); 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 <https://doi.org/10.1163/15718158-26020001> accessed 20 April 2026.

50 Bach and Nguyen (n 8); Nguyen (n 8).

Where public authorities act as controllers and private providers act as processors, contracts or other binding legal instruments allocate their respective responsibilities, and effective oversight requires public authorities to possess the legal and technical skills necessary to monitor and enforce contractual obligations. In many administrations, these skills are lacking. Consequently, public authorities may have bound themselves contractually to processors and relied on vendor certifications, without having substantive control of processing activities. Such dependence raises questions regarding accountability and the erosion of public control over sensitive data.[51] Under Article 28 GDPR, controllers may use only processors that provide sufficient guarantees and must regulate processing through a binding contract or other legal act. Article 37 of Vietnam's Law similarly allocates responsibilities between controllers and processors. In both systems, outsourcing does not eliminate the public authority's responsibility to supervise processing carried out on its behalf. The significance of organizational culture is often underappreciated, but it is critical to compliance outcomes. When data protection is seen as a barrier to efficiency and innovation, compliance is viewed as a defensive and minimalist practice. Rather than focusing on protecting individual rights, officials seek to avoid penalties. In contrast, when data protection is seen as a component of governance values, such as accountability, service, and trust, officials are more likely to comply. Differences in organizational culture may help explain why similar regulatory obligations produce different outcomes across public administrations.[52]

The digital age adds complexity to administrative compliance. Automated decision making, interoperability of databases, and large-scale sharing of data complicate compliance models that rely on well-defined process steps and control points. Responsibility may be within the operational, technical, and contractual layers of an organization. Under the GDPR, Articles 22, 25, and 35 address aspects of automated decision-making, data protection by design, and high-risk processing. Article 30 of Vietnam's Law specifically regulates personal data processed through big data systems, artificial intelligence, blockchain, virtual environments, and cloud computing. It requires purpose limitation, necessity, appropriate safeguards, and risk classification for artificial intelligence systems. Nevertheless, Article 30 is a personal-data-protection provision rather than a comprehensive AI regulatory framework and should be read together with the Law on Artificial Intelligence. The existence of statutory requirements does not establish their effectiveness in practice; implementation depends on technical capacity, internal review, and effective supervision.[53]

The enforcement ecosystem plays a vital role in administrative compliance. Secondary literature reports positive compliance developments in regulatory environments where enforcement agencies interact with public administrations through guidance, audits, dialogue, and enforcement actions. Such interactions enable public administrations to

51 Guamán and others (n 41).

52 Ma and Zheng (n 43).

53 Nannini and others (n 32).

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navigate regulatory ambiguity and institutionalize compliance. Weak, inconsistent, or politically limited enforcement tends to reinforce the notion that compliance with data protection regulations is merely a formality. Under Articles 57 and 58 GDPR, supervisory authorities combine advisory, investigative, and corrective functions. In Vietnam, supervision and state-management responsibilities are principally exercised through the Ministry of Public Security under Articles 33 and 36 of Law No. 91/2025/QH15. As discussed in Section 3.2, this institutional distinction may affect how compliance by public authorities is guided, investigated, and enforced.[54] Administrative implementation demonstrates the limitations of relying exclusively on formal legal rules. Under both the GDPR and Vietnamese law, effective public-sector compliance depends on organizational capacity, professional culture, appropriate technology, meaningful documentation, risk assessment, and sustained oversight. The principal differences concern state-agency impact assessments and the institutional structure through which public-sector compliance is supervised and enforced.

3.4. Analytical Framework for Legal Integration and Advancing Public Data Governance Systems

The analysis of public administration's legal perspectives on data protection reveals new avenues and challenges for integrating contemporary governance systems. Both the GDPR and Vietnam's Law No. 91/2025/QH15, together with Decree No. 356/2025/ND-CP, recognize core data-protection principles and impose obligations on public-sector processing. Nonetheless, the way in which these frameworks structure, interpret, and enforce those obligations differs significantly. Therefore, legal integration requires more than the formal alignment of legal texts; it requires attention to institutional design, administrative capacity, and enforcement structures. At the level of principles, comparative analysis shows partial convergence on the core elements of data protection, such as lawfulness, proportionality, purpose limitation, accountability, and transparency. These elements have become a part of the shared regulatory lexicon, and increasingly influence legislative reforms outside of their initial jurisdictions. The regulatory framework established by the European Union has been particularly influential and serves as both a point of reference and a source of inspiration for policymakers aiming to update their data protection legislation.[55] Furthermore, principle-based convergence does not imply that governance outcomes may converge. Legal homogeneity often obscures variation in the implementation of norms.

A purely formal approach to harmonization has significant structural limitations. Although legislative alignment may improve legal certainty and facilitate cross-jurisdictional cooperation, it does not by itself address differences in administrative

54 Kuner (n 5); Hoofnagle, van der Sloot and Borgesius (n 3).

55 Hoofnagle, van der Sloot and Borgesius (n 3); Ryngaer and Taylor (n 4).

systems and institutional arrangements. Disparities in the resources, technology, professional capacity, and organizational structures of public administration can result in the same legal duty being applicable and enforceable in one context while remaining ineffective or merely symbolic in another. Substantive differences in implementation may persist despite formal legal convergence. The comparison developed in Sections 3.1–3.3 illustrates this distinction. The GDPR requires independent supervisory authorities and ordinarily requires public authorities to appoint data protection officers, whereas Vietnam places specialized oversight principally within the executive state-management structure led by the Ministry of Public Security. Vietnam's framework exempts competent state agencies from the personal-data-processing impact-assessment requirement, unlike the GDPR's risk-based approach to high-risk public-sector processing. The secondary literature reviewed suggests that, in the absence of a corresponding degree of investment in administrative systems, harmonization is likely to increase the governance gap.[56] Additionally, there is tension between administrative autonomy at the national level and regulatory consistency at the international level, and this is particularly concerning for the harmonization of data protection. In some areas, externally imposed data protection standards seem to infringe on policy making and administrative processes. This is particularly true for issues of public sensitivity, such as the protection of the state, the management of migration, and the administration of social welfare, where policymakers need to exercise discretion and make decisions quickly. In such matters, the legislation may be implemented selectively or only at a formal level. Conversely, where harmonization standards are perceived to be for the betterment of governance, the protection of rights, and the enhancement of public confidence, authorities are more likely to adopt them as legitimate governance standards.[57]

The comparative approach focuses on the interplay between the harmonization of data protection and administrative reform priorities on a broader scale. A considerable number of public administrations pursue digital transformation strategies aimed at improving efficiency, system interoperability, and evidence-based policymaking. Although such goals may seem to be aligned with the principles of innovation and effectiveness, in the absence of adequate data protection, they may create conflicts. Legal harmonization is not sufficient to resolve such conflicts. Governance frameworks must deal with the protection of personal data in advance and in an integrated way with digital strategies, procurement frameworks, and organizational structures.[58] Another area where comparative variances have pronounced governance implications is oversight and coordination mechanisms. As processing public sector data becomes more inter-organizational and cross-sectoral, oversight fragmentation becomes more problematic. Some jurisdictions have sought to

56 Sirur, Nurse and Webb (n 7).

57 Huynh (n 26); Janssen and others (n 39).

58 Mark Esposito, Yusaf Akbar and Francis Xavier Campbell, *Digitalization in Emerging Economies* (CUP 2025); Pencheva, Esteve and Mikhaylov (n 1).

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address this by enhancing coordination among oversight bodies, clarifying roles in multi-party data processing, and establishing frameworks for collaborative regulation. Other jurisdictions continue to operate under oversight arrangements that are, by design, administratively siloed. These patterns suggest that achieving effective harmonization is more complex than simple uniformity; it requires governance arrangements that integrate both stasis and adaptive oversight to mirror evolving administrative arrangements.[59]

From a comparative perspective, the challenges posed by legal translation in the governance of data protection are more pronounced. While the adoption of legal ideas, institutional frameworks, or enforcement models from other jurisdictions can facilitate the development of a regulatory framework and demonstrate a commitment to aligning with international standards, it can result in regulatory misalignment if the transplant is not crafted with sufficient contextual awareness.[60] Accountability frameworks designed for sophisticated, resource-rich environments may operate poorly in fragmented or resource-constrained settings. Formal compliance cannot compensate for the absence of effective governance structures and may create the appearance of harmonization without equivalent protection in practice.[61] Ideally, if harmonized rules are properly reflected in administrative practices, they would support participatory governance and trust in public authorities. Weak and inconsistent practices, however, may increase administrative opacity and arbitrariness. The comparison indicates that governance outcomes depend less on the formal incorporation of shared principles than on the extent to which those principles are integrated into administrative culture and decision-making processes.[62]

Democratic accountability has emerged as a key concern in harmonized data protection governance. As regulatory frameworks become more complex and technically sophisticated, there is a risk that governance shifts away from political and public scrutiny towards expert-driven regulation. While expertise is indispensable in managing complex data processing systems, excessive technocratization may reduce transparency and weaken democratic oversight. The secondary literature reviewed suggests that governance arrangements combining independent supervision with parliamentary scrutiny and judicial review are more resilient and enjoy greater public legitimacy over time.[63] Technological change further complicates harmonization dynamics. Automated decision-making, artificial intelligence, and large-scale data analytics challenge legal concepts developed for earlier administrative models. The GDPR addresses these developments through instruments including data protection by design, impact assessment, and restrictions on

59 Kuner (n 5).

60 Do Hong Quyen and Bui Ngoc Linh, 'Discussing Personal Data Protection During Arbitration Proceedings and Lessons for Vietnam' (2024) 9(6) European Journal of Social Sciences Studies 75 <http://dx.doi.org/10.46827/ejsss.v9i6.1691> accessed 20 April 2026.

61 Bach and Nguyen (n 8); Nguyen (n 8).

62 Ma and Zheng (n 43).

63 González Pascual (n 31); Streinz (n 21).

certain automated decisions. Vietnam's Article 30 specifically addresses personal data processed through big data systems, artificial intelligence, blockchain, virtual environments, and cloud computing. However, Article 30 is a personal-data-protection provision rather than a comprehensive AI regulatory framework. It should be read together with the Law on Artificial Intelligence and, where applicable, the Data Law, Decree No. 165/2025/ND-CP, and the Law on Electronic Transactions. Nevertheless, the existence of technologically responsive provisions does not ensure equivalent implementation, particularly where institutional capacity and independent supervision differ.

Comparative analysis suggests that harmonization efforts must remain flexible if they are to remain relevant in rapidly evolving digital environments.[64] Accordingly, harmonization should pursue convergence in substantive protection without requiring identical institutional arrangements in every jurisdiction. Sufficient flexibility is necessary to accommodate administrative traditions, institutional capacity, and continuing technological development. In the comparison between the GDPR and Vietnam's current framework, meaningful integration depends on whether shared legal principles are supported by effective internal compliance, credible oversight, accessible remedies, and sustained administrative reform.

4 CONCLUSION

This study has undertaken the analysis of personal data protection in public administration through a comparative, governance-based approach. The study illustrates that, within public sector administration, data protection cannot be achieved solely through the design of legislation, but through the legal, institutional, and practical interplay of the day-to-day operation of public administrators. Therefore, protecting personal data in the context of governance should be regarded as an essential feature of contemporary administrative law and the exercise of public authority. While there seems to be partial convergence on the fundamental principles of data protection across jurisdictions, this analysis shows that there remains significant divergence on the structures and processes that integrate these principles into public administration. In particular, the GDPR and Vietnam's framework differ in public-sector processing, impact-assessment requirements, internal compliance functions, supervisory independence, and enforcement. Institutional responsibilities and oversight mechanisms are crucial in closing the gap between law and practice. In the public sector, oversight, internal compliance mechanisms, and judicial remedies are important elements of data-protection governance, although their institutional form differs between the two systems. However, these mechanisms are most effective where there is institutional autonomy, sufficient resources, and unambiguous mandates.

64 Nannini and others (n 32).

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The analysis of the administrative implementation shows the limitations of strictly legalistic or enforcement-centered approaches. As these implementation findings are derived from secondary literature rather than original empirical research, they should be interpreted as contextual observations. The integration of data protection into everyday administrative practices relies on compliance activities such as training, documentation, risk assessment, and transparency. Yet, these activities are influenced by competing demands, such as efficiency, the delivery of a particular policy, or political responsiveness. With the growing adoption of digital technologies in public administration, traditional compliance approaches based on separate processing and linear decision-making are under increasing pressure. Such a shift demands new governance strategies that weave data protection considerations into digital strategy, procurement, organizational design, and systems design from the outset, rather than as after-the-fact considerations. While principles may be common, administrative capability and institutional culture may differ, and rigid harmonization may disregard these differences. By contrast, regulatory harmonization, which permits contextual differences and allows for adaptive learning may support substantive rather than merely formal protection. The protection of personal data is transforming the public authorities' understanding of legitimacy, transparency, and the interface of governance with the citizen. The integration of data protection norms into the administration of processes can strengthen governance, fairness, and trust in public administration. On the contrary, poor implementation may contribute to administrative opacity and arbitrariness, especially in areas of governance where there is heavy reliance on data.

This study urges a rethinking of data protection as a fundamental element of democratic governance. The unanswered questions posed by automated decision-making, artificial intelligence, and massive data analytic processing remain only partly addressed by existing legal frameworks. Comparative insights may help identify alternative governance models, highlight relevant and adaptable features of models, and position such models within the limits of the contexts. The comparative and contextual approach can assist researchers and policymakers in navigating the challenges of balancing the protection of privacy and the administrative innovation for the digital age. This approach is critical to data protection as a means of upholding individual rights and enabling honest governance.

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Summary: 1. Introduction. – 2. Methods. – 3. Results and Discussion. – *3.1. Normative Architecture for the Protection of Personal Data in the Public Sector. – 3.2. The Architecture of Institutional Accountability and the Oversight Frameworks for the Governance of Data Protection in the Public Sector. – 3.3. Administrative Implementation and Compliance in Public-Sector Data Protection Frameworks. – 3.4. Analytical Framework for Legal Integration and Advancing Public Data Governance Systems.* – 4. Conclusion.

Keywords: *Administrative Law; Data Governance; Digital Governance; Legal Harmonization; Personal Data Protection.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАХИСТ ПЕРСОНАЛЬНИХ ДАНИХ У ПУБЛІЧНІЙ АДМІНІСТРАЦІЇ В'ЄТНАМУ: ПОРІВНЯЛЬНИЙ АНАЛІЗ ІЗ ЗАГАЛЬНИМ РЕГЛАМЕНТОМ ЄС ПРО ЗАХИСТ ДАНИХ

Нгуєн Тхі Тхуй, Чан Кім Льєу* та Ву Ван Туан

АНОТАЦІЯ

Передумови. *Розширення масштабів врядування на основі даних актуалізувало проблему захисту персональних даних у сфері публічної адміністрації. Хоча сучасні режими захисту даних ґрунтуються на спільних засадах, їх функціонування в публічному секторі залишається неоднорідним. У цьому дослідженні проаналізовано, як GDPR та Закон В'єтнаму № 91/2025/QH15 регулюють обробку персональних даних органами публічної влади, а також які наслідки мають виявлені між ними розбіжності для інституційної підзвітності та прав фізичних осіб.*

Методи. *У межах дослідження оцінено нормативну архітектуру, інституційну відповідальність і механізми забезпечення відповідності (комплаєнсу) у двох правових системах. Поєднання систематичного порівняльно-правового аналізу первинних нормативно-правових актів із тематичним аналізом вторинних джерел уможливило як структурне зіставлення, так і контекстуальне тлумачення правових реалій обох юрисдикцій. Доктринальний аналіз виявляє формальні юридичні вимоги, тоді як висновки щодо правозастосування ґрунтуються на опрацюванні вторинних джерел і не позиціонуються як первинні емпіричні результати.*

Результати та висновки. *Результати засвідчують, що наявність розвиненої правової бази сама по собі не гарантує ефективного захисту. Обидві системи демонструють часткову конвергенцію загальних засад захисту даних, утім істотно різняться щодо обробки даних у публічному секторі, оцінки впливу, внутрішніх функцій комплаєнсу, незалежності наглядових органів і механізмів примусового виконання правових вимог. Відмінності в адміністративній спроможності, організаційній культурі, системі нагляду та стратегіях цифрового врядування, виявлені у вторинній літературі, здатні впливати на рівень дотримання встановлених вимог. Відтак, формальну конвергенцію не слід ототожнювати з інституційною або функціональною еквівалентністю. Доведено, що дієвий захист персональних даних у публічній адміністрації залежить від узгодженості законодавства, інституцій та управлінських практик. Контекстуально адаптована гармонізація, підкріплена дієвим наглядом і належною адміністративною спроможністю, є критично важливою для гарантування прав людини та підвищення довіри до публічного врядування, заснованого на даних.*

Ключові слова: *адміністративне право, управління даними, цифрове врядування, гармонізація законодавства, захист персональних даних.*

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TÓM TẮT BẰNG TIẾNG VIỆT*

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BẢO VỆ DỮ LIỆU CÁ NHÂN TRONG NỀN HÀNH CHÍNH CÔNG VIỆT NAM: PHÂN TÍCH SO SÁNH VỚI QUY ĐỊNH CHUNG VỀ BẢO VỆ DỮ LIỆU CỦA LIÊN MINH CHÂU ÂU (GDPR)

Nguyễn Thị Thuỷ, Trần Kim Liễu*, Vũ Văn Tuấn

TÓM TẮT

Bối cảnh: *Sự phát triển mạnh mẽ của quản trị dựa trên dữ liệu đặt ra yêu cầu ngày càng cao đối với việc bảo vệ dữ liệu cá nhân trong hoạt động hành chính công. Mặc dù các hệ thống pháp luật hiện đại về bảo vệ dữ liệu cá nhân có sự tương đồng nhất định về các nguyên tắc nền tảng, việc áp dụng các nguyên tắc này trong khu vực công vẫn có sự khác biệt đáng kể giữa các quốc gia và khu vực pháp lý. Nghiên cứu này phân tích cách thức Quy định chung về bảo vệ dữ liệu của Liên minh châu Âu (GDPR) và Luật số 91/2025/QH15 của Việt Nam điều chỉnh hoạt động xử lý dữ liệu cá nhân của các cơ quan công quyền, qua đó làm rõ những khác biệt giữa hai hệ thống và hệ quả của các khác biệt này đối với trách nhiệm giải trình của cơ quan nhà nước cũng như việc bảo đảm quyền của chủ thể dữ liệu.*

Phương pháp nghiên cứu: *Nghiên cứu tập trung đánh giá cấu trúc quy phạm, trách nhiệm của các chủ thể thể chế và cơ chế bảo đảm tuân thủ trong hai hệ thống pháp luật. Phương pháp nghiên cứu được sử dụng là sự kết hợp giữa phân tích pháp lý so sánh một cách có hệ thống đối với các văn bản pháp luật sơ cấp và phân tích theo chủ đề đối với các nguồn tài liệu thứ cấp, qua đó cho phép vừa so sánh cấu trúc pháp lý, vừa lý giải các quy định trong bối cảnh thể chế và quản trị cụ thể của từng hệ thống. Phân tích pháp lý quy phạm được sử dụng để xác định các yêu cầu pháp lý chính thức; trong khi đó, các nhận định liên quan đến thực tiễn thi hành được tổng hợp từ các công trình nghiên cứu và tài liệu thứ cấp hiện có, không được xem là kết quả nghiên cứu thực nghiệm độc lập của nghiên cứu này.*

Kết quả và kết luận: *Kết quả nghiên cứu cho thấy việc thiết lập một khuôn khổ pháp lý tương đối đầy đủ và chặt chẽ chưa phải là điều kiện đủ để bảo đảm hiệu quả bảo vệ dữ liệu cá nhân trên thực tế. Hai hệ thống pháp luật có sự hội tụ nhất định về các nguyên tắc chung của bảo vệ dữ liệu cá nhân, song vẫn tồn tại những khác biệt đáng kể trong các quy định và cơ chế liên quan đến xử lý dữ liệu cá nhân trong khu vực công, đánh giá tác động đối với việc bảo vệ dữ liệu, chức năng tuân thủ nội bộ, tính độc lập của cơ quan giám sát và cơ chế thực thi pháp luật. Các khác biệt về năng lực hành chính, văn hóa tổ chức, cơ chế giám sát và chiến lược quản trị số được ghi nhận trong các tài liệu thứ cấp có thể tác động đáng kể đến mức độ tuân*

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

thủ trên thực tế. Vì vậy, sự tương đồng về mặt quy phạm không đồng nghĩa với sự tương đương về thể chế hoặc hiệu quả vận hành. Nghiên cứu cho rằng việc bảo vệ dữ liệu cá nhân một cách thực chất trong nền hành chính công đòi hỏi sự gắn kết và đồng bộ giữa khuôn khổ pháp luật, thiết chế thực thi và thực tiễn quản trị. Việc hài hòa hóa pháp luật cần được thực hiện trên cơ sở tôn trọng đặc thù bối cảnh, đồng thời phải đi kèm với cơ chế giám sát hiệu quả và năng lực hành chính phù hợp nhằm bảo đảm quyền của cá nhân và củng cố niềm tin của xã hội đối với quản trị công dựa trên dữ liệu.

Từ khóa: *luật hành chính, quản trị dữ liệu, quản trị số, hài hòa hóa pháp luật, bảo vệ dữ liệu cá nhân.*

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Research Article

TOPICAL ISSUES OF ANTIMONOPOLY LEGISLATION APPLICATION: JUDICIAL PRACTICE AND LEGAL POSITIONS OF THE SUPREME COURT OF THE REPUBLIC OF KAZAKHSTAN

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ABSTRACT

Background: *This article examines the role of the Supreme Court of the Republic of Kazakhstan's legal positions in ensuring consistency in judicial practice in cases involving the application of competition (antimonopoly) law. It focuses on the judiciary's evolving role in the context of the establishment of administrative justice and the increasing complexity of state market regulation. It argues that decisions of the highest judicial authority increasingly go beyond resolving individual disputes and acquire systemic significance for legal interpretation and enforcement.*

Method: *The study employs formal legal, systemic-structural, and comparative legal methods. The empirical basis includes administrative court decisions and the Supreme Court of the Republic of Kazakhstan rulings in antimonopoly cases. These methods allow identification of stable patterns of judicial interpretation and assessment of their impact on the development of competition law regulation.*

Results and Conclusions: *The analysis shows that the Supreme Court's legal positions serve a coordinating function, ensuring coherence in judicial practice in the absence of a formally established doctrine of precedent. The study identifies a gradual shift from a formalistic to a functional approach in assessing administrative acts issued by competition authorities, where emphasis is placed not on the form of the act but on its legal effects. It also shows that Supreme Court jurisprudence helps fill legislative gaps and resolve normative uncertainties, thereby shaping more predictable standards of legal application. The study shows that in Kazakhstan a model of de facto precedential influence is gradually taking shape, where the Supreme Court's legal positions begin to play a guiding role for lower courts. This contributes to greater consistency in judicial practice and improves legal certainty in antimonopoly regulation. At the same time, this development inevitably raises broader questions about how far courts should go in shaping the content of law and where the boundary lies between interpretation and law-making.*

1 INTRODUCTION

The application of antimonopoly legislation by administrative courts has become increasingly important in the Republic of Kazakhstan (RK), particularly amid ongoing economic transformation, growing market competition, and rising demands for business transparency. In recent years, the state has taken consistent steps to strengthen a fair competitive environment. However, the real effectiveness of these measures largely depends on judicial practice. Through the fair and lawful application of legislation, as well as the development of coherent legal positions, courts help shape behavioural standards for market participants. Ultimately, this contributes to more consistent and effective implementation of antimonopoly rules by all actors involved in legal relations.

Although the Agency for the Protection and Development of Competition of the RK and its territorial bodies primarily oversee the implementation and observance of antimonopoly legislation in Kazakhstan, administrative courts play an important role in the state control system. Their participation in applying antimonopoly legislation is extremely important, since the court, as a rule, resolves disputes about the law.

Foreign researchers also write about this, emphasising that judicial control is an integral part of ensuring fairness, transparency, and accountability in competition law enforcement in all jurisdictions.[1] Moreover, according to some researchers, it is the judges who determine the content of competition law.[2]

1 Rigin S Thomas, 'The Role of Courts in Reviewing Competition Agencies' Decisions to Prevent Arbitrariness' (2025) 5(1) Indian Journal of Integrated Research in Law 729 <https://ijirl.com/volume-v-issue-i/> accessed 19 April 2026.

2 Frederic Jenny, 'Opening Speech' in *Judicial Enforcement of Competition Law* (OCDE/GD(97)200, Roundtables on Competition Policy no 13, OECD 1997) 16 <https://dx.doi.org/10.2139/ssrn.141067> accessed 19 April 2026.

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This topic is relevant for Kazakhstan because the administrative justice system has been fully operational for only a few years. With the adoption of the Administrative Procedural and Process-Related Code of the RK on June 29, 2020[3] and the creation of specialised administrative courts, the legislative formalisation of the administrative justice system in the RK has been completed. At the same time, theoretical and practical developments to further improve the system of administrative courts that hear complaints about the actions and decisions of government agencies and officials are actively continuing.

One of the most important issues in the legal regulatory mechanism is the formation and development of a legislative system. The quality and stability of antimonopoly legislation play a crucial role in transit countries such as Kazakhstan, where there were no market relations in the economy for a long time during the Soviet era. High-quality legislative regulation of relations in this area is necessary to prevent abuse of a dominant position in the market and regulate the actions of its participants, who may use their position to conduct unfair competition, endanger small and medium-sized enterprises, and harm consumers.[4]

Consequently, an appropriate legal system designed to preserve and create conditions for competitive activity is the basis for ensuring its real functioning. Legislation in this area, recognising the principle of private property and freedom of contract and giving a precise definition of these legal institutions, is designed to promote competition.[5]

At the same time, the legal literature has rightly pointed out that the desire to issue clear, specific, and precise legislative norms without gaps often leads to a situation where solving this problem does not yield the necessary result. On the one hand, the desire for clear, concise legal norms stems from the fact that it is impossible to require coordinated behaviour of subjects of legal relations in accordance with legislative prescriptions without clarity and simplicity of the law.

On the other hand, in life the necessary simplicity and clarity of legal regulations often clash with the complexity of human experience. As a result of the resolution of this contradiction, which is mainly carried out through law enforcement activities, primarily by the court, one or another national legal system is largely being formed.[6]

Modern researchers share this view, emphasising that the legislature cannot and should not regulate every issue in the economy, society, and the world in every individual case.

3 Administrative Procedural and Process-Related Code of the Republic of Kazakhstan no 350-VI (adopted 29 June 2020) <https://clck.ru/3SsGLD> accessed 19 April 2026.

4 Sishang Zhang, 'An Analysis of the Roles of the Anti-monopoly Law in Sustainable Economic Development' (2023) 63(1) Proceedings of the 2nd International Conference on Financial Technology and Business Analysis 40 <https://doi.org/10.54254/2754-1169/63/20231368> accessed 19 April 2026.

5 Thibault Schrepel, 'Friedrich Hayek's 'Contribution to Antitrust Law and Its Modern Application' [2014] ICC Global Antitrust Review 199 <https://ssrn.com/abstract=2548420> accessed 19 April 2026.

6 Ronald J Allen, 'Foreword: The Nature of Discretion' (1984) 47(4) Law and Contemporary Problems 1 <http://www.jstor.org/stable/1191684> accessed 19 April 2026.

In the process of judicial application of the law, the legal certainty of its norms is clarified, and the issues of justice are specified.[7]

In this regard, the purpose of this article is to analyse the importance and role of the legal positions of administrative courts in ensuring the protection of the rights and freedoms of economic entities in the RK.

Within the framework of this goal, the task is to separately review the activities of the Supreme Court of the RK, which creates new legal provisions and specifies the norms of the law in the process of adopting its instructional acts, which are officially called 'Regulatory Resolutions of the Supreme Court of the RK'. The Supreme Court also puts forward its legal positions when deciding specific cases. Through this activity, the Supreme Court ensures uniformity in judicial practice. It improves and develops antimonopoly legislation by identifying gaps and inaccuracies in the legal regulation of relevant public relations.

2 RESEARCH METHODS

The methodological framework of this study reflects its subject matter. It aims to show how courts apply antimonopoly legislation and to clarify the Supreme Court of the RK's role in ensuring consistency in judicial practice. To achieve this, the research relies on a combination of methods that allow not only description but also interpretation and explanation of the legal phenomena under review.

A key element of the methodology is the review and analysis of academic literature, which provides the study's theoretical basis. By synthesising doctrinal approaches to judicial practice, legal positions of courts, and their place within the system of legal sources, it becomes possible to outline the conceptual framework of the research and to guide the subsequent analysis of case law. Importantly, this theoretical work is consistently compared with empirical material, which helps to align doctrinal assumptions with actual judicial practice.

A significant part of the study is devoted to analysing case law, particularly decisions of administrative courts and the Supreme Court of the RK in antimonopoly disputes. The focus here is on identifying the legal positions developed in judicial decisions and assessing how they influence later adjudication. This makes it possible to move beyond a mere description of individual cases and instead identify broader and more stable patterns in judicial practice, supporting the conclusion that the Supreme Court's positions play a de facto guiding role in the development of consistent case law.

7 Bemd H Oppermann, 'On the Role of Precedents and Legal Certainty in German Private Law' (2018) 27(1) Studia Iuridica Lublinesia 107 <https://doi.org/10.17951/sil.2018.27.1.107> accessed 19 April 2026.

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The systemic-structural method examined antimonopoly legislation, judicial practice, and legal doctrine as interrelated elements of a single legal system. Its application made it possible to determine the interaction between normative regulation and judicial interpretation, as well as to identify instances in which courts fill legislative gaps and remove legal uncertainties. On this basis, the study supports the proposition that the Supreme Court's legal positions serve a law-making function in conditions of dynamically evolving legal regulation.

Comparative legal analysis was also employed, enabling the correlation of identified features of Kazakhstani practice with approaches developed in other legal systems. This made it possible to interpret more convincingly the increasing role of judicial practice and to explain courts' factual reliance on the positions of the highest judicial instance in the absence of a formally established precedent mechanism.

The study's normative basis consists of current RK legislation, analysed through official legal sources. Comparing it with judicial practice revealed discrepancies between statutory provisions and their application, which directly informed the conclusions about the role of judicial interpretation in the development of antimonopoly law.

Together, these methods enabled the study to move beyond a purely descriptive account of the problem and to produce substantive findings. Engagement with the academic literature helped to clarify the theoretical framework and to avoid an overly formalistic understanding of judicial practice and legal positions of courts. The analysis of judicial decisions showed that lower courts, in practice, tend to rely consistently on the positions of the Supreme Court, pointing to its de facto guiding role despite the absence of a formal doctrine of precedent.

The system-structural approach further showed that many uncertainties in antimonopoly legislation are addressed through judicial interpretation rather than formal amendments to statutory provisions. The comparative perspective, in turn, suggests that similar developments appear in other legal systems and are not unique to Kazakhstan. Finally, comparing statutory norms with their practical application revealed a gap between formal regulation and implementation, supporting the conclusion that judicial practice plays an important role in enhancing legal certainty in antimonopoly law.

Taken together, these methodological approaches ensured a comprehensive analysis of the research problem and support the conclusion that the legal positions of the Supreme Court of the RK not only contribute to the uniformity of judicial practice but also influence the development and clarification of antimonopoly legislation.

The empirical basis for this study consists of judicial decisions issued by the Specialized Interdistrict Administrative Courts (SIAC), appellate courts, and the Judicial Chamber for Administrative Cases of the Supreme Court of the RK between 2023 and 2025. To ensure a representative sample, we analysed and summarised twenty court cases related to antitrust

disputes, competition protection, and challenges to administrative acts of regulatory authorities. However, to provide a thorough doctrinal analysis, this article focuses primarily on three landmark cases (complex areas of review) and the relevant legal framework. These selected cases serve as key indicators of existing gaps in law enforcement, the limits of judicial review, and shifts in legal positions across all levels of the judicial system. The data collection and extraction process involved remotely retrieving primary legal data from the state platform "Judicial Cabinet", specifically from the "Bank of Judicial Acts" database. To comply with state security requirements and ensure data verification, access to the database required mandatory remote authentication using an electronic digital signature (EDS) managed by the RK National Certification Authority. We conducted a targeted search for relevant judicial acts in accordance with a structured three-stage protocol.

To validate our findings and align them with official judicial positions, we cross-referenced the retrieved raw data with the Bulletin of the Judicial Board on Administrative Cases of the Supreme Court of the RK. Analysing this Bulletin enabled us to examine verified case studies and official reviews of judicial practice, ensuring that the selected cases reflect systemic trends rather than isolated anomalies.

We limited the search parameters to "administrative proceedings", categorised the files by specific court levels (courts of first instance, appellate courts, and the Supreme Court), and established a time frame. Contextual search by descriptors: because common search queries, such as "antitrust dispute", yielded low-relevance results due to database indexing limitations, we used precise legal descriptors and document types. These included phrases such as "on declaring a notification unlawful", "on challenging a conclusion", "on challenging an investigation report", "Agency for the Protection and Development of Competition", and "dominant position". By analysing various instances, identifying key Supreme Court decisions by their unique identifiers (e.g., № 6001-23-00-227 or № 6001-24-00-6ap/1850) or by the names of market participants, we reconstructed the full procedural sequence, including proceedings in the court of first instance, appeal, and cassation. This method enabled us to systematically track how the highest judicial body's final legal positions evolved.

3 RESULTS AND DISCUSSION

3.1. The Role of Regulatory Resolutions of the Supreme Court of the RK to Ensure the Uniformity of Judicial Practice in the Field of Competitive Activity

The issue of uniform application of the law is central to discussions of the judiciary's authority and public trust. The "Overview of the national mechanisms to ensure uniformity of judicial practice: in France, Germany, Italy, and Lithuania" emphasises that mechanisms

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and tools for ensuring uniform application of the law by courts play an important role in shaping the views of the legal community and the general public about the judicial system.[8]

In almost all countries, the highest courts are primarily responsible for achieving national uniformity of judicial practice.[9]

In the RK, the Supreme Court, in most cases, ensures the unity of judicial practice through its legal positions expressed in regulatory rulings.

This means that judicial practice in all categories of cases, including the resolution of antimonopoly disputes, is guided not only by laws adopted by the Parliament of the RK, but also by regulatory decisions of the Supreme Court of the RK.

The legal nature of these acts is still being discussed among scientists and practitioners, since paragraph 1 of Article 17 of the Constitutional Law of the RK on the Judicial System and the Status of Judges, defining the powers of the Supreme judicial instance of the RK, establishes that the Supreme Court clarifies judicial practice through the adoption of regulatory rulings.[10]

In reality, the Supreme Court does not clarify issues of judicial practice; rather, it clarifies legislative norms on issues arising from their judicial application. According to many modern researchers, such instructions and regulations from higher courts have existed since the Soviet judicial system, when courts, in resolving cases, expected instructions from above and could not express their legal position without proper guidance. Consequently, active judicial activity was unacceptable and limited.

This long-standing practice of formalism and passivity on the part of the judiciary persists in several post-Soviet states: many judges today, either out of inertia or because the law requires them to do so, as in the RK, passively await clarification from the supreme courts to resolve complex cases, instead of actively and effectively administering justice.[11]

Some researchers in Kazakhstan, to whose opinion we also subscribe, believe that the Supreme Court of the RK, issuing regulatory resolutions for the judiciary of lower instances in the form of mandatory instructions, turns, in fact, into a law-making and even legislative body (through the creation of mandatory norms detailing and specifying

8 Council of Europe, *Overview of the National Mechanisms to Ensure Uniformity of Judicial Practice: In France, Germany, Italy, and Lithuania* (Project 'Support for judicial institutions and processes to improve access to justice in Ukraine', CoE 2022) <https://rm.coe.int/overview-of-the-national-mechanisms-to-ensure-uniformity-of-judicial-p/1680af07ad> accessed 19 April 2026.

9 Jacob Sandler, 'Uncompelling Uniformity' (2024) 76(6) Florida Law Review 1961 <https://dx.doi.org/10.2139/ssrn.5027826> accessed 19 April 2026.

10 Constitutional Law of the Republic of Kazakhstan no 132 'On the Judicial System and Status of Judges in the Republic of Kazakhstan' (adopted 25 December 2000) <https://clck.su/BbMpQ> accessed 19 April 2026.

11 Nazar Stetsyk, 'Case Law of the Supreme Courts in Post-Soviet Legal Systems' (2018) 11 Juridiskā Zinātne 62 <https://doi.org/10.22364/jull.11.05> accessed 19 April 2026.

laws), which contradicts the principle of separation of powers and independence of judges in administering justice.[12]

At the same time, while maintaining this position in principle, we believe that the Supreme Court must clarify the law at this stage of Kazakhstan's development, given the judiciary's relative weakness, constant changes in legislation, and the formation of new institutions in the republic's legal system.

Until 2021, when specialised administrative courts had not yet been established and the Administrative Procedural and Process-Related Code of the RK had not entered into force, all court cases concerning appeals against actions of state bodies and officials were resolved in accordance with the norms of Chapter 29 of the Civil Procedure Code of the RK.[13]

During this period, the Regulatory Resolution of the Supreme Court of the RK dated December 24, 2010 No. 20 «On certain issues of application by courts of the norms of Chapter 29 of the Civil Procedure Code of the RK» was in force.[14]

This regulatory resolution, which all judicial instances followed, stated that any person has the right to challenge a government agency's decision (action or inaction) in a special claim procedure if the act was carried out while performing managerial functions in the relevant field of state regulation (paragraph 1). An additional feature that allows for an appeal against such a legal act: a decision taken in the performance of managerial functions may be related to the monitoring or supervision of compliance by a market entity with the generally binding rules of conduct established by law (subparagraph 2 of paragraph 3).

The Supreme Court's normative resolution contributed, to some extent, to the uniformity of judicial practice. It stopped the practice developed by some courts of terminating proceedings on complaints by market participants against orders approving conclusions and prescriptions issued following antitrust investigations. The termination of proceedings was often based on the court's reasoning that the notification, order, or instruction issued by the antitrust authority allegedly did not infringe on the legal and factual status of the market participant and therefore could not be appealed.[15]

12 Aizhan Abdrassulova, 'Official Clarification of Normative Legal Acts: The Experience of the EAEU Countries and Gaps in Legal Regulation of the Republic of Kazakhstan' (2021) 3(136) Bulletin of LN Gumilyov Eurasian National University: Law Series 11 <https://doi.org/10.32523/2616-6844-2021-136-3-11-20> accessed 19 April 2026.

13 Civil Procedural Code of the Republic of Kazakhstan no 377-V (adopted 31 October 2015) <https://adilet.zan.kz/eng/docs/K1500000377> accessed 19 April 2026.

14 Regulatory resolutions of the Supreme Court of the Republic of Kazakhstan no. 20 'On Some Issues of Implementation by Courts Standards of Chapter 29 of Civil Procedure Code of the Republic of Kazakhstan' (no longer in force) (adopted 24 December 2010) <https://adilet.zan.kz/eng/docs/P100000020S> accessed 19 April 2026.

15 Dmitry Bratus, 'Protection of Civil Rights in Antimonopoly Disputes (Problems of Judicial Practice for the Investment Ombudsman's attention)' (*PRG*, 30 November 2018) <https://prg.kz/document/?doc_id=33386552&pos=9;223> accessed 19 April 2026.

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However, after the Administrative Procedural and Process-Related Code of the RK came into force, the Supreme Court of the RK resolution "On certain issues of application by courts of the norms of Chapter 29 of the Civil Procedure Code of the RK" (2010) became invalid.

The Supreme Court has not issued a similar regulatory decision on courts' application of the norms of the RK Administrative Procedural and Process-Related Code, except for a regulatory resolution that indirectly affects protection in the field of competition. This is the regulatory resolution of the Supreme Court of the RK dated November 29, 2024 No. 5 "On Judicial decision on administrative cases".[16]

As a result, courts today focus on the legal positions of higher courts and the Supreme Court, as expressed in their decisions on specific cases. Below we will analyse the legal positions of the Supreme Court of the RK on the application of antimonopoly legislation.

3.2. Judicial Practice of Consideration of Administrative Cases Related to Violation of Antimonopoly Legislation

a) The legal position of the Supreme Court of the RK on specific cases as a factor ensuring the uniformity of judicial practice

If we consider the evolution of antimonopoly law enforcement in the RK in a broader institutional context, it becomes evident that its stability is shaped less by the literal content of statutory provisions than by their judicial interpretation. At the same time, the central role is gradually concentrating at the level of the Supreme Court, whose legal positions in practice begin to serve as a systemic coordinator of judicial practice, ensuring uniformity in the absence of a formally established precedent mechanism.

The most illustrative issue concerns the legal nature of notifications issued by the competition authority regarding indications of violations of competition protection legislation, sent before the initiation of a full investigation. Formally, such notifications fall within the preliminary stage of the administrative procedure and do not have the characteristics of a final legal act. However, economic actors often perceive them more broadly: they are frequently seen as an early indicator of possible state intervention, giving them enhanced regulatory significance that does not always match their strict legal nature.

This discrepancy between the formal legal characterisation and its practical perception gives rise to the key problem of judicial qualification. During the formative stage of administrative justice in Kazakhstan, case law demonstrated a significant lack of consistency: some courts proceeded on the basis that such notifications may affect the rights

16 Normative Resolution of the Supreme Court of the Republic of Kazakhstan no 5 'On the Court Judgement in Administrative Cases' (adopted 29 November 2024) <https://adilet.zan.kz/eng/docs/P240000005S> accessed 19 April 2026.

and legitimate interests of market participants and are therefore subject to judicial review; others treated them as internal organisational measures of an administrative authority that do not produce independent legal effects. This uncertainty reveals the lack of a stable criterion for distinguishing procedural actions from legally relevant administrative acts.

In this context, the Supreme Court, in the case brought by JSC A. (No. 6001-23-00-227), adopted a fundamentally different doctrinal position. The court held that the disputed notification lacks independent legal force, does not alter the legal status of its addressee, and does not create external legal consequences. It operates exclusively within the competition authority's internal administrative logic. It constitutes an element of a preparatory stage aimed at organising subsequent procedures, rather than regulating the rights of legal subjects.

This approach allows a more fundamental theoretical and legal explanation. From the perspective of H. Kelsen, the distinction between a normative act and other administrative actions is determined not by the form of their expression, but by their capacity to produce legal effects within the hierarchical structure of the legal system.[17] In other words, the legal nature of an act depends not on its formal appearance, but on its normative significance and its position within the hierarchy of legal norms. In this sense, a notification issued by the competition authority does not reach the level of an independent legal norm, as it does not alter the legal situation of its addressee and does not form part of the chain of normative effect as a completed legal element.

This distinction is linked to the criterion of judicial review: only acts that produce external legal effects may be challenged in court. For this reason, the Supreme Court effectively establishes a functional test of justiciability based not on the document's formal nature, but on its actual impact on the affected subject's legal position.

At the same time, the broader theoretical meaning of this position becomes evident when viewed through the lens of H. L. A. Hart's concept. Within his framework, the stability of a legal system is ensured not only by primary rules of conduct, but also by the "rule of recognition", which encompasses established institutional practices of legal interpretation.[18] In this sense, the legal positions of the Supreme Court begin to function as an element of such a rule of recognition, gradually shaping the benchmarks for acceptable interpretation of competition law.

However, the court's interpretative role is not without limits. In this regard, J. Raz's position is particularly relevant, as he links the authority of law to its capacity to ensure the predictability of legal subjects' behaviour, while also emphasising that an excessive expansion of interpretative discretion may undermine the normative certainty of the legal system. This approach demonstrates that the authority of law is connected to its ability to

17 Hans Kelsen, *Pure Theory of Law* (University of California Press 2022).

18 Herbert Lionel A Hart, *The Concept of Law* (2nd edn, OUP 1994).

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guide behaviour and ensure predictability, given that an overextension of discretionary power may weaken legal certainty.[19]

In this context, judicial interpretation must ensure uniformity in legal practice while preserving the boundary between interpretation and the creation of new legal norms.

An additional dimension of this issue is developed in R. Dworkin's theory, which views judicial decision-making as a process of constructing the best possible interpretation of the legal system as a whole.[20] In this sense, the position of the Supreme Court in competition law cases should not be regarded as an isolated ruling, but rather as part of a coherent reconstruction of the meaning of legal regulation aimed at eliminating inconsistencies in the practice of lower courts.

From a comparative law perspective, it becomes clear that such a transformation is not an exclusively national phenomenon. M. Cappelletti, in his research, points to the gradual convergence of legal systems and the emergence of elements of "hidden precedent" even within classical civil law jurisdictions, where the principle of *stare decisis* is formally absent.[21] In this sense, decisions of higher courts acquire de facto normative significance, albeit implicit, since the legislation of the Republic of Kazakhstan does not formally allow lower courts to cite the legal positions of the Supreme Court. However, such decisions ensure the de facto uniformity of judicial practice through institutional authority rather than formal binding effect.

Naturally, adherence to precedent is typically characteristic of common law jurisdictions, where the doctrine of *stare decisis*, under which courts are required to follow previous decisions handed down by courts of equal or higher rank or jurisdiction, is a foundational principle of adjudication in the United Kingdom.[22]

However, even in Germany, a civil law jurisdiction where the doctrine of *stare decisis* does not govern the court system, judges in practice may take into account, and frequently do consider, decisions handed down in previous cases, even though they are not formally bound to follow them.[23] As a result, the highest courts in Germany (Bundesgerichtshof, Bundesverwaltungsgericht, Bundesfinanzhof, and others) ensure a certain degree of legal certainty and equal treatment of comparable cases.

19 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) <https://doi.org/10.1093/acprof:oso/9780198253457.001.0001> accessed 19 April 2026.

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

21 Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989).

22 Lewis Craham, 'Strong Decisions and Stare Decisis in Co-ordinate Courts' (2024) 35(2) King's Law Journal 224 <https://doi.org/10.1080/09615768.2023.2236733> accessed 19 April 2026.

23 'German Legal Research' (*Georgetown Law Library*, May 2025) <https://guides.ll.georgetown.edu/germanlegalresearch/judicialdecisions> accessed 19 April 2026.

Thus, the Supreme Court of the RK's practice in competition law demonstrates, as in some other civil law jurisdictions, the emergence of a hybrid model of adjudication. On the one hand, the continental legal structure remains intact, being based on the supremacy of statute and the absence of formal precedent. On the other hand, judicial interpretation is increasingly strengthened as a de facto mechanism for unifying legal practice.

This enhances the predictability of legal regulation while also highlighting a broader theoretical issue: the limits of judicial involvement in shaping the substance of law within a civil law system.

At the same time, it would be advisable for civil law jurisdictions to consider adopting a greater number of common law methods, like the historical evolution of the common law itself, since, unlike common law systems, civil law systems lack certain necessary methodological tools.[24] This recommendation is also relevant for the RK, which identifies itself as belonging to the civil law tradition.

b) Filling in inaccuracies, deficiencies, and gaps in legislation

Defects, gaps, and inaccuracies in legislation are a natural phenomenon inherent in any legal system, since no system of positive law, even the most perfect one, can fully encompass the diversity of real-life situations. As a rule, the shortcomings of legislation are identified much later, at the stage of law enforcement.[25] In such circumstances, the theory of interpretation and argumentation in law comes to the rescue.[26] As a result, the court actually participates in the formation of positive law, since it fills a possible "open space" in the law, acting creatively[27] and creating new legal provisions. These legal provisions result from interpreting and detailing general principles of the law in court decisions, shaped by the judge's personal experience, beliefs, and social context. This makes the law dynamic and adaptable, reflecting socio-economic interests and government policy.[28]

Contemporary research in competition law also indicates that the effectiveness of an antitrust system depends not only on the quality of legislation, but also on the extent of

24 Oppermann (n 7).

25 Anatoliy Kostruba and others, 'Legal Gaps: Concept, Content, Problems of the Role of Legal Doctrine in Overcoming them' (2023) 44(2) Statute Law Review 1 <https://doi.org/10.1093/slr/hmac016> accessed 19 April 2026.

26 Marijan Pavčnik, 'Questioning the Nature of Gaps in the Law [(Organic) Gaps in the Law]' (2012) 7(16) I-Lex: Rivista di Scienze Giuridiche, Scienze Cognitive ed Intelligenza Artificiale 119 <http://www.i-lex.it/articles/volume7/issue16/pavcnik.pdf> accessed 19 April 2026.

27 Michael C Ogwezzy, 'Appraisal of What Constitutes Legal Gaps and How They Are Filled in Different Jurisdictions' (2014) 41(1) Journal of Malaysian and Comparative Law 141 <https://ejournal.um.edu.my/index.php/JMCL/article/view/14340> accessed 19 April 2026.

28 Sakshi Andhare, 'Role of Judges in Development of Law with Reference to Realist Theory' (2025) 5(12) Indian Journal of Legal Review 438 <https://ijlr.iledu.in/role-of-judges-in-development-of-law-with-reference-to-realist-theory/> accessed 19 April 2026.

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its judicial interpretation. In particular, OECD reports emphasise that fragmented regulatory frameworks and the rapid pace of legislative change strengthen the role of courts as an institution ensuring legal certainty and the uniform application of the law. In this sense, judicial practice becomes a key mechanism for stabilising the legal system under conditions of regulatory uncertainty.[29]

A clear illustration of such judicial law-shaping, where case law acquires not a subsidiary but a system-forming function, ensuring predictability of legal application and stability of regulatory governance, can be found in certain decisions of the Judicial Chamber for Administrative Cases of the Supreme Court of the RK.

In this field, the Supreme Court of the RK generally demonstrates a shift from a formal-dogmatic model of legal application to a functional-interpretative model, in which the meaning of a legal norm is determined not only by its literal wording but also by its systemic role within the regulatory framework.

This approach aligns with contemporary developments in European competition law, where judicial interpretation is seen not as a departure from regulation, but as a mechanism for securing its effectiveness. EU competition law, in particular, is characterised by a functional and purposive method of interpretation, under which courts contribute to strengthening the effectiveness of legal regulation rather than confining themselves to its literal wording.[30]

A clear illustration of these issues appears in court decision No. 6001-25-00-6ap/475 of 23 June 2025,[31] which concerned amendments to Article 224 of the Entrepreneurial Code of the RK following the 2024 reform. The abolition of the requirement that the competition authority's conclusion be approved as an administrative order led to divergent judicial approaches. In particular, lower courts tended to adopt a formalistic position, holding that such acts were not subject to judicial review. This reasoning reflects a traditional form of legal formalism, where an act's legal relevance derives primarily from its formal classification rather than its actual legal effect.

However, in contemporary administrative and competition law doctrine, a purely formal classification of administrative acts is widely accepted as insufficient to meet the requirements of effective judicial protection, because it fails to account for the actual impact of regulatory decisions on the legal position of affected parties.

29 OECD, *OECD Peer Reviews of Competition Law and Policy: Kazakhstan 2025* (Competition Law and Policy Reviews, OECD Publishing 2025) <https://doi.org/10.1787/b7659978-en> accessed 19 April 2026.

30 Richard Whish and David Bailey, *Competition Law* (10th edn, OUP 2021).

31 Judicial Collegium for Administrative Cases of the Supreme Court of the Republic of Kazakhstan, 'A Brief Overview of the Administrative Cases Considered in Cassation for 6 Months of 2025' (*PRG*, 2025) <https://prg.kz/Document/?doc_id=33065686> accessed 19 April 2026.

Often, a purely formal classification of administrative acts proves insufficient to ensure effective protection of competition actors, as such protection requires assessing how regulatory prescriptions affect real legal relations. In this context, a key factor underpinning effective enforcement in the field of competition lies in the powers vested in the competition authority.[32] At the same time, judicial positions that identify the actual impact of normative legal acts on real legal relations should enhance the effectiveness of other actors' law enforcement activities through judicial oversight.

In its analysis of recent legislative amendments and parliamentary debates, the Supreme Court of Kazakhstan found that the legislature did not intend to restrict the right to judicial protection; rather, it merely reorganised certain procedural elements of antitrust enforcement. This reasoning reflects a more modern approach to contextual judicial analysis, where the meaning of a legal norm derives not only from its wording but also from its purpose, its place within the legal system, and the practical consequences of its application.

From this position, the Supreme Court of the RK concludes that the antimonopoly authority's decision retains the character of an independent law enforcement act, since it generates legally significant consequences and initiates subsequent stages of administrative proceedings. Consequently, the conclusion cannot be excluded from the scope of judicial review.[33]

This conclusion is in line with current approaches to standards of judicial review in competition law, where courts effectively set the minimum requirements for the justification of administrative and economic decisions, applying a standard of reasonableness in their rulings.[34] At the same time, some scholars argue that the role courts play within the administrative model of competition enforcement is greater than is commonly assumed.[35]

Thus, the Supreme Court's judicial position under consideration forms a broader model of interaction between legislative uncertainty and judicial interpretation. In this case, the court does not exceed its competence but systematically corrects legal regulation, ensuring its internal consistency and functional integrity.

As a result, modern judicial practice in the field of antimonopoly regulation of the RK is developing towards strengthening the role of judicial interpretation as a tool for ensuring

32 Maciej Bernatt and Laura Zoboli, 'The Enforcement of Competition Law in the EU: A Critical Overview' (*SSRN*, 30 December 2023) <https://dx.doi.org/10.2139/ssrn.4309073> accessed 19 April 2026.

33 Judicial Collegium for Administrative Cases of the Supreme Court of the Republic of Kazakhstan (n 31).

34 Dina Awad, 'Judicial Review Post-Vavilov: Are Courts "Correcting" Administrative Decisions?' [2020] Dentons Canada Regulatory Review <https://www.canadaregulatoryreview.com/judicial-review-post-vavilov-are-courts-correcting-administrative-decisions/> accessed 19 April 2026.

35 Roksolana Ivanova, 'Growing Influence of Judicial Control of Administrative Courts on Public Administration Bodies' (2023) 9 Economics, Finances, Law 82 <https://doi.org/10.37634/efp.2023.9.19> accessed 19 April 2026.

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access to justice and improving the quality of legal protection for market participants. This aligns with the broader European trend of strengthening the judiciary's role in administrative and competition law. Thus, the documents and analytical notes of the Organisation for Economic Co-operation and Development (OECD) note the increasing role of courts and institutional actors in balancing public values in competition law, reflecting a broader trend towards value-based and interpretative decisions: «The judicial system plays a central role in the implementation of competition policy. Competition laws are formulated in a broad sense, and judicial precedent is important for interpreting these laws, even in countries where there is no common law».[36]

c) The role of Supreme Court Decisions in individual cases in the improvement of legal norms at the legislative level

Practice shows that the legal positions of the RK's Supreme Court in competition law disputes are gradually moving beyond the traditional understanding of judicial interpretation. In certain cases, they are increasingly perceived as reference points that the legislature considers when amending and refining regulatory frameworks, particularly where procedural mechanisms lack clarity.

It should be noted that the doctrine of constitutional and administrative law increasingly emphasises that the interaction of the court and the legislator in complex regulatory areas is not linear, but reciprocal, since courts and legislative bodies play different but complementary roles in dialogue not only with each other, but also with society.[37]

Judicial practice does not merely "apply" the law; it also identifies those points within the legal framework where its literal wording no longer ensures predictability and procedural protection for market participants.

In the Kazakhstani context, this issue is reflected in the ongoing discussion on amendments to Article 224 of the Entrepreneurial Code.[38] The proposed changes envisage introducing a mechanism for the deferred entry into force of conclusions issued following antitrust investigations, with their legal effect being linked to the possibility of judicial review. In practical terms, this approach aims to ensure that administrative measures do not produce irreversible consequences before judicial control has been exercised.

Taken together, these developments indicate a gradual movement towards strengthening judicial safeguards in competition law. At the same time, they align with broader tendencies

36 Darryl R Biggar, *Judicial Enforcement of Competition Law* (OCDE/GD(97)200, Roundtables on Competition Policy no 13, OECD 1997) <https://dx.doi.org/10.2139/ssrn.141067> accessed 19 April 2026.

37 Catherine A Fraser, 'Constitutional Dialogues Between Courts and Legislatures: Can We Talk?' (2005) 14(2-3) Constitutional Forum 7 <https://doi.org/10.21991/C9QX0S> accessed 19 April 2026.

38 Entrepreneur Code of the Republic of Kazakhstan no 375-V (adopted 29 October 2015) <https://adilet.zan.kz/eng/docs/K1500000375> accessed 19 April 2026.

observable in European competition law, where greater emphasis is placed on effective judicial protection within regulatory processes.

In particular, the legal press informs about the implementation of the principle of effective judicial protection in relation to administrative decisions that may affect market behaviour, since judicial control plays a central role in the direction and evolution of EU competition law.[39]

Importantly, such changes cannot be seen as a mere mechanical borrowing of foreign models. Rather, they reflect the gradual formation of an internal logic of interaction between the judicial and legislative branches, in which decisions of the highest court identify systemic defects in legal regulation.

In this sense, the legal positions of the Supreme Court should be understood not so much as a source of law in the formal sense, but rather as a mechanism of "feedback" within the legal system. They capture situations in which existing regulation requires clarification or a redistribution of procedural safeguards among participants in competition law relations.

Thus, an emerging and stable trend is evident: judicial practice in competition law is gradually becoming a factor shaping the content of future legislative decisions, thereby strengthening its role in the development of the legal system as a whole. For example, the proposed provisions of the draft law "On Amendments and Additions to Certain Legislative Acts of the RK on Competition Issues"[40] fully correspond to the legal position previously articulated by the Supreme Court in its ruling, thereby confirming the thesis that legal positions developed in the course of adjudication serve as a key to understanding the distinctive role of higher courts as a source in the formation of legislative norms.[41]

d) Digitalisation and its Impact on Judicial Positions

In the context of the digital transformation of public administration, it is not only the technical infrastructure of justice that is undergoing change, but also the very logic of judicial review of administrative acts. Digitalisation has increased expectations of transparency, efficiency, and accessibility in administrative procedures, while also raising new legal questions about how far formal requirements should be taken when assessing alleged administrative violations.

39 Pablo Ibáñez Colomo, 'Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law' (2022) 24 Cambridge Yearbook of European Legal Studies 143 <https://doi.org/10.1017/cel.2022.7> accessed 19 April 2026.

40 Law of the Republic of Kazakhstan no 101-VII 'On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Competition Issues' (adopted 3 January 2022) <https://adilet.zan.kz/kaz/docs/Z2200000101> accessed 19 April 2026.

41 Earl M Maltz, 'The Function of Supreme Court Opinions' (2000) 37(5) Houston Law Review 1395 <https://houstonlawreview.org/article/4810-the-function-of-supreme-court-opinions> accessed 19 April 2026.

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The modern doctrine of digital administrative law proceeds from the fact that the introduction of electronic management systems should not replace guarantees of due process and judicial protection; however, excessive procedural formalism can lead to unjustified restrictions on public functions of the state.[42]

Contemporary digital administrative law starts from the idea that introducing electronic governance systems must not come at the expense of core guarantees of due process and judicial protection. At the same time, it is also recognised that overly rigid procedural formalism may unnecessarily constrain the effective functioning of public administration. In current academic discussions, this tension is often framed in terms of "algorithmically mediated justice", highlighting the need to strike a balance between the efficiency of digital procedures and the preservation of fundamental due process guarantees.[43]

A relevant illustration appears in a case concerning the judicial review of a regulatory order issued by the authority for natural monopolies, where the courts adopted different approaches to the legal significance of the digital form of the administrative procedure.

Article 45 of the Administrative Procedural and Process-Related Code of the RK establishes the equivalence between an electronic document signed with a digital signature and a paper-based document. This provision reflects a broader shift towards recognising the functional equivalence of digital and traditional forms of administrative acts.

In Case No. 6001-24-00-6ap/1850 of 13 February 2025,[44] the courts of first instance and appeal held that the absence of electronic formalisation of inspection results and their failure to be entered into the state control information system constituted a breach of mandatory procedural requirements, which, in their view, rendered the entire administrative act unlawful.

The Supreme Court of the RK adopted a different approach. The Judicial Panel held that the form of recording inspection results (whether paper-based or electronic) cannot, in itself, be regarded as a decisive criterion for the legality of an administrative act, provided that its substantive content complies with the requirements of legislation. Moreover, responsibility for the technical functioning of information systems cannot be automatically attributed to the administrative authority exercising the supervisory function.

This approach reflects a broader trend in contemporary administrative justice, shifting from formal procedural review to an assessment of the substantive legality of administrative

42 Firdaus Arifin, 'Reforming State Administration Law in the Digital Era: The Impact on Public Policy Efficiency' (2024) 23(3) Pena Justisia Media Komunikasi dan Kajian Hukum 7403 <https://dx.doi.org/10.31941/pj.v23i3.5078> accessed 19 April 2026.

43 Mireille Hildebrandt, 'Algorithmic Regulation and the Rule of Law' (2018) 376(2128) Philosophical Transactions of the Royal Society A 20170355 <https://doi.org/10.1098/rsta.2017.0355> accessed 19 April 2026.

44 Case no 6001-24-00-6ap/1850 (Supreme Court of the Republic of Kazakhstan, 13 February 2025).

decisions. Modern literature on administrative and digital law notes that excessive emphasis on formal procedural requirements may reduce the effectiveness of public administration. In contrast, deviations from digital standards should not automatically invalidate an administrative act, provided such violations do not affect the substance of legal protection or distort the balance of procedural safeguards. This is because an analysis of the legality and transparency of automated administrative decisions shows that government agencies are increasingly relying on intelligent systems, which can pose legal challenges, especially in matters of oversight and accountability.[45]

As a result, the Supreme Court effectively affirmed the primacy of a substantive assessment of an administrative act over formal defects in its digital form, holding that not every procedural irregularity arising outside the control of the administrative authority should lead to the annulment of the act, provided that it does not affect its legal essence.

Thus, the digitalisation of administrative procedures entails not only technological changes but also a transformation of the standards of judicial review. The emerging case law shows that courts are gradually moving away from a formal-digital approach towards a functional-legal analysis of administrative acts, ultimately strengthening the balance between the effectiveness of public administration and the guarantees of judicial protection for legal subjects.

4 CONCLUSIONS AND SUGGESTIONS

The transition of the RK to the administrative justice system has strengthened the protection of market participants' rights and freedoms, since the regulatory authority can, through administrative procedure, suppress possible abuses by any entity in a dominant position under competition law.

On the other hand, state bodies that oversee the implementation and observance of antimonopoly legislation in Kazakhstan may violate entrepreneurs' rights and freedoms. In this context, administrative courts play a key role in safeguarding the rights and freedoms of the relevant parties and in protecting their interests against unlawful actions and decisions of public authorities.

The effectiveness of such protection largely depends on the judiciary's ability to articulate its legal position clearly when applying antimonopoly legislation, while balancing fairness and legality and addressing gaps and inconsistencies in competition law. In practice, courts frequently encounter situations where public authorities misinterpret or improperly assess

45 Ahmed Mokhtar Abdel Hamid, 'Administrative Liability for Damages Caused by Artificial Intelligence Systems in Public Services: An Analytical Study in Light of the Principles of Legality and Transparency' (2025) 13(4) Humanities and Social Sciences 382 <https://doi.org/10.11648/j.hss.20251304.21> accessed 19 April 2026.

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evidence, fail to rely on direct proof, or apply a purely formal approach to inspections and regulatory control. Judicial decisions often note that the competent authorities do not always ensure consistency in administrative practice, particularly in relation to established procedures for analysing competition conditions in commodity markets. Procedural deadlines are also not infrequently exceeded, and administrative acts are sometimes adopted in a predominantly formal or mechanical manner. In the context of the ongoing digital transformation of public administration, this problem becomes particularly acute. As our analysis shows, the transition to electronic control and registration systems often prompts administrative authorities to overemphasise digital procedural formalities. However, as recent RK Supreme Court jurisprudence shows, deviations from technical or digital standards must not automatically invalidate an administrative act if its substantive content is legal. Courts are increasingly adopting a functional-legal approach, ensuring that algorithmically mediated or digitally executed administrative procedures do not override the substantive guarantees of legal protection for market participants.

The Supreme Court of the RK plays a special role in this process. The analysis in this study shows that, in practice, its legal positions serve not only an interpretative function but also act as a mechanism for shaping approaches to resolving similar cases. This explains the consistent orientation of lower courts toward the Supreme Court's positions, even without a formally established precedent mechanism. Courts typically use these judicial findings as guidance in resolving competition-related disputes, thereby contributing to uniformity in judicial practice.

We also agree with the Supreme Court's position reflected in the Summary of Judicial Practice and the Bulletin of the Judicial Panel on Administrative Cases. Case law analysis indicates that courts should continue to ensure proper preparation of administrative cases, accurately determine the relevant circumstances, comply with antimonopoly legislation, and fully implement the principle of the court's active role established in Article 16 of the Administrative Procedural and Process-Related Code of the RK.

Particular attention should be paid to assessing evidence and consistently applying competition law in public procurement procedures.

At the same time, the results of this study allow for a more general conclusion regarding the transformation of the role of judicial practice in RK's legal system. The analysis shows that, in antimonopoly regulation, the Supreme Court's legal positions are not limited to interpretation but increasingly function as a mechanism for shaping the content of legal regulation. This makes it possible to characterise the emerging model as hybrid, combining elements of a continental legal system with a de facto reliance on judicial positions that function similarly to precedent.

The study's scientific contribution lies in substantiating this conclusion through analysis of specific case law and showing that judicial practice serves not only a stabilising function, ensuring uniformity in law enforcement, but also a corrective and developmental function,

compensating for legislative gaps and influencing subsequent legislative developments. This corrective role is vital in adapting administrative law to the digital age. By prioritising substantive legality over formal digital defects, the Supreme Court prevents electronic administrative systems from becoming an obstacle to fair market competition, striking a balance between public administration efficiency and robust judicial protection. In this sense, the Supreme Court's legal positions can be an important institutional tool for ensuring legal certainty amid the dynamic development of antimonopoly legislation.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

АКТУАЛЬНІ ПИТАННЯ ЗАСТОСУВАННЯ АНТИМОНОПОЛЬНОГО ЗАКОНОДАВСТВА: СУДОВА ПРАКТИКА ТА ПРАВОВІ ПОЗИЦІЇ ВЕРХОВНОГО СУДУ РЕСПУБЛІКИ КАЗАХСТАН

Єрмек Абдрасулов*, Мурат Оспанов, Бауржан Сматлаєв, Айдана Нургалієва та Айжан Абдрасулова

АНОТАЦІЯ

Передумови. *У статті досліджено роль правових позицій Верховного Суду Республіки Казахстан у забезпеченні єдності судової практики у справах, пов'язаних із застосуванням конкурентного (антимонопольного) законодавства. Основну увагу приділено трансформації ролі судової влади в контексті становлення адміністративної юстиції та ускладнення механізмів державного регулювання ринку. Обґрунтовано, що рішення найвищої судової інстанції все частіше виходять за межі вирішення окремих спорів і набувають системного значення для тлумачення та застосування права.*

Методи. *У статті використано формально-юридичний, системно-структурний та порівняльно-правовий методи. Емпіричну основу дослідження становлять судові рішення адміністративних судів та постанови Верховного Суду Республіки Казахстан у справах про порушення антимонопольного законодавства. Застосування зазначених методів дає змогу виявити сталі моделі судового тлумачення та оцінити їхній вплив на розвиток правового регулювання конкуренції.*

Результати та висновки. *Аналіз засвідчує, що правові позиції Верховного Суду виконують координаційну функцію, забезпечуючи узгодженість правозастосовної практики за відсутності формально закріпленої доктрини судового прецеденту. Виявлено поступовий перехід від формального до функціонального підходу в оцінці актів антимонопольних органів, де вирішальне значення має не зовнішня форма документа, а його реальні правові наслідки. Доведено, що практика Верховного Суду сприяє заповненню законодавчих прогалин і подоланню нормативної невизначеності, формуючи більш передбачувані стандарти правозастосування. У результаті в Казахстані de facto формується модель прецедентного впливу вищих судових інстанцій. Це підвищує правову визначеність, водночас актуалізуючи питання щодо меж судової дискреції та нормотворчості.*

Ключові слова: *Антимонопольне законодавство, судове правозастосування, правова позиція Верховного Суду, нормативні постанови Верховного Суду, єдність судової практики, усунення прогалин у сфері конкурентного права, адміністративна юстиція, адміністративний суд.*

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Research Article

SOCIO-ECONOMIC IMPACTS OF BUSINESS CLOSURES IN KOSOVO: A CRIMINOLOGICAL AND LEGAL PERSPECTIVE (2021-2025)

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ABSTRACT

Background: *This study will analyse and present the situation of business closures in Kosovo and their possible implications for increased unemployment and illegal behaviour in the country. Business closures, with their negative consequences for their management entities, will, however, be argued to have other multidimensional consequences. The study will be based on data collected and processed for the years 2021–2025. The study will present the issue through independent and dependent variables, encouraging critical, debatable, and influential thinking in the development context to overcome society's eventual challenges.*

Method: *To address the study's research objectives and analyse, compare, interpret, and evaluate data, while considering the study's specific content, several scientific methods were used to achieve concrete results. The descriptive statistical method will be applied to collect and describe statistical data from selected official institutions. The correlation method is applicable for*

analytically examining possible implications in the cause-and-effect relationships of the processes treated in mutual interrelation during the realisation of the study. Meanwhile, the process of comparing statistical data will be carried out through the application of the comparative method. The normative-legal method will be applied to concrete legal definitions related to the basic notions of the topic addressed. The analysis method is applicable throughout this study, especially because processes, phenomena, and data are continuously and carefully analysed.

Results and Conclusions: *The study's results make it clear that, in Kosovar society, there is currently a high number of business closures, a high rate of unemployment, and a high prevalence of criminal offences at the national level. During the study period, from 2021 to 2025, when the data were collected, processed, and presented, the results show that business closures are most prevalent year after year. The study data suggest that the high number of business closures may be linked to increases in unemployment and potentially to rising criminogenic factors.*

1 INTRODUCTION

The high rates of business closures and unemployment, along with the equally high prevalence of criminal offences, raise concern in the country's socio-economic context. Although society, or rather state mechanisms, are trying to achieve their development objectives, the situation seems to have remained the same over the years. This result stems from an analysis of the study data, which form the basis of this study. Consequently, to address the study objectives, we will approach the research and analysis process not only from a theoretical perspective on fundamental issues of interest, but also by systematically analysing statistical data and presenting and interpreting them in detail.

The study will include criminological aspects of the closure of businesses in our country, as well as the possible implications for the increase in unemployment in the country, and also the possible effect on the increase in criminal offences in the country, all of which will be treated in the context of the cause-and-effect relationship.

The *theoretical context* will review recent research literature, while *the empirical context* will present and analyse statistical data covering 2021 to 2025. However, as has been observed throughout studying this topic, it can be emphasised that, from *a scientific perspective*, the chosen topic constitutes a topic of interest for study; there is a significant lack of scientific treatment of such a study connection in the country, and it has been deemed necessary to conduct more scientific debates about this sensitive socio-economic and state topic. From *a state policy perspective*, the topic shows room to raise awareness, respond, and improve citizens' lives socially, economically, and politically.

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2 STUDY OBJECTIVES AND RESEARCH METHODOLOGY

This study will provide a theoretical and practical treatment of business closures in the country and their socio-economic impact, including the possible implications of increased unemployment and rising criminogenic factors. Consequently, the *objectives* of this study are already clear and include:

1) *Review of basic literature that has a direct connection to addressing business closures, unemployment, and the presence of criminal offences in the country.*

2) *Monitoring the possible implications of the closure of businesses on the high unemployment rate and the emergence of criminogenic factors in society.*

3) *The presentation of accurate, clear data in a single study, in a way not previously done, on the current trend of business closures in the country, the identification of the unemployment rate, as well as the number of people convicted of criminal offences in the country.*

4) *From the literature reviewed and the statistical data presented, identify potential shortcomings and areas where improvements can be made. Conclusions and recommendations are offered at the end of this study, which can not only stimulate debate among experts in the field but also serve as a basis for relevant institutions to reflect, improve, and change.*

It can be noted that

> "the world, and with it all of humanity, throughout the history of its existence, continue to face numerous challenges and problems of various natures, which is why man has made continuous efforts to solve these issues in various ways."[1]

In this regard, Kosovar society continues to face numerous challenges and problems, although efforts to overcome them continue. One challenge that has not been sufficiently addressed is the closure of businesses in the country, which continues at a high level year after year. Consequently, this economic and social challenge could also contribute to rising unemployment or, at least, make it harder to solve the problem of unemployment for the creative entities behind such businesses, who, in creating them, have already tried to overcome it.

Meanwhile, from

> "poverty assessment: based on income data and the poverty line of 1.85 EUR per person per day, the poverty rate in 2023 is estimated to be 16%, compared to 17.6% in 2022 and 14.5% in 2021. In other words, each year's percentage of families living below the poverty threshold of 1.85 EUR per day fell below 10%, and the share of

1 Bekim Baliqi, *Politikat Publike dhe Qeverisja* (Konrad Adenauer Stiftung 2017) 15.

> households living below the threshold was considerably lower in 2023 than in 2021, showing a decline from the previous year. Compared to 2021, in 2023, an additional 10% of surveyed families were living below the threshold of 1.85 EUR per day when adjusted for price increases,"[2]

and also

> "inflation has increased indebtedness among households, as they rely on loans and credit cards to meet financial needs."[3]

Therefore, it can be considered that poverty and "the unemployment rate is typically found to increase property crime."[4]

Furthermore,

> "individuals with potentially better current and future opportunities in the legal labour market are less likely to commit crime. One determinant of these opportunities in the labour market is the unemployment rate, which fluctuates over the business cycle. During a recession, when the unemployment rate goes up, employment chances in the legal labour market diminish. As long as the employment prospects of individuals are influenced by the legal labour market conditions, the changes in the unemployment rate will impact the crime rate which is an aggregation of individuals' criminal activities. During times of high unemployment, the relative benefit of working in the legal labour market for an individual decreases on the margin, increasing the crime rate in the country."[5]

However, we must emphasise that,

> "while unemployment is a 'cancer' for all societies, especially for countries emerging from war, the structure of the economy during such events is characterised by a transitional economy, as in the case of Kosovo, where unemployment rates are higher compared to countries in the region."[6]

2 USAID, *Exploring the Dynamics of Household Poverty in the Face of Inflation: Evidence from a Survey* (UNDP Kosovo, 2023) 8 <https://www.undp.org/kosovo/publications/exploring-dynamics-household-poverty-face-inflation-evidence-survey> accessed 24 June 2026.

3 ibid. 8.

4 Steven D Levitt, 'Alternative Strategies for Identifying the Link Between Unemployment and Crime' (2001) 17(4) Journal of Quantitatiûe Criminology 382 <https://doi.org/10.1023/A:1012541821386> accessed 24 June 2026.

5 Duha T Altindag, 'Crime and Unemployment: Evidence from Europe' (2012) 32(1) International Review of Law and Economics 145 <https://doi.org/10.1016/j.irle.2011.10.003> accessed 24 June 2026.

6 Burhan Reshat Rexhepi and Burim Isa Berisha, 'Economic Developments and Employment Growth Policy after the War in Kosovo' (2022) 20 Review of Economics and Finance 1109 <https://doi.org/10.55365/1923.x2022.20.124> accessed 24 June 2026.

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Consequently, the closure of businesses and the increase in the number of unemployed people, as well as the inability to meet even the basic personal and family needs of individuals, can be considered factors influencing the emergence of other criminogenic factors. Several theories of criminality emphasise economic causes as the reason for the appearance of deviant behaviour in society. Therefore, it is considered that "deteriorating economic conditions affect social strain."[7]

One of these theories is *the theory of anomie*, according to which "the situation that is created in society, when people, especially the broad and poor strata, fail to realise their goals, when in the struggle of competition and penetration, some fail"[8] can be the reason for the appearance of deviant behaviours in society.

On the other hand, according to social disorganisation theory,

> "social disorganisation refers to the inability of a community to realise common goals and solve chronic problems. According to the theory, poverty, residential mobility, ethnic heterogeneity, and weak social networks decrease a neighbourhood's capacity to control the behaviour of people in public, and hence increase the likelihood of crime"[9]

so,

> "this disorganisation is particularly present in conditions of great social mobility, of a great movement of society, population, great migrations of citizens from rural regions to urban regions, from small centres to large industrial centres, etc. This movement also encourages the mentality of consumption, the competition for prestige and for profit, the uncompromising struggle for the creation of capital, material well-being, etc. Often, in these competitions and in this uncompromising struggle, many people fail to satisfy their desires, realise their plans, realise their dreams, etc."[10]

At the same time, this can also affect the appearance of deviant behaviours in society. However, in this study, such a link cannot be tested directly due to the specific nature of the thematic matter and particularly because the empirical data do not directly measure social disorganisation and its causal impact on business closures, although business closures can

7 Julie Phillips and Kenneth C Land, 'The Link Between Unemployment and Crime Rate Fluctuations: An Analysis at the County, State, and National Levels' (2012) 41(3) Social Science Research 681 <https://doi.org/10.1016/j.ssresearch.2012.01.001> accessed 24 June 2026.

8 Ragip Halili, *Kriminologjia* (8th edn, Universiteti i Prishtinës 2016) 101.

9 Charis E Kubrin and Ronald Weitzer, 'New Directions in Social Disorganization Theory' (2003) 40 Journal of Research in Crime and Delinquency 374 <https://ssrn.com/abstract=2029097> accessed 24 June 2026.

10 Halili (n 8) 100.

be interpreted through this study as a phenomenon potentially linked to conditions of existing social disorganisation.

At the same time, we also must not leave aside the treatment of the reasonableness of the appearance of criminality in society, elaborated according to *the crime opportunity theory*, according to which "a perceived crime opportunity is when the perceived benefits outweigh the perceived costs of committing crime, and perceptions vary between individuals. Reducing actual or perceived crime opportunities occurs by modifying actual or perceived costs and benefits, respectively".[11] Consequently,

> "the decrease in income and potential earnings associated with involuntary unemployment increases the relative returns of illegal activity. Moreover, workers that experience chronic joblessness have less to lose in the event of an arrest and incarceration. Hence, straightforward economic reasoning suggests that unemployment is an important determinant of the supply of criminal offenders and hence, the overall crime rate."[12]

Looking at the problem from another academic angle,

> "unemployment is a major challenge all countries face especially in transition countries as our country."[13] Moreover, extremely worrying is the fact that "economic and political instability, together with low job opportunities at home, are some of the main push factors encouraging the educated and highly skilled to emigrate."[14]

Meanwhile, to avoid unemployment, a many people, especially young people, choose migration. As a process,

> "migration offers a potential solution for advanced EU economies to meet labour market shortages but creates a potential drain on labour market resources in Kosovo and other emerging economies".[15]

11 Graham Farrell and Nick Tilley, 'Crime Opportunity Theory: The State of the Art' (2026) 15(12) Crime Science 3 <https://doi.org/10.1186/s40163-026-00275-z> accessed 24 June 2026.

12 Steven Raphael and Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime* (Discussion Paper 98-19, UC San Diego, Department of Economics 1998) <https://escholarship.org/uc/item/5hb4h56g> accessed 24 June 2026.

13 Besnik Desku and Bahrije Ramaj, 'Unemployment in Kosovo in the Last Ten Years 2002–2012' (2013) 4(10) Mediterranean Journal os Social Sciences 191 <https://www.richtmann.org/journal/index.php/mjss/article/view/1175> accessed 24 June 2026.

14 Labinot Hajdari and Judita Krasniqi, 'The Economic Dimension of Migration: Kosovo from 2015 to 2020' (2021) 8 Humanities and Social Sciences Communications 5 <https://doi.org/10.1057/s41599-021-00923-6> accessed 24 June 2026.

15 International Monetary Fund, European Dept, *Republic of Kosovo: Selected Issues* (IMF Staff Country Reports vol 365, IMF, 2024) 5 <https://doi.org/10.5089/9798400297991.002> accessed 24 June 2026.

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Consequently, another harmful gap is being created in the country, which has to do with the fact that today

> "in many cases the recruited personnel are not the best graduates, as they prefer to work in international institutions, the financial sector and public administration, where salaries are higher."[16]

As a result, professionally prepared people continue their careers abroad.

Another fact is that

> "in parallel, gender inequality in the labour market remains a persistent challenge in Kosovo, particularly in the private sector and family-owned businesses, where women remain underrepresented as employers and entrepreneurs."[17]

Above all, it is clear that, today, "the regulation of mutual relations within the economic market is achieved by applying the law on competition."[18] On the other hand, "a university degree is not a sufficient criterion for employment, but what matters instead are the practical experiences of graduates, transferable skills and the compatibility of the graduate's professional profile with market requirements,"[19] although "the nepotism and corruption are among the most serious barriers to institutional and economic development in transitional countries, including Kosovo." *(sic)*[20]

Although "the fundamental purpose of business strategy is to direct companies towards sustainable sources of growth and profit,"[21] measured state intervention is necessary to fulfil that purpose. Furthermore, "markets and government intervention respond jointly to unemployment when creating new jobs".[22] Consequently, concrete strategies, combined with adequate legal and practical support, can create socio-economic stability.

16 Ines Dika, 'Largimi i trurit dhe faktorët që ndikojnë' (2023) 2 Revista Shqiptare Social Ekonomike 83.

17 Shpëtim Memishi, 'Family Economic Inequality and Gender Dynamics in Kosovo: Resource Allocation, Unpaid Work, and Decision-Making (2019–2024)' (2026) 7(1) Architecture Image Studies 1009 <https://doi.org/10.62754/ais.v7i1.977> accessed 24 June 2026.

18 Teuta Beka, 'Konkurrenca dhe Konsumatori në Kosovë' (Book of proceedings 3-rd ICIS: Third International Conference on: "Interdisciplinary Studies", 5 March 2016) 197.

19 Xhavit Rexhaj, Arberesha Qerimi, and Fidan Qerimi, 'The Impact of Higher Education on Youth Employability in Kosovo: Key Determinants Affecting the Interface Between Higher Education Provision and Labor Market Needs' (2026) 6 Open Research Europe 4 <https://doi.org/10.12688/openreseurope.21616.2> accessed 24 June 2026.

20 Arsim Gjinovci and Dren Gjinovci, 'Favoritism Practices, Nepotism, and Corruption in Public Administration: Impacts on Employment, Meritocracy, Efficiency, and Institutional Trust. An Institutional and Governance Perspective in Transitional Public Sectors' (2026) 3(2) European Journal of Management, Economics and Business 202-3 <https://doi.org/10.59324/ejmeb.2026.3(2).15> accessed 24 June 2026.

21 Ira Gjika and Rudina Qurku, 'Economic Policies to Help SMEs in the Face of Covid-19, Experiences and Suggestions' (Covid - 19 Economy Impact: Book of Proceedings, Mediterranean University, 2020) 133.

22 Liliana Harding and Mihaela Neamțu, 'A Dynamic Model of Unemployment with Migration and Delayed Policy Intervention' (2018) 51 Computational Economics 427 <https://doi.org/10.1007/s10614-016-9610-3> accessed 24 June 2026.

However, long-standing political problems in the country also have a direct, negative effect on society and the economy. This situation also fundamentally affects the country's broader migration patterns, especially among young people. Therefore,

> "political actors must overcome the prolonged political deadlock and address the numerous challenges of reforms related to the rule of law, including the independence of the judiciary and structural socio-economic reforms that address the high level of unemployment."[23]

One thing to keep in mind is that business closures directly cause job losses, reduce citizens' incomes, reduce capital, limit investment opportunities, and directly reduce the state's public revenues.

Finally, "while young and adolescent firms predominantly fail due to internal shortcomings, mature small and medium-sized enterprises struggle more with increased competition and economic slowdowns".[24] Consequently, the state should pay special attention to creating new businesses and supporting them.

Given the topic's special nature, the study used *descriptive*, *correlational*, and *comparative methods* within a *quantitative framework*. The *study applied descriptive statistical methods* throughout the data collection and description process, namely, interpreting relevant statistical data from official institutions.. Meanwhile, the *correlation method* was applied to the analytical examination of the cause-and-effect relationship of processes for which the results of the study have shown possible reciprocal implications, i.e. *the reason for the closure of businesses → causing the high number of unemployed → increase in criminogenic factors*. The *comparative method* proved necessary, especially when comparing the same type of statistical data over the years or different types of data.

To present the most accurate and clear data within the framework of *qualitative methods* and based on the study's specifics, the *normative-legal method* and the *analysis method* proved applicable. *The normative-legal* method is applied to follow concrete legal definitions and elaborate basic notions related to the topic. Meanwhile, *the analysis method* was applied throughout the study to provide a clear, concrete analysis of all issues that contribute to a more meaningful presentation of the study.

While this study primarily utilises empirical and criminological data regarding business closures and unemployment, its structural framework remains firmly anchored in the legal definitions and penal standards established by the *Criminal Code of the Republic of Kosovo*.[25]

23 Nina Skočajič Juvan and Anton Grizold, 'The Complexity of Security in the Western Balkans: Processes and Issues' (2017) 54(2) Teorija in Praksa 241.

24 Alexander Kücher et al., 'Firm Age Dynamics and Causes of Corporate Bankruptcy: Age Dependent Explanations for Business Failure' (2020)14 Review of Managerial Science 633 <https://doi.org/10.1007/s11846-018-0303-2> accessed 24 June 2026.

25 Code no 06/L-074 Criminal Code of the Republic of Kosovo (adopted 23 November 2018) <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18413&langid=2> accessed 24 June 2026.

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Consequently, the legal analysis herein does not aim to provide a pure dogmatic review of statutory provisions, but rather examines how normative-legal instruments such as criminal sanctions, prosecutorial mandates, and procedural penal orders mediate and respond to socio-economic disruptions.

3 RESULTS, CRIMINOLOGICAL IMPLICATIONS, AND LEGAL-NORMATIVE FRAMEWORK

In this study, the legal dimension serves as a concrete normative basis for defining criminal offences and penalties under the *Criminal Code,* including procedural enforcement mechanisms, and punitive orders. The study addresses these provisions in connection with the analysed socio-economic factors, rather than as a dogmatic analysis isolated within the criminal-legal framework.

Meanwhile, in the context of addressing the closure of businesses, as well as the possible implications for the increase in unemployment in the country and also the possibility of the potential effect on the creation of criminogenic factors in society, which may consequently lead to an increase in criminal offences, the discussion based on concrete study results and their presentation will be carried out gradually and in mutual interrelation. However, we must emphasise that

> "the new system established in 1999 by the international community has also impacted on the socio-cultural life here. Experts that came from different countries have brought their experiences in establishing institutions and drafting laws that were adopted by the Kosovo Parliament. Those laws were not always responsive to prevention and the fight against crime in Kosovo. On the other hand, due to the limited funds for public research institutions and the lack of experience of private institutions (non-governmental organisations), criminological education and research failed to contribute to policymaking and to be the promoter of development in the field of criminology. More to the point, for individual researchers it is very difficult to conduct such research due to the lack of systematised data, reports, up-to-date books and scholarly journals, etc." *(sic)*.[26]

Consequently, even today, challenges arise in the field of data recording by the relevant institutions and mechanisms called upon to fulfil such a process.

26 Lavdim Krasniqi, 'Criminology and Crime in Kosovo' in Anna-Maria Getoš Kalac, Hans-Jörg Albrecht and Michael Kilchling (eds), *Mapping the Criminological Landscape of the Balkans: A Survey on Criminology and Crime with an Expedition into the Criminal Landscape of the Balkans* (Research Series of the Max Planck Institute for Foreign and International Criminal Law, Series BC: Publications of the Max Planck Partner Group for Balkan Criminology 1, MPIBC 2014) 235.

To present the data on the real situation of business closures in our country in more detail, we will present the study data gradually. In this section, we must initially emphasise that

> "currently, Kosovo has 38 municipalities, 1,467 settlements, with a total population of 1,780,021 inhabitants, in a total area of 10,896 km^2. The municipality with the largest population is the *Municipality of Prishtina* with a total population of 198,897 inhabitants, while the municipality with the smallest population is the *Municipality of Partesh* with 1,787 inhabitants."[27]

In this section, we present data for the entire study period and for each municipality separately. Finally, we will assess the comparability of the number of businesses closed to track the numerical movement of this process over the years.

So, to better reflect the studied issue, we emphasise that, in this study, *the independent variables* will be the study years, for which data will be gradually presented, including data for the years 2021 to 2025, as well as the municipalities of the Republic of Kosovo, while, year after year, *the dependent variables* will be followed by presenting statistical data through which the studied situation will be clarified.

In this regard, Table 1 and Table 6 (see the Appendix) present the number of business closures in the country during 2021. The data show clear differences in business closures across municipalities and categories. In total, 1,556 businesses closed during 2021. The largest number of closures occurred among individual businesses, with around 1,348, and the *Municipality of Pristina* led with the highest figure, with 297 closed businesses. This situation can be interpreted as evidence that business closures increase unemployment, but it may also help explain the possible absence of deviant behaviour in the capital.

Table 1 and Table 6 (see the Appendix) also show the number of business closures in the country during 2022. The data show clear differences in business closures across municipalities and categories. In total, 1,752 businesses were closed during 2022. Even in this year, the data show that most closures were individual businesses, with about 1,500 such businesses, and the *Municipality of Pristina* led with 347 closed businesses. Consequently, this situation may also reflect business closures that contribute to increased unemployment and create criminogenic factors, which may explain the higher presence of deviant behaviour in the capital.

In addition, Table 1 and Table 6 (see the Appendix) show the number of business closures in the country in 2023. Even so, the numerical differences in business closures across municipalities and categories are clearly noticeable. In total, 1,591 businesses closed in 2023. Even in this year, the data show that most closures are individual businesses (about 1,358), and the *Municipality of Pristina* again leads with 273 closed businesses.

27 Arsim Jaha, *Korporatat Publike Financiare Në Kosovë (Rast Studimi: Fondet Pensionale)* (Kolegji UBT Fakulteti për Menaxhment, Biznes dhe Ekonomi 2020) 5 <https://doi.org/10.33107/ubt-etd.2020.2770> accessed 24 June 2026.

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Consequently, this situation may also reflect how business closures increase unemployment and create criminogenic factors, which may help explain the higher presence of deviant behaviour in the capital.

Table 1 and Table 6 (see the Appendix) show the number of business closures in the country in 2024. Even so, the numerical differences in business closures across municipalities and categories are clear. In total, 1,624 businesses closed during 2024. Even in this year, the data show that most closures are individual businesses (about 1,337), and the *Municipality of Pristina* again leads with 300 closed businesses. Consequently, this situation may also reflect business closures contributing to increased unemployment and the creation of criminogenic factors, which may explain the higher presence of deviant behaviour in the capital.

Table 1 and Table 6 (see the Appendix) also show the number of business closures in the country during 2025. Even so, the numerical differences in business closures across municipalities and categories are noticeable. In total, 1,345 businesses closed during 2025. Even in this year, the data show that most closures are individual businesses (about 1,101), and the Municipality of Pristina again leads with 247 closed businesses. Consequently, this situation may also imply that business closures increase unemployment and create criminogenic factors, which may explain the higher presence of deviant behaviour in the capital.

To provide a more comprehensive, narrower-dimensional treatment of the data, we focus on the independent variable, the time period 2021 to 2025 at the country level; the dependent variables show movement over the years but, overall, make it clear that 7,868 businesses closed during this time. If the categorisations of closed businesses are the dependent variables, then from 2021 to 2025, most of these closures were individual businesses, with 6,644. Ultimately, this situation, in a broader dimension, can be interpreted as a possible implication of the closure of businesses at the national level, in the increase in unemployment also at the national level, but also in the creation of criminogenic factors, which can also explain possible implications in the presence of deviant behaviours at the national level. The analysis of the main findings supports the possible reciprocal implications highlighted above (see Table 1 below).

Table 1. Business closures across the country from 2021–2025[28]

Business closures across the country												
Time period	*Individual business*	*General partnership*	*Limited partnership*	*Limited liability company*	*Joint stock company*	*Branch of a foreign company*	*Social enterprise*	*Public enterprise*	*Agricultural cooperatives*	*Other enterprises under the jurisdiction of the AKM*	*Representative office in Kosovo*	*Total:*
2025	1101	13	0	215	1	14	0	0	1	0	0	**1345**
2024	1337	14	0	260	0	13	0	0	0	0	0	**1624**
2023	1358	14	0	209	3	6	0	0	0	0	1	**1591**
2022	1500	22	0	211	1	15	0	0	2	0	1	**1752**
2021	1348	17	1	177	0	11	0	0	2	0	0	**1556**
Total:	**6644**	**80**	**1**	**1072**	**5**	**59**	**0**	**0**	**5**	**0**	**2**	**7868**

Viewed from another criminological perspective and always in search of an accurate analysis of the rate of business closures in relation to active businesses in the country, from the analysed data, the situation for the study period is presented in Table 2 below:

Table 2. Business closures in relation to active businesses at the national level

Business closures in relation to active businesses at the national level			
Time period:	*Total number of active businesses*	*Total number of closed businesses*	*Business closures expressed as a percentage*
2025	12,917	1,345	10.41%
2024	11,718	1,624	13.85%
2023	10,913	1,591	14.57%

28 The statistical data in tables nos. 1, 2, and 6 have been processed by the author from official data obtained from the official website of the *Kosovo Business Registration Agency*, *Ministry of Industry, Entrepreneurship, Trade, and Innovation*. The last access to the electronic data of this institution was on 18.06.2026. See, 'Agjencia e Regjistrimit të Bizneseve të Kosovës (ARBK)' (*Ministria e Industrisë, Sipërmarrjes, Tregtisë dhe Inovacionit*, 2026) <https://arbk.rks-gov.net/> accessed 18 June 2026.

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Business closures in relation to active businesses at the national level			
Time period:	***Total number of active businesses***	***Total number of closed businesses***	***Business closures expressed as a percentage***
2022	10,411	1,752	16.82%
2021	9,973	1,556	15.60%
Total:	55,932	7,868	14.06%

The tabular data above show that the rate of business closure in the country remains high. In total, during the study period, there are 55,932 active businesses, but the business closure rate is also high, with 7,868 businesses (14.06%). In comparison, the business closure rate remains stable over the years. In some cases, an increase in active businesses is accompanied by an increase in closed businesses.

Alongside the high rate of business closures, another socio-economic concern is the *high rate of unemployment*. In fact, this situation continues year after year and has become a widespread social concern. Not only in our society, but especially among young people, the inability to find work remains a major concern that prevents them from securing the income needed for a normal life.

Since the study aims to present objective data for the country, the *independent variables* are the study years, 2021 to 2025, while the *dependent variables* are the different percentages, which show how they change year after year.

In this regard, looking specifically at the employment issue and from official data, it shows that "in 2021, *the employment rate is 31.1%*, *the unemployment rate is 20.7%*, while *the inactivity rate is 60.7%*. LFS data[29] show that the percentage of people employed part-time for 2021 is 6.7%. Self-employment (as a percentage of employees) for this year is 19.1%. The percentage of people employed in precarious work (people who are self-employed and have no employees and those who work unpaid in a family business) was 12.7%. Trade, construction, manufacturing, and education continue to employ half of the employed. Regarding the labour force participation, which is 39.3% in this period, the number of women belonging to the labour force was 22.0%, while men were 56.6%. The youth unemployment rate is 38.0%."[30]

29 In this article, *LFS* refers to the Labor Force Survey.

30 Kosovo Agency of Statistics (KAS), *Labor Force Survey 2021* (Series 5: Social Statistics, Republic of Kosovo, Office of the Prime Minister 2022) 5.

On the other hand,

> "compared to the previous year (2021), the labour force participation rate has decreased by 0.7%. In 2022, *the employment rate was 33.8%*, *the unemployment rate was 12.6%*, and *the inactivity rate was 61.4%*. LFS data show that part-time employment was 6.0%, self-employment was 17.2% of employees and precarious work was 13.3% (including self-employed persons without other employees and unpaid family business employees). The sectors of trade, construction, education, manufacturing as well as public administration and defence continue to employ over half of the working population. Women accounted for 22.0% of the labour force, while men represented 55.5% out of a total participation rate of 38.6%. The youth unemployment rate was 21.4%."[31]

Looking at 2023,

> "compared to the previous year (2022), the labour force participation rate has increased by 2.1%. In 2023, *the employment rate was 33.3%*, *the unemployment rate was 10.9%*, and *the inactivity rate was 59.3%*. LFS data show that part-time employment was 6.3%, self-employment was 17.2% of employees and precarious work was 15.3% (including self-employed persons without other employees and unpaid family business employees). The sectors of trade, construction, education, manufacturing as well as public administration and defence continue to employ over half of the employed. Women accounted for 24.2% of the labour force, while men represented 57.8% out of a total participation rate of 40.7%. The youth unemployment rate was 17.3%."[32]

During 2024,

> "compared to the previous year (2023), the labour force participation rate increased by 42.5%. In 2024, *the employment rate was 38.6%*, *the unemployment rate was 10.8%*, and *the inactivity rate was 56.8%*. LFS data show that part-time employment was 6.9%, self-employment was 16.6% of employees and precarious work was 14.5% (including self-employed persons without other employees and unpaid family business employees). The sectors of trade, construction, manufacturing, education as well as public administration and defence continue to employ over half of the working population. Women accounted for 25.9% of the labour force, while men represented 60.6% out of a total participation rate of 43.2%. The youth unemployment rate was 19.5%"[33].

31 Kosovo Agency of Statistics (KAS), *Labor Force Survey 2022* (Series 5: Social Statistics, Republic of Kosovo, Office of the Prime Minister 2023) 1.

32 Kosovo Agency of Statistics (KAS), *Labor Force Survey 2023* (Series 5: Social Statistics, Republic of Kosovo, Office of the Prime Minister 2024) 5.

33 Kosovo Agency of Statistics (KAS), *Labor Force Survey 2024* (Series 5: Social Statistics, Republic of Kosovo, Office of the Prime Minister 2025) 5.

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The tabular data are as follows:

Table 3. Employment, unemployment, and inactivity rates (2021–2025)[34]

Employment, unemployment, and inactivity rates (2021 – 2025)				
Time period:	***Employment rate***	***Unemployment rate***	***Inactivity rate***	***Youth unemployment rate***
2025	*There is no official data published.*			
2024	38.60%	10.80%	56.80%	19.50%
2023	33.30%	10.90%	59.30%	17.30%
2022	33.80%	12.60%	61.40%	21.40%
2021	31.10%	20.70%	60.70%	38.00%

Consequently, business closures should not be viewed only as an economic process but also as a factor that may directly contribute to increased unemployment in the country. Meanwhile, unemployment is known in criminological literature as a criminogenic factor that causes poverty and, with it, the possibility of people being involved in illegal activities. In fact,

> "the rise in crime in many countries around the world today can be explained, among other factors, by the impact of unemployment. In almost all countries where unemployment has increased, a rise in various forms of crime is also observed"[35].

Therefore, the analysis of the main findings aims to argue the possible implications of unemployment in the increase in criminal offences in the country and thus in the higher level of punishments.

Given the potential impact of business closures on the country's rising unemployment rate, an increase in citizens' emigration is also evident. Official data clearly shows this trend, making it a current concern. Official data shows the situation as follows:

34 The data were processed by the author from official *Labor Force Survey* data for the years 2021–2024, provided as data sources (references) within this article.

35 Halili (n 8) 250.

Table 4. Balance of international migration of the population of Kosovo (2021–2025)[36]

Balance of international migration of the population of Kosovo (2021 – 2025)	
2025	*There is no official data published.*
2024	- 28,413 inhabitants
2023	- 15,394 inhabitants
2022	- 30,889 inhabitants
2021	-38,606 inhabitants

Although population migration is not the primary empirical object of this criminological and legal analysis, it is integrated into the discussion as a critical secondary socio-economic phenomenon closely tied to labour market distress and business closures, thereby providing a more comprehensive contextual background for the study.

Consequently, at a time when Kosovar society is facing problems of a social, political, and economic nature, and when "Kosovo's security institutions have not developed the necessary capacity to guarantee the security of all Kosovo citizens,"[37] there is a lot of work to be done for an even more pronounced standardisation of a life lived in better conditions. Many citizens, disappointed with the current reality, are choosing migration as a solution, which also contributes to the decline of our country's young population.

Compared with the high figures for business closures over the years, the accompanying data suggest possible implications not only for rising unemployment but also for citizens fleeing the country. The implications should also be considered in another dimension, especially the possibility that this process may lead to the emergence of criminogenic factors in society. So, although these implications may not be direct, society and the state must remain vigilant about their possibility. Based on the data presented for the independent variables, which remained unchanged over the study years, the dependent variables show a significant trend: both the number of accused persons and the number

36 The tabular data has been obtained and processed from data published in the following sources: Kosovo Agency of Statistics (KAS), *Estimate - Kosovo Population 2021* (Series 5: Social Statistics, Republic of Kosovo, Office of the Prime Minister 2022) 9-10; Kosovo Agency of Statistics (KAS), *Estimate - Kosovo Population 2022* (Series 5: Social Statistics, Republic of Kosovo, Office of the Prime Minister 2023) 9-10; Kosovo Agency of Statistics (KAS), *Estimate - Kosovo Population 2023* (Series 5: Social Statistics, Republic of Kosovo, Office of the Prime Minister 2024) 9; Kosovo Statistics Agency (KAS), *Estimate - Kosovo Population 2024* (Series 5: Social Statistics, Republic of Kosovo, Office of the Prime Minister 2025) 1.

37 Mensut Ademi, 'The Role of the Intelligence Service in the Prevention of Organized Crime in Kosovo' (2022) 10(2) Sociology and Criminology 2 <https://www.longdom.org/open-access/the-role-of-the-intelligence-service-in-the-prevention-of-organized-crime-inkosovo-93735.html> accessed 24 June 2026.

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of convicted persons increased. Rather than trending downward as expected in a democratic society, the statistical data unfortunately show an increasing trend. Consequently, the findings presented in tabular form look as follows:

Table 5. Number of people accused and convicted at the national level (2021– 2025)[38]

Number of people accused and convicted at the national level		
Time period:	***Number of accused persons***	***Number of convicted persons***
2025	*There is no official data published.*	*There is no official data published.*
2024	18345	15259
2023	16160	12963
2022	15281	12746
2021	7395	6317

Although the number of accused and convicted persons presented above is based on official data that refer directly to registered cases, the figures do not necessarily reflect the actual number of illegal behaviours in society. Such a situation stems from the fact that "in the practice of criminality research, problems arise regarding the accuracy of statistical evidence because it happens that the data do not correspond to what actually happened. For this reason, during criminological research and the treatment of criminality records, the phenomenon of the "dark number", or even the phenomenon of the "excess number" of criminality in a country must always be taken into account"[39] and this of course applies in this case as well.

Such a situation, even in dimensions beyond the statistical aspect, makes it clear that there is indeed a logical connection, namely a possible negative implication of *the high number of business closures in the country → increasing unemployment → increasing criminogenic factors*. The increase in criminogenic factors on the other hand means a greater possibility of the involvement of persons in the commission of criminal offences in which case "the criminal offense is illegal act which is defined by law as a criminal offense, the features of which are defined by law and for which the criminal sanction or compulsory treatment measure is defined by law."[40] However, the effectiveness of the punitive policy and in this sense the increase in the number of convicted persons, may have been influenced by the application

38 The data was processed by the author from the official data of *Jurisprudence Statistics for Adults 2021-2024*, which are also included as data sources (references) within this article.

39 Halili (n 8) 54.

40 Code no 06/L-074 (n 25) art 7.

of "punitive order as an instrument of criminal case resolution outside of the main trial has a great criminal-legal, criminal-procedural and criminal policy importance.

Through this instrument Kosovo legislator aimed to increase the effectiveness of the courts work in resolution of court cases."*(sic)*[41] Meanwhile, the increase in the number of convicted persons may also have affected the effectiveness of the prosecution of the perpetrators of criminal offences, all the more so because "the role of the public prosecutor is extremely important in the Kosovo system, for a number of reasons. It is a young state, for which an effective fight against crime is essential to strengthen the structures of the new state institutions".[42] However, we should not ignore the ever-increasing efficiency of the judicial system itself, and in particular in the process "of (a) reviewing and properly implementing existing sentencing rationales, sentencing ranges, statutory provisions, unifying opinions, reasoning provisions, control by appellate courts, sentencing scholarship, and judicial training and (b) adopting new measures"[43] by the responsible state bodies.

At first glance, a comparative review of the statistical data on unemployment rates (Table 3) and the number of convicted persons (Table 5) may seem counterintuitive or even suggest an inverse trend in certain years of the analysed period (2021–2025). Specifically, while 2021 recorded the highest unemployment rate (20.7%), it showed significantly fewer convictions (6,317), whereas 2024 had a lower unemployment rate (10.8%) but saw a sharp increase in convictions (15,259).

However, this dynamic does not invalidate the core criminological proposition; rather, it underscores the multifaceted and non-linear nature of crime causation.

While economic deprivation and unemployment are critical baseline criminogenic factors, particularly for survival-driven offences, institutional enforcement, investigative capacity, and judicial efficiency also shape criminality. The marked increase in convictions in the study's later years cannot be attributed to economic indicators alone. Instead, it must be analysed alongside stronger law enforcement responses, the public prosecutor's office's proactive role in tackling institutional backlogs, and the Kosovo judicial system's increased institutional efficiency. While business closures and subsequent unemployment broaden the risk of economic instability, state law enforcement policies, procedural reforms (such as the expanded application of punitive orders), and the judiciary's evolving operational capacity ultimately shape the number of official convictions.

41 Azem Hajdari, 'Imposition of Punitive Order in Criminal Procedure: In Context of Kosovo' (2016) 3(8) International Academic Journal of Social Sciences 68 <https://ssrn.com/abstract=2850002> accessed 24 June 2026.

42 Andrea Venegoni, 'Il Pubblico Ministero nel Sistema Giudiziario del Kosovo' (2024) 62(1) DPCE Online 521 <https://doi.org/10.57660/dpceonline.2024.2090> accessed 24 June 2026.

43 Jakub Drápal and Mojca Plesničar, 'Sentencing Elsewhere: Structuring Sentencing Discretion in Post-Communist Europe' (2025) 31 European Journal on Criminal Policy and Research 267 <https://doi.org/10.1007/s10610-023-09568-4> accessed 24 June 2026.

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4 CONCLUSION AND RECOMMENDATIONS

After a detailed treatment of the study's chosen topic, the data support the possible implications of business closures, including increased unemployment and the emergence of criminogenic factors in the country. Furthermore, we conclude that the study findings helped achieve the first objective because the literature review and analysis identified possible links between business closures, increases in unemployment, and increases in criminogenic factors in the country. Furthermore, the study's findings highlight gaps in the correlative treatment of the relevant phenomenon in both the theoretical context and the empirical prism. The statistical findings indicate the achievement of the study's second objective because the high rate of business closure continues to exist over the years in the country, which also makes clear the possible implication of this process in the increase in the unemployment rate, as well as in the appearance of criminogenic factors in the country.

Analysis demonstrates that the third objective has also been fulfilled because the data, presented in clear tabular form, make it clear that no correlative study of this treatment interrelationship has been found before. Consequently, this study is unique and offers a clear, easily understandable reflection of the problem studied. The study's findings argue that its fourth objective has also been achieved, since the following recommendations are derived and offered.

Addressing the correlation between business closures, high unemployment rates, migration, and the emergence of criminogenic factors is an important area for treatment not only in the social context but also in the legal one, and not only in the theoretical but also in the empirical aspect.

This research demonstrates that business closures are a continuous process. The data clearly show that individual businesses are most affected by such closures, which requires active state policy support for newly created businesses.

Attention is also drawn to the possible implications of business closures in increasing the number of unemployed people in society; consequently, the state should have a more active employment policy. It clearly argues that the number of unemployed and inactive people in society is very high and that young people continue to remain the most disadvantaged group due to their inability to find an adequate job, despite the professional preparation they may have.

Another point highlighted is the possible implications of unemployment in the high migration of the population.

Additionally, a current societal concern addressed in the text is that international migration is also reducing the total population in the country.

Recent evaluation indicates that the number of criminal offences in the country has recently increased and, in this sense, the number of convicted persons, while official data evidence this.

There is a strong emphasis on the necessity of applying specific and planned measures in terms of linking education with the labour market, preserving existing jobs for citizens, supporting individual businesses and creating jobs, especially for young people, creating concrete programmes to support the possible reactivation of closed businesses, financial support for new businesses, providing easier access to credit for small businesses, eventual assistance for businesses in difficulty, etc.

A clear need to overcome the problematic situations discussed above is emphasised, which can also be achieved through opening opportunities for foreign investment in the country, improving meritocracy in employment, and creating more appropriate working conditions.

Ultimately, the findings of the study argue the necessity of institutional coordination, the compilation of concrete state programmes and the undertaking of preventive measures to improve and overcome such a problematic situation.

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APPENDIX

Table 6. **Total business closures by municipality (2021–2025)**

No.	Municipality	2021	2022	2023	2024	2025	Total (2021-2025)
1	Deçan	15	30	19	17	17	**98**
2	Gjakova	81	89	109	123	71	**473**
3	Gllogoc	37	60	52	81	46	**276**
4	Gjilan	132	142	146	124	95	**639**
5	Dragash	19	14	14	15	17	**79**
6	Istog	18	19	21	21	17	**96**
7	Kaçanik	13	11	17	15	9	**65**
8	Klina	42	50	30	37	25	**184**

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No.	Municipality	2021	2022	2023	2024	2025	Total (2021-2025)
9	Fushë Kosovë	59	51	46	54	32	**242**
10	Kamenica	30	32	39	41	25	**167**
11	Mitrovica	138	125	105	105	92	**565**
12	Leposaviç	6	1	2	5	11	**25**
13	Lipjan	31	39	35	41	34	**180**
14	Novobërdë	0	3	4	1	1	**9**
15	Obiliq	16	42	26	24	14	**122**
16	Rahovec	58	52	54	28	21	**213**
17	Pejë	74	74	75	59	63	**345**
18	Podujevë	58	48	57	51	52	**266**
19	Prishtinë	297	347	273	300	247	**1464**
20	Prizren	128	146	129	122	108	**633**
21	Skënderaj	21	31	29	32	35	**148**
22	Shtime	15	13	15	11	9	**63**
23	Shterpcë	15	9	7	15	7	**53**
24	Suharekë	45	59	44	50	56	**254**
25	Ferizaj	89	85	99	73	63	**409**
26	Viti	25	47	44	39	28	**183**
27	Vushtrri	54	67	54	82	62	**319**
28	Zubin Potok	0	4	0	1	2	**7**
29	Zveçan	4	5	1	4	8	**22**
30	Malisheva	20	22	21	26	27	**116**
31	Junik	0	1	1	3	1	**6**
32	Mamushë	0	1	1	0	1	**3**
33	Hani i Elezit	3	12	8	6	6	**35**
34	Gracanica	9	13	9	10	27	**68**
35	Ranillug	1	0	4	1	2	**8**

No.	Municipality	2021	2022	2023	2024	2025	Total (2021-2025)
36	Partesh	0	0	0	1	0	**1**
37	Kllokot	0	2	1	1	3	**7**
38	North Mitrovica	3	6	0	5	11	**25**
Total:	**All municipalities**	**1556**	**1752**	**1591**	**1624**	**1345**	**7868**

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СОЦІАЛЬНО-ЕКОНОМІЧНІ НАСЛІДКИ ПРИПИНЕННЯ ДІЯЛЬНОСТІ СУБ'ЄКТІВ ГОСПОДАРЮВАННЯ У КОСОВІ: КРИМІНОЛОГІЧНИЙ ТА ПРАВОВИЙ АСПЕКТИ (2021–2025 РР.)

Фатміре Краснікі

АНОТАЦІЯ

Передумови. *У статті проаналізовано ситуацію щодо припинення діяльності суб'єктів господарювання в Косово та можливі наслідки цього явища, зокрема його вплив на зростання безробіття й поширення протиправної поведінки в країні. Водночас обґрунтовується теза про те, що припинення діяльності суб'єктів господарювання, окрім негативних наслідків для них самих, спричиняє й інші багатовимірні соціально-економічні наслідки. Дослідження ґрунтується на даних за 2021–2025 роки, які було зібрано та опрацьовано в межах дослідження. Проблематику розглянуто крізь призму незалежних і залежних змінних, що сприяє критичному осмисленню досліджуваного явища, науковій дискусії та формуванню дієвих підходів до подолання потенційних викликів у контексті суспільного розвитку.*

Методи. *Для досягнення мети дослідження, виконання поставлених завдань, а також аналізу, порівняння, інтерпретації й оцінки даних з урахуванням специфіки теми застосовано комплекс наукових методів. Метод описової статистики застосовано для збирання й опису статистичних даних, отриманих від окремих офіційних установ. Кореляційний метод застосовано для виявлення можливих взаємозв'язків між досліджуваними процесами. Порівняльний метод застосовано для зіставлення статистичних даних. Нормативно-правовий метод застосовано для аналізу правових дефініцій, пов'язаних із базовими поняттями досліджуваної проблематики. Метод аналізу було використано впродовж усього дослідження для ретельного вивчення процесів, явищ та даних.*

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Результати та висновки. *Результати дослідження свідчать, що в сучасному суспільстві Косова спостерігаються численні випадки припинення діяльності суб'єктів господарювання, високий рівень безробіття та поширеність кримінальних правопорушень. Аналіз статистичних даних за 2021–2025 роки свідчить про значну кількість випадків припинення діяльності суб'єктів господарювання протягом досліджуваного періоду. Отримані дані дають підстави припускати, що значна кількість випадків припинення діяльності суб'єктів господарювання може бути пов'язана зі зростанням безробіття та потенційним посиленням криміногенних чинників.*

Ключові слова: *припинення діяльності суб'єктів господарювання; безробіття; міграція; криміногенні чинники; кримінальні правопорушення.*

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Research Article

RETHINKING THE LEGAL PROTECTION OF SCHOOLS DURING ARMED CONFLICT: FUNCTIONAL DEPENDENCY AND ACCESS TO JUSTICE

Nazym Sairankyzy

ABSTRACT

Background: *This article examines the international legal implications of destroying accessibility infrastructure in schools during armed conflict. International humanitarian law protects schools as civilian objects. International human rights law protects the individual rights affected by the consequences of armed conflict. The Convention on the Rights of Persons with Disabilities provides specific guarantees concerning accessibility, inclusive education, and the protection of persons with disabilities in situations of risk. These bodies of law have distinct scopes of application and duty-bearers. Their application to the same attack may nevertheless reveal a legal characterisation gap where the specific consequences of damage to accessibility infrastructure for students with disabilities remain unidentified. Elevators, ramps, accessible evacuation routes, and other accessibility features may determine students' ability to access education and evacuate safely.*

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Method: *This study employs doctrinal legal research based on the analysis of international humanitarian law, international human rights law, and international criminal law. It also applies the comparative legal method and systemic treaty interpretation. The analysis distinguishes the scope, obligations, and duty-bearers under the relevant bodies of international law. It then examines their relationship in cases involving damage to accessibility infrastructure. International treaties, international court jurisprudence, the practice of international human rights treaty bodies, and academic scholarship provide the legal basis for developing and assessing the proposed criterion.*

Results and Conclusions: *This study identifies a legal characterisation gap in assessing disability-specific consequences arising from damage to accessibility infrastructure during armed conflict. It develops functional dependency as an interpretative and analytical criterion. The criterion identifies the objective relationship between the exercise of a protected individual right and the continued functioning of a particular infrastructure element. Its application enables the identification of the specific consequences of infrastructure damage for persons who depend on its continued functioning. This assessment may inform the identification of victims, the evaluation of evidence, and the selection of appropriate remedies. The criterion also provides a basis for documenting functional harm and strengthening access to justice for students with disabilities affected by attacks on schools.*

1 INTRODUCTION

Protecting educational institutions remains one of the most pressing concerns of contemporary international law in situations of armed conflict. Although schools are recognised as civilian objects and the right to education is firmly established as a fundamental human right, armed conflicts continue to involve large-scale attacks on educational infrastructure. The consequences of such attacks extend far beyond property damage. They affect civilian safety, the effective enjoyment of the right to education, and the restoration of educational systems after hostilities cease. Two interrelated developments determine the relevance of this study.

The first is the unprecedented increase in attacks on educational institutions. According to international monitoring data, approximately 130 armed conflicts were taking place worldwide in 2024, during which nearly 6,000 attacks on schools, universities, students, and educational personnel were recorded. This represented an increase of 166 per cent compared with 2021.[1] The effects of armed conflict reached approximately 234 million

1 Farida Shaheed, *Right to Education in Armed Conflict: A Human Rights Imperative: Report of the Special Rapporteur on the right to education* (UN Doc A/80/479, 15 October 2025) para 6 <https://www.ohchr.org/en/documents/thematic-reports/a80479-right-education-armed-conflict-human-rights-imperative-report> accessed 27 July 2026.

school-age children, 35 million more than during the preceding three-year period.[2] More than 52 million children living in conflict-affected countries were out of school in 2024.[3] In 2025, the Secretary-General of the United Nations confirmed that this trend was continuing, reporting a further 44 per cent increase in attacks on educational institutions.[4] International monitoring mechanisms recorded at least 340 attacks on educational facilities in Ukraine during 2025 alone,[5] while the Independent International Commission of Inquiry on the Occupied Palestinian Territory documented the extensive destruction of the education system in the Gaza Strip.[6]

The second development concerns the evolution of the international legal framework governing the protection of education during armed conflict. This framework encompasses both international humanitarian law (hereafter, IHL) and international human rights law (hereafter, IHRL). These legal regimes address different aspects of the same situation. They also differ in their scope of application and duty-bearers. IHL regulates the conduct of hostilities and protects schools as civilian objects.[7] IHRL protects individual rights affected by armed conflict, including the right to education. Within this framework, the UN Convention on the Rights of Persons with Disabilities (hereinafter, CRPD) provides specific protection for persons with disabilities and establishes obligations concerning inclusive education, accessibility, and protection in situations of risk.[8] These obligations have particular significance for students with disabilities whose participation in education depends on an accessible educational environment.[9] Lifts, ramps, accessible evacuation routes, and other accessibility features may determine their ability to access education and evacuate safely. An attack on a school may therefore have two legally relevant dimensions. It may damage a civilian object protected under international humanitarian

2 ibid

3 ibid

4 'Attacks on Schools Surge by "Staggering" 44 per cent Over the Past Year' (*UN News*, 9 September 2025) <https://news.un.org/en/story/2025/09/1165810> accessed 27 July 2026.

5 'More than 340 Educational Facilities Damaged or Destroyed in Ukraine this Year: Press Release' (*UNICEF*, 26 November 2025) <https://www.unicef.org/press-releases/more-340-educational-facilities-damaged-or-destroyed-ukraine-year> accessed 27 July 2026.

6 UN Human Rights Council, *Legal Analysis of the Conduct of Israel in Gaza Pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide: Conference room paper of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel* (UN Doc A/HRC/60/CRP.3, 16 September 2025) paras 146, 161, 189 <https://digitallibrary.un.org/record/4089577> accessed 27 July 2026.

7 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) [1986] UNTS 1125/3, art 52 <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f3586> accessed 27 July 2026.

8 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006) [2008] UNTS 2515/3 <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&clang=_en&mtdsg_no=iv-15&src=treaty> accessed 27 July 2026.

9 UN Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities: General Comment No 4 on the Right to Inclusive Education* (UN Doc CRPD/C/GC/4, 2 September 2016) para 10 <https://digitallibrary.un.org/record/1313836?v> accessed 27 July 2026.

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law. It may also affect the exercise of individual rights protected under international human rights law. The destruction of accessibility infrastructure makes the relationship between these two dimensions particularly significant.

The interaction between these legal regimes reveals a gap in legal characterisation. IHL protects schools as civilian objects, whereas IHRL protects the individual rights affected by the consequences of armed conflict. However, existing legal approaches do not clearly identify the specific harm that arises when damage to accessibility infrastructure prevents students with disabilities from accessing education or evacuating safely. A related difficulty lies in documentation and accountability. Data on attacks on education are rarely disaggregated by disability.[10] This limits the assessment of their specific consequences for persons with disabilities. Damage to elevators, ramps, lifting platforms, designated evacuation routes, and other accessibility features may therefore be recorded as part of the general damage to an educational institution. The resulting loss of access to education or safe evacuation may remain unidentified as a distinct form of harm.

This legal characterisation gap gives rise to the central research question addressed in this article: How can existing international law account for the specific consequences of the destruction of accessibility infrastructure for students with disabilities during armed conflict? Answering this question requires a criterion that can identify the relationship between damage to a particular element of infrastructure and its consequences for the exercise of protected rights, personal safety, and access to justice. This study aims to develop functional dependency as an interpretative and analytical criterion through a systemic interpretation of IHL, the CRPD, and international standards on access to justice. The criterion identifies the relationship between specific infrastructure elements and the exercise of protected rights by persons who depend on their continued functioning. It does not constitute an autonomous rule of existing international law. The article examines its relevance to the legal characterisation of the resulting harm and to access to justice. The study's originality lies in applying this criterion to infrastructure damage during armed conflict and linking the protection of the civilian object to the legal position of the individual rights-holder.

The article is divided into four sections. Section 2 sets out the research methodology. Section 3 examines the international legal foundations protecting an inclusive educational environment and the evolution of the right to inclusive education in the context of the interaction between IHL and IHRL. Section 4 develops the criterion of functional dependency and considers its relevance to the legal characterisation of damage to accessibility infrastructure, the protection of the rights of students with disabilities, and access to justice. The conclusion summarises the study's principal findings.

10 Global Coalition to Protect Education from Attack, *Enhancing Accountability for Attacks on Education: Guidance on Investigating and Prosecuting Education-Related Crimes* (GCPEA 2025) <https://protectingeducation.org/publication/enhancing-accountability-for-attacks-on-education/> accessed 27 July 2026.

2 METHODOLOGY

This study employs doctrinal legal research complemented by a comparative analysis of international case law and an examination of documented incidents. The analysis considers IHL, IHRL, international criminal law, and relevant soft law instruments separately, according to their respective scopes of application and duty-bearers. It then examines their relationship in cases involving damage to accessibility infrastructure in schools during armed conflicts. Treaty interpretation follows the rules of the Vienna Convention on the Law of Treaties. Particular attention is given to the principle of systemic integration under Article 31(3)(c). This analysis considers the relevant provisions of the CRPD alongside the rules of Additional Protocol I on the protection of civilian objects. Article 18 of the Fourth Geneva Convention is examined for the limited purpose of a functional comparison with civilian hospitals. Article 8 of the Rome Statute is considered in relation to individual criminal responsibility for attacks against buildings dedicated to education. This approach preserves the distinct scope and requirements of each body of international law.

The study also applies legal analogy. The comparison between schools and civilian hospitals is limited to the functional relationship between particular persons and infrastructure that is essential to their safety. It does not extend the special legal protection afforded to civilian hospitals under IHL to schools. The comparison provides an analytical basis for examining the legal significance of infrastructure on which particular persons objectively depend. On this basis, the study develops functional dependency as an interpretative and analytical criterion. The criterion derives from the relationship between existing international legal obligations and the practical conditions required to exercise protected rights. It is used to identify disability-specific consequences that may remain insufficiently recognised when an attack is assessed primarily through damage to the civilian object. The analysis then considers the implications of this characterisation for identifying victims, assessing evidence, and accessing an effective remedy.

3 INTERNATIONAL LEGAL FOUNDATIONS FOR THE PROTECTION OF THE INCLUSIVE EDUCATIONAL ENVIRONMENT AND CONCEPTUAL TRANSFORMATION OF SCHOOLS

International legal protection of education during armed conflict draws on rules from several branches of international law. International humanitarian law provides the primary legal framework for protecting schools during hostilities. Schools are generally protected as civilian objects under Article 52 of Additional Protocol I.[11] The relevant rules govern the conduct of parties to an armed conflict. The legal assessment under IHL therefore concerns the school's status and the rules governing attacks on civilian objects. Damage to particular

11 Protocol I (n 7) art 52.

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elements of school infrastructure may also have specific consequences for certain groups of students. This issue is particularly significant for students with disabilities.

International criminal law provides a separate basis for individual responsibility. Article 8(2)(b)(ix) of the Rome Statute criminalises the intentional directing of attacks against buildings dedicated to education when the relevant legal requirements are satisfied.[12] Legal scholarship has also questioned the adequacy of the existing protection of schools. Earlier proposals included stronger protection by analogy with hospitals and religious buildings.[13] This study examines the legal significance of particular elements of school infrastructure for persons who depend on their continued functioning.

IHRL approaches education from the perspective of individual rights. Article 26 of the Universal Declaration of Human Rights (1948) recognises the right to education for everyone.[14] The International Covenant on Economic, Social, and Cultural Rights (1966) subsequently established binding obligations for state parties in this field.[15] The normative content of the right to education is commonly explained through availability, accessibility, acceptability, and adaptability.[16] This framework is also reflected in the Committee on Economic, Social and Cultural Rights' interpretation of the right to education.[17] Accessibility is particularly relevant to this study. It concerns the practical conditions that enable students to access and use the educational environment. Accessibility is even more important in crisis settings. The International Network for Education in Emergencies Minimum Standards links the continuity of education with the safety of the educational environment and continued access to education during emergencies, including armed conflict.[18] Therefore, the exercise of the right to education also depends on practical conditions that enable students to access the educational environment.

12 Rome Statute of the International Criminal Court (adopted 17 July 1998) [2004] UNTS 2187/3, art 8(2)(b)(ix) <https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en> accessed 27 July 2026.

13 Gregory Raymond Bart, 'The Ambiguous Protection of Schools Under the Law of War – Time for Parity with Hospitals and Religious Buildings' (2009) 40(2) Georgetown Journal of International Law 405.

14 Universal Declaration of Human Rights (UNGA Res 217 A(III), adopted 10 December 1948) art 26 <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 27 July 2026.

15 International Covenant on Economic, Social and Cultural Rights (UNGA Res 2200A (XXI), adopted 16 December 1966) [1983] UNTS 993/3, arts 13, 14 <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&mtdsg_no=IV-3&src=TREATY&clang=_en> accessed 27 July 2026.

16 Katarina Tomasevski, *Manual on Rights Based Education: Global Human Rights Requirements Made Simple* (UNESCO Bangkok 2004) <https://unesdoc.unesco.org/ark:/48223/pf0000135168> accessed 27 July 2026.

17 UN Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No 13: The Right to Education* (UN Doc E/C.12/1999/10, 8 December 1999) <https://digitallibrary.un.org/record/407275?v> accessed 27 July 2026.

18 Maya Khater, 'Refugee Children's Right to Education: Education of Syrian Refugee Children in Jordan – Reality and Prospects' (2023) 6(3) Access to Justice in Eastern Europe 108 <https://doi.org/10.33327/AJEE-18-6.3-a000302> accessed 27 July 2026.

General guarantees of the right to education did not eliminate the specific barriers faced by persons with disabilities. The CRPD gave these barriers more specific legal recognition. The development of Article 24 gave inclusive education a distinct place within the international legal protection of the right to education.[19] The precise content of this right remains the subject of legal debate. Recent scholarship emphasises the relevance of educational quality, individual educational needs, the best interests of the child, and the effective enjoyment of CRPD rights.[20] The legal character of an individual right is relevant to the relationship between the rights-holder and duty-bearer. The justiciability of the right to education allows an affected person to seek legal protection where the applicable right has been violated.[21] In the context of disability, the development of the right to education has placed corresponding obligations on States to address barriers that prevent persons with disabilities from participating in education.[22] Judicial practice illustrates the practical content of these obligations. In *Çam v Turkey*, the European Court of Human Rights found discrimination in the enjoyment of the right to education after a visually impaired applicant was refused admission without an adequate assessment of reasonable accommodation.[23] In *Enver Şahin v Turkey*, the court found a violation of Article 14 of the European Convention read in conjunction with Article 2 of Protocol No. 1. The case concerned effective access to university premises for a student with a mobility impairment.[24] In *G.L. v Italy,* the absence of necessary educational support resulted in a discriminatory restriction of a child's access to education.[25] These cases demonstrate the legal significance of the practical conditions required for persons with disabilities to exercise the right to education.

Accessibility forms one of these conditions. The Committee on the Rights of Persons with Disabilities interprets accessibility as an obligation that requires the identification and

19 Gauthier de Beco, Shivaun Quinlivan and Janet E Lord (eds), *The Right to Inclusive Education in International Human Rights Law* (CUP 2019) 7 <https://doi.org/10.1017/9781316392881> accessed 27 July 2026; Gauthier de Beco, 'The Right to "Inclusive" Education' (2022) 85(6) Modern Law Review 1329 <https://doi.org/10.1111/1468-2230.12742> accessed 27 July 2026.

20 Lucie Margot Ducarre, 'De-centring Inclusion: Discussing the Meaning and Place of Inclusive Education in International and European Law through the Case of Children with Autism' (2024) 42(4) Netherlands Quarterly of Human Rights 319 <https://doi.org/10.1177/09240519241284448> accessed 27 July 2026.

21 Nagarjun Kandukuru, 'Justiciability' (*Right to Education Initiative*, 2023) <https://www.right-to-education.org/issue-page/justiciability> accessed 27 July 2026.

22 Vernor Muñoz, *The Right to Education of Persons with Disabilities: Report of the Special Rapporteur on the Right to Education* (UN Doc A/HRC/4/29, 19 February 2007) <https://digitallibrary.un.org/record/595007> accessed 27 July 2026.

23 *Çam v Turkey* App no 51500/08 (ECtHR, 23 February 2016) <https://hudoc.echr.coe.int/eng?i=001-161149> accessed 27 July 2026.

24 *Enver Şahin v Turkey* App no 23065/12 (ECtHR, 30 January 2018) <https://hudoc.echr.coe.int/eng?i=001-180499> accessed 27 July 2026.

25 *GL v Italy* App no 59751/15 (ECtHR, 10 September 2020) paras 66–72 <https://hudoc.echr.coe.int/?i=001-204685> accessed 27 July 2026.

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removal of barriers in advance.[26] The development of international disability rights has also strengthened the legal significance of reasonable accommodation, accessibility, support measures, and accessible communication.[27] These requirements have direct implications for the design, adaptation, and use of educational infrastructure.

The CRPD establishes specific obligations for States Parties concerning persons with disabilities in situations of armed conflict. Article 11 requires States Parties to take necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including armed conflict. Article 24 sets out obligations on inclusive education. The Committee has further clarified the accessibility obligations arising under Article 9 of the Convention. These provisions provide the legal basis for considering accessibility, education, and the safety of persons with disabilities within the same human rights framework. Contemporary scholarship also recognises the relevance of this relationship during armed conflict. Armed conflict may create new environmental barriers and intensify existing ones. Damage to infrastructure may have particularly serious consequences for persons with disabilities who depend on its continued functioning for mobility and access to essential services.[28] The effects of an attack may therefore differ according to the relationship between the affected person and the damaged infrastructure.

The obligations arising under these bodies of international law retain their distinct legal character. Their scope of application and duty-bearers must therefore be identified separately. IHL governs the conduct of parties to an armed conflict. The treaty obligations examined under IHRL bind state parties to the relevant treaties. The ICESCR establishes obligations concerning the right to education. The CRPD establishes disability-specific obligations concerning accessibility, inclusive education, and protection in situations of risk. International criminal law addresses individual criminal responsibility where the elements of an international crime are established. The application of these rules depends on the applicable legal framework and the circumstances of the particular case. A single attack may nevertheless have legal consequences under more than one body of law. An attack on a school may be assessed under IHL rules protecting civilian objects. The same attack may affect the exercise of the right to education. It may also have specific consequences for persons with disabilities. These legal assessments address different

26 UN Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities: General Comment No 2, Article 9: Accessibility* (UN Doc CRPD/C/GC/2, 22 May 2014) <https://digitallibrary.un.org/record/812025?v> accessed 27 July 2026.

27 Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2015) 9.

28 Gauthier de Beco, 'Taking Economic and Social Rights Earnestly: What Does International Human Rights Law Offer Persons with Disabilities in Situations of Armed Conflict?' (2023) 105(922) International Review of the Red Cross 306 <https://doi.org/10.1017/S1816383122000923> accessed 27 July 2026.

dimensions of the same factual event. The relationship between applicable rules may be considered through the principle of systemic integration. Article 31(3)(c) of the Vienna Convention on the Law of Treaties requires relevant rules of international law applicable between the parties to be taken into consideration in treaty interpretation.[29] This principle provides a basis for considering relevant human rights obligations when interpreting applicable international rules. It does not alter the legal status of a school under IHL. This relationship becomes particularly significant for accessibility infrastructure. Elevators, ramps, lifting platforms, accessible circulation routes, and evacuation routes may perform essential functions for persons with disabilities.[30] Damage to these elements may restrict access to education. It may also affect the possibility of safe evacuation. Their legal significance depends partly on the function they perform for the persons who rely on them. Contemporary armed conflicts demonstrate the practical importance of infrastructure for the continuity of education. Evidence from Ukraine documents the serious effects of attacks on schools and the educational opportunities available to children.[31] International investigative mechanisms have also documented circumstances in which violence during conflict and crisis affected civilians' safety and their ability to reach safety.[32] These examples illustrate the importance of examining the consequences of infrastructure damage for people who face disability-related barriers.

This issue is also important for assessing the consequences of military operations. The specific function of accessibility infrastructure may remain invisible when a school is assessed only through its general status as a civilian object. An elevator or evacuation platform may perform an ordinary transport function for many students. For a student with a mobility impairment, the same element may determine whether leaving a building is practically possible. Therefore, the function performed by the damaged infrastructure may be important when assessing the resulting harm. Soft law instruments supplement this legal framework. The Safe Schools Declaration promotes measures aimed at protecting education and ensuring its continuation during armed conflicts.[33] United Nations Security Council Resolution 2601 reinforces international commitments to protect education in

29 Vienna Convention on the Law of Treaties (adopted 23 May 1969) [1987] UNTS 1155/331, art 31(3)(c) <https://treaties.un.org/pages/showdetails.aspx?objid=080000028003902f> accessed 27 July 2026.

30 Eyal Weizman, *Forensic Architecture: Violence at the Threshold of Detectability* (Zone Books 2017) <https://doi.org/10.2307/j.ctv14gphth> accessed 27 July 2026.

31 'Ukraine: War's Toll on Schools, Children's Future' (*Human Rights Watch*, 9 November 2023) <https://www.hrw.org/news/2023/11/09/ukraine-wars-toll-schools-childrens-future> accessed 27 July 2026.

32 UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on the Islamic Republic of Iran* (UN Doc A/HRC/61/60, 10 March 2026) <https://digitallibrary.un.org/record/4039538> accessed 27 July 2026.

33 Safe Schools Declaration (adopted 28 May 2015) <https://ssd.protectingeducation.org/> accessed 27 July 2026.

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armed conflicts.[34] These instruments also support the documentation of attacks and the restoration of education after such disruptions.

These forms of protection raise a further question concerning the legal significance of the relationship between damaged infrastructure and a person whose exercise of a protected right depends on its continued functioning. This question has direct implications for access to justice. Its legal assessment affects how courts identify individual harm. It also influences victim identification, the evidence required, and appropriate remedies. Section 4 develops functional dependency as a proposed interpretative and analytical criterion for identifying and assessing this relationship.

4 FUNCTIONAL DEPENDENCY: LEGAL CHARACTERISATION, PROTECTION OF RIGHTS, AND ACCESS TO JUSTICE

IHL is structured to protect persons and objects.

Its legal framework distinguishes between civilian objects, military objectives, and specially protected objects. The legal assessment of attacks against infrastructure is therefore determined by the rules applicable to the relevant object.[35] Schools generally receive protection as civilian objects. A separate legal dimension arises where damage to a particular element of school infrastructure also affects the exercise of individual rights protected under IHRL. The same factual event may therefore require distinct legal assessments under IHL and IHRL. The legal characterisation gap examined in this study concerns the relationship between these assessments where infrastructure damage has specific consequences for persons who depend on its continued functioning.

This legal characterisation gap provides the basis for the functional dependency criterion proposed in this study. The criterion is intended to identify situations in which damage to physical infrastructure has specific consequences for exercising an individual right. Functional dependency is understood as the objective relationship between the effective exercise of a specific individual right and the continued operation of a particular element of infrastructure, without which the exercise of that right becomes impossible or disproportionately impaired. Unlike social vulnerability or a person's medical condition, functional dependency does not describe the individual's characteristics. Rather, it identifies a legally significant relationship between a specific component of infrastructure and the rights-holder's practical ability to exercise a protected right.

34 UN Security Council Resolution 2601 (UN Doc S/RES/2601, adopted 29 October 2021) preamble, paras 3, 9 <https://docs.un.org/en/S/RES/2601(2021)> accessed 27 July 2026.

35 Protocol I (n 7) arts 48, 52.

The functional dependency criterion proposed in this study is not presented as an autonomous rule of international law. It derives its legal basis from existing rules of IHL and IHRL and is further supported by legal theory. These legal foundations perform different functions. IHL determines the protection afforded to schools and other civilian objects during armed conflict. IHRL identifies the individual rights affected by the consequences of infrastructure damage and the corresponding obligations of States. The general doctrine of individual rights provides an additional theoretical basis for explaining the relationship between protected rights and the conditions necessary for their effective exercise. Functional dependency brings these elements together to assess the legal significance of infrastructure damage for persons who depend on its continued functioning. The first normative foundation is found in international humanitarian law. Article 18 of the Fourth Geneva Convention grants specific protection to civilian hospitals.[36] This protection reflects the humanitarian function performed by civilian hospitals and the vital interests of persons receiving medical care. The continued functioning of such facilities may therefore directly affect the life and safety of persons who depend on the services provided there. This functional dimension is relevant to this study. It provides a point of comparison for examining whether destroying particular elements of infrastructure in an inclusive school may affect students who depend on those elements for their safety and the effective exercise of their rights.

The protection of civilian hospitals provides a relevant point of functional comparison, although the legal regimes applicable to hospitals and schools remain distinct. International humanitarian law affords civilian hospitals specific protection. Schools generally retain the protection afforded to civilian objects. The present study does not propose extending the legal status of medical facilities to educational institutions. The comparison concerns the relationship between protected persons and infrastructure whose continued operation is essential to their safety. In a hospital, disruption of essential infrastructure may affect care for persons who depend on it. A comparable relationship may arise in an inclusive school. For a student who uses a wheelchair, an elevator, evacuation lift, ramp, or accessible evacuation route may provide the only practicable means of reaching safety. The comparison serves an analytical purpose. It helps to identify situations in which damage to infrastructure produces consequences for particular persons that extend beyond material damage to the civilian object.

The second normative foundation of the proposed criterion is found in international human rights law. The CRPD is grounded in the social model of disability, according to which disability arises from the interaction between an individual's impairment and barriers created by the surrounding environment. Within this framework, accessibility is

36 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) [1950] UNTS 75/287, art 18 <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280158b1a> accessed 27 July 2026.

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not an autonomous benefit but a mandatory precondition for the effective enjoyment of other rights. Article 9 requires States to identify and remove barriers to accessibility; Article 24 links accessibility to the realisation of the right to education; and Article 13 requires States to ensure effective access to justice for persons with disabilities. The Convention thus proceeds from the premise that, without an accessible environment, these rights cannot be exercised effectively. This framework has significant legal consequences. Where infrastructure is an indispensable legal condition for exercising an individual right, its destruction affects more than the physical object itself. It also interferes with the effective exercise of the corresponding right. Accessibility infrastructure therefore acquires an independent legal significance not because of its material characteristics, but because it enables a particular rights-holder to exercise rights guaranteed under international law.

The third foundation of the proposed criterion lies in the general doctrine of individual rights. Contemporary legal theory understands an individual right as a legally protected entitlement whose effective exercise depends on the existence of conditions that make its practical realisation possible. This understanding is reflected in Martha Fineman's theory of vulnerability, which explains human dependence on social institutions as the basis of the State's positive obligations[37], and in the capabilities approach developed by Amartya Sen and Martha Nussbaum, according to which the formal recognition of a right does not, by itself, ensure its effective enjoyment.[38] This study extends these theoretical approaches by focusing on a more specific relationship. Rather than examining the dependence of rights on social institutions in general, it identifies the dependence of a particular individual right on the continued functioning of specific elements of physical infrastructure. The legal assessment therefore concerns not an individual's vulnerability as such, but the objective relationship between exercising a protected right and preserving the infrastructure that makes that exercise possible. Complementary normative and theoretical foundations therefore support the criterion of functional dependency. Each performs a distinct function in the proposed analysis. IHL determines the legal protection of civilian objects. IHRL provides the basis for assessing the consequences of infrastructure damage for individual rights. The criterion of functional dependency identifies the relationship between these two dimensions without altering the scope or legal requirements of either body of law.

In international humanitarian law, the protection of civilian objects has traditionally been understood in light of the humanitarian functions they perform. As Michael Schmitt observes, the special protection afforded to certain categories of civilian objects is

37 Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press 2004) <https://archive.org/details/autonomymyththeo0000fine> accessed 27 July 2026; Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60(2) Emory Law Journal 251 <https://scholarlycommons.law.emory.edu/elj/vol60/iss2/1/> accessed 27 July 2026.

38 Amartya Sen, *Development as Freedom* (OUP 1999); Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard UP, Belknap Press 2011) <https://doi.org/10.2307/j.ctt2jbt31> accessed 27 July 2026.

determined less by their physical characteristics than by the vital interests of the civilian population that their continued functioning serves.[39] Marco Sassòli similarly argues that the primary purpose of IHL is to preserve the conditions necessary for civilian life, rather than merely safeguarding the physical integrity of civilian objects.[40] This understanding provides a basis for viewing infrastructure as an essential means through which internationally protected interests are realised. A comparable line of reasoning can be found in Martha Fineman's theory of vulnerability. Fineman argues that human dependence on social institutions is a universal condition rather than an exceptional circumstance and that this dependence gives rise to positive obligations on the part of the State to maintain the conditions necessary for the effective enjoyment of rights.[41] The present study develops this approach further by applying it to situations of armed conflict. Rather than focusing on dependence on social institutions in general, it examines the legal significance of dependence on specific elements of physical infrastructure whose continued functioning determines whether particular rights can be exercised in practice. The same underlying logic is reflected in Amartya Sen's capabilities approach. Sen emphasises that formal recognition of a right does not, in itself, guarantee the practical ability to exercise it. This insight is particularly significant in the context of international humanitarian law.[42] Following the destruction of accessibility infrastructure, a child with a disability may formally retain the right to education while being deprived, in practice, of any realistic opportunity to exercise it. The international legal assessment of such situations should therefore extend beyond the formal existence of the right itself and consider whether the conditions necessary for its effective enjoyment have been preserved.

The criterion of functional dependency brings these doctrinal approaches together within a single analytical framework. Under the proposed criterion, the continued functioning of a particular element of infrastructure becomes relevant to legal assessment where it constitutes a necessary condition for the exercise of an individual right by a specific group of persons. Its significance may be assessed by reference to the function it performs for the affected rights-holders. Legal protection extends beyond the civilian object as a material entity to encompass the function it performs in enabling the effective enjoyment of internationally protected rights. This constitutes the theoretical foundation of the proposed criterion of functional dependency. The legal characterisation of an attack's consequences determines which forms of harm receive legal recognition and which claims victims may

39 Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) Virginia Journal of International Law 795 <https://ssrn.com/abstract=1600241> accessed 27 July 2026; Michael N Schmitt (ed), *The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, CUP 2017) 503-7 <https://doi.org/10.1017/9781316822524> accessed 27 July 2026.

40 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2nd edn, Edward Elgar 2019) 367-72.

41 Fineman (n 37).

42 Sen (n 38) 74-87.

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advance. An assessment focused on physical damage to the school may fail to identify the specific consequences experienced by students with disabilities. A school may remain operational for most students while becoming entirely inaccessible to those whose participation in education depended on elevators, ramps, lifting platforms, wayfinding systems, or specially designed evacuation routes. The absence of a legal framework capable of recognising this form of dependency creates an additional obstacle to access to justice. Judicial protection is available only in respect of harm that can be characterised as the violation of a legally protected right and substantiated by legally relevant evidence. Where the loss of accessibility is regarded merely as a secondary consequence of property damage, children with disabilities and their representatives face difficulties at the very outset of legal proceedings in defining the subject matter of their claim. Their exclusion from the educational environment consequently remains without independent legal recognition. The criterion of functional dependency provides a framework for identifying and assessing this distinct form of harm. Legal proceedings should therefore examine the function of the damaged infrastructure, the category of students who depended upon it to access education, the availability of equivalent alternatives, and the duration of the resulting restriction. Particular attention should also be given to the impact of the damage on evacuation safety, regular school attendance, and the child's ability to participate in mainstream education. Considered together, these factors make it possible to determine whether the attack impaired the practical exercise of the right concerned.

The proposed criterion has important implications for evidentiary assessments. Photographs of damaged buildings and estimates of repair costs provide only partial accounts of the consequences of an attack. Assessing functional harm requires additional forms of evidence, including accessibility plans, information on the educational needs of affected students, technical documentation relating to accessibility equipment, evidence regarding the accessibility of temporary educational facilities, and expert assessments. The testimony of the child and the child's legal representatives likewise assumes particular importance, as it enables the decision-maker to assess how the destruction of specific infrastructure affected both educational participation and personal safety of the child.

Article 2(3) of the International Covenant on Civil and Political Rights requires state parties to ensure an effective remedy for violations of the rights recognised in the Covenant.[43] An effective remedy presupposes access to a competent authority, a genuine examination of the claim on its merits, and the availability of an enforceable decision. In cases involving the destruction of educational infrastructure, Article 2(3) may become relevant if the consequences of an attack affect rights protected by the Covenant, including the right to life, equality before the law, freedom from discrimination, or other applicable guarantees. The scope of the remedy must correspond to the nature of the violation established during the proceedings.

43 International Covenant on Civil and Political Rights (adopted 16 December 1966) [1983] UNTS 999/171, art 2(3) <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&clang=_en> accessed 27 July 2026.

The CRPD establishes a more specific procedural framework for accessing justice. Article 13 requires state parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including by providing procedural and age-appropriate accommodations. This obligation applies to all legal proceedings. For children, accessible forms of communication, adapted interviewing procedures, the participation of legal representatives, the removal of architectural and informational barriers, and procedures that take account of the child's individual means of communication and participation are required. The Committee on the Rights of Persons with Disabilities has likewise emphasised that effective complaint mechanisms and appropriate remedies are indispensable components of the right to inclusive education.[44]

In situations of armed conflict, these obligations require a broader understanding of what constitutes an effective remedy. A judicial decision that merely establishes the fact of destruction or awards monetary compensation may leave the principal consequences of the violation unaddressed. A child's right to education cannot be regarded as effectively restored while the accessibility infrastructure remains unavailable or until an equivalent and safe educational alternative has been provided.

Therefore, the remedy should correspond to the function performed by the damaged infrastructure. Depending on the circumstances, appropriate measures may include the restoration of elevators or lifting equipment, the construction of accessible entrances, the re-establishment of safe evacuation routes, the provision of accessible transport, the temporary relocation of students to accessible educational facilities, or the organisation of education within another comparable inclusive school. Where reconstruction is likely to be prolonged, interim and precautionary measures become particularly important, as they prevent legal proceedings from coinciding with a prolonged period during which the child is effectively excluded from education.

Compensation remains an important component of legal protection, although its role depends on the circumstances of the individual case. Financial compensation may cover additional expenses incurred by the family, non-pecuniary harm, and costs arising from the loss of accessibility. However, compensation alone rarely restores a child's practical ability to attend school. An effective remedy requires a combination of individual reparation and measures that re-establish the practical conditions necessary for the effective enjoyment of the right to education.

The criterion of functional dependency also has implications for determining who should be recognised as a victim for procedural purposes. The owner of a damaged school building and a child who has lost access to education suffer fundamentally different forms of harm. The former sustains property damage, whereas the latter may be excluded from the

44 UN Committee on the Rights of Persons with Disabilities, *General Comment No 4* (n 9) paras 4, 30, 31, 63.

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educational environment, exposed to increased risks to personal safety, and experience broader social consequences arising from interruptions in education. Distinguishing between these forms of harm helps avoid the erroneous assumption that restoring the school's physical structure is sufficient to remedy the violation suffered by the child.

Institutional measures form an essential component of an effective remedy. The documentation of attacks should record damage to accessibility infrastructure, along with its specific consequences for students with disabilities. Investigative authorities and courts need appropriate methods to identify and assess functional harm. Reconstruction and recovery planning should involve organisations of persons with disabilities, parents, and specialists in inclusive education to ensure that accessibility considerations are adequately addressed. Such measures help prevent future violations and improve the effectiveness of subsequent legal and administrative responses. The Basic Principles and Guidelines on the Right to a Remedy and Reparation recognise a range of forms of reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In the context of inclusive schools, the choice of an appropriate remedy should be guided by the extent to which it restores the capacity of the educational environment to serve all students on an equal basis.

The functional dependency criterion connects the assessment of infrastructure damage with its procedural consequences. It provides a framework for identifying specific harm, determining the affected persons, defining relevant evidence, and assessing the appropriate content of effective remedies. From this perspective, access to justice includes the ability of the legal process to address the practical consequences of harm suffered by a child. An effective remedy should help restore the conditions necessary for education in a safe and accessible environment for all children.

5 CONCLUSION

This study demonstrates that the destruction of accessibility infrastructure in schools during armed conflict may engage distinct forms of protection under existing international law. IHL protects schools as civilian objects. IHRL protects the individual rights affected by the attack's consequences. The CRPD provides specific guarantees concerning persons with disabilities. These bodies of law retain distinct scopes of application and duty-bearers. A legal characterisation gap may nevertheless arise when damage to accessibility infrastructure prevents students with disabilities from exercising protected rights or evacuating safely. At the same time, these specific consequences remain unidentified within the legal assessment of the attack. To address this gap, this article develops the criterion of functional dependency. Under this approach, legal significance arises from the objective relationship between the continued functioning of a specific infrastructure element and the effective exercise of a particular individual right.

This criterion provides a basis for identifying the specific consequences of infrastructure damage for persons who depend on its continued functioning. Damage to accessibility infrastructure may therefore affect the effective exercise of protected rights, including the right to education and rights related to personal safety. Recognition of this specific harm also has consequences for subsequent access to justice.

The study's principal contribution is the development of a functional legal characterisation. This approach examines whether infrastructure damage has removed the conditions necessary to effectively exercise an individual's right. Functional dependency identifies the relationship between relevant legal dimensions while preserving the distinct scope and requirements of IHL and IHRL. It also provides a basis for examining the procedural consequences of the resulting harm for accessing effective remedies. This approach has practical implications for access to justice. Recognising functional harm influences victim identification, the evidentiary framework, and the selection of appropriate remedies for the victim. Effective judicial protection requires an assessment of the specific consequences experienced by the affected child. It also requires consideration of the conditions necessary to restore the practical exercise of the affected rights. In the context of inclusive schools, an appropriate remedy may therefore require the restoration or replacement of accessibility infrastructure. Equivalent accessible educational arrangements may also be necessary when immediate restoration is impossible.

The continuing development of international standards on inclusive education has increased the legal significance of accessibility infrastructure. Particular elements of the built environment may constitute indispensable conditions for the effective exercise of individual rights. Their destruction may therefore require separate consideration of the specific consequences for persons who depend on that infrastructure. This perspective supports a more complete legal assessment of attacks on civilian infrastructure. Such an assessment considers the protection of the civilian object and the consequences of infrastructure damage for the effective enjoyment of individual rights.

The proposed framework leaves the existing categories of protected objects under IHL unchanged. Functional dependency provides an interpretative and analytical criterion for assessing the relationship between accessibility infrastructure, individual rights, and access to an effective remedy. Its contribution lies in identifying disability-specific harm that may remain insufficiently recognised when the consequences of an attack are assessed primarily through damage to the civilian object.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПЕРЕОСМИСЛЕННЯ ПРАВОВОГО ЗАХИСТУ ЗАКЛАДІВ ОСВІТИ ПІД ЧАС ЗБРОЙНОГО КОНФЛІКТУ: ФУНКЦІОНАЛЬНА ЗАЛЕЖНІСТЬ ТА ДОСТУП ДО ПРАВОСУДДЯ

Назим Сайранкизи

АНОТАЦІЯ

Передумови. *У статті досліджено міжнародно-правові наслідки знищення інфраструктури доступності в закладах освіти під час збройного конфлікту. Міжнародне гуманітарне право захищає заклади освіти як цивільні об'єкти. Міжнародне право прав людини захищає індивідуальні права, реалізація яких зазнає впливу внаслідок збройного конфлікту. Конвенція про права осіб з інвалідністю закріплює спеціальні гарантії щодо доступності, інклюзивної освіти та захисту осіб з інвалідністю в ситуаціях ризику. Зазначені правові режими мають різні сфери застосування та покладають відповідні обов'язки на різних суб'єктів. Водночас їхнє застосування до одного й того самого нападу може виявити прогалину в правовій кваліфікації, за якої наслідки пошкодження інфраструктури доступності для здобувачів освіти з інвалідністю залишаються невизначеними. Ліфти, пандуси,*

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доступні шляхи евакуації та інші елементи доступності можуть визначати здатність здобувачів освіти реалізовувати право на освіту та безпечно евакуюватися.

Методи. *Дослідження здійснено із застосуванням доктринального юридичного методу, що ґрунтується на аналізі норм міжнародного гуманітарного права, міжнародного права прав людини та міжнародного кримінального права. Також застосовано порівняльно-правовий метод і системне тлумачення міжнародних договорів. Під час аналізу розмежовано сфери застосування, характер зобов'язань і суб'єктів, на яких вони покладаються, у відповідних міжнародно-правових режимах, після чого досліджено співвідношення цих правових режимів у випадках пошкодження інфраструктури доступності. Правову основу для розроблення та оцінювання запропонованого критерію становлять міжнародні договори, практика міжнародних судів, практика договірних органів з прав людини та наукові праці.*

Результати та висновки. *У дослідженні виявлено прогалину в правовій кваліфікації наслідків пошкодження інфраструктури доступності для осіб з інвалідністю під час збройного конфлікту. Розроблено критерій функціональної залежності, який може застосовуватися як інтерпретаційний та аналітичний критерій. Цей критерій встановлює об'єктивний зв'язок між реалізацією захищеного індивідуального права та подальшим функціонуванням конкретного елемента інфраструктури. Застосування цього критерію дає змогу визначити конкретні наслідки пошкодження інфраструктури для осіб, реалізація захищених прав яких залежить від подальшого функціонування відповідного елемента. Такий підхід має практичне значення для встановлення кола постраждалих осіб, оцінки доказів та визначення належних засобів правового захисту. Крім того, запропонований критерій забезпечує підґрунтя для належного документування функціональної шкоди та посилення доступу до правосуддя для здобувачів освіти з інвалідністю, які постраждали внаслідок нападів на заклади освіти.*

Ключові слова: *право на освіту; доступність; особи з інвалідністю; функціональна залежність; міжнародне гуманітарне право; доступ до правосуддя.*

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Research Article

PROTECTION OF ENTREPRENEURIAL FREEDOM AS A RULE-OF-LAW CRITERION: ADMINISTRATIVE DISCRETION AND JUDICIAL REVIEW IN KAZAKHSTAN

Indira Ilyassova*, Narkes Zhexembayeva, Askhat Gazayev, Ainur Akimbaeva and Aidana Aldabergen

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ABSTRACT

Background: *Freedom of entrepreneurship serves as a practical rule-of-law criterion because regulatory intervention directly affects private actors' autonomy, property interests, and legal certainty. In Kazakhstan, this freedom is constitutionally protected, but its practical effect depends on how administrative bodies justify restrictive measures and how courts review their legality, evidentiary basis, and proportionality. The article examines the relationship between administrative reasoning, discretionary decision-making, and judicial protection in disputes affecting entrepreneurial activity. It focuses on the extent to which courts can transform formal guarantees into effective protection against unjustified restrictions.*

Method: *The study combines limited doctrinal analysis with an illustrative examination of one published administrative ruling. The Constitution establishes the legal status of entrepreneurial freedom. At the same time, selected provisions of the Administrative Procedural and Process-Related Code and the*

Entrepreneurial Code provide general criteria governing discretion, proportionality, procedure, and supervision. The Energo-upravlenie LLP ruling is the only case analysed individually. The empirical component is limited to one published judicial ruling. The World Justice Project Rule of Law Index 2025 is used solely as an external institutional benchmark. The study does not use a continuous official dataset of judicial statistics or conduct longitudinal statistical analysis. The study does not claim comprehensive normative coverage, representative case-law analysis, or statistical generalisation. The study did not conduct cross-to-case or intervention-group comparisons, correlation analysis, regression modelling, sensitivity testing, double coding, or intercoder reliability assessment. A generic prospective coding protocol is provided separately in the supporting materials deposited on Zenodo. It was not mapped onto Kazakhstan's legislation, tested against national judicial practice, or used in the empirical analysis.

Results and Conclusions: *The selected ruling documents a dispute concerning an unscheduled tax inspection and the judicial review of the contested administrative acts. The doctrinal analysis identifies five functional areas of regulatory discretion: initiation of intervention, evidentiary assessment, selection and intensity of the measure, procedural participation and reason-giving, and subsequent administrative or judicial correction. It permits reconstruction of the procedural path, the legal positions presented in the proceedings, and the judicial outcome recorded in the published text. The ruling does not establish that the intervention was based on vague statutory grounds, insufficient evidence, or an incomplete assessment of necessity and balancing, because the judicial act did not expressly determine these issues. Such criteria are retained only as elements of an author-developed analytical framework for future application to a broader body of judicial materials. The proposed legal measures include clearer regulatory triggers, evidentiary thresholds, structured reasoning requirements, accessible risk-assessment criteria, and institutional feedback from review outcomes. The case-specific conclusion is therefore limited to the institutional availability of judicial review in a dispute affecting entrepreneurial activity.*

1 INTRODUCTION

Freedom of entrepreneurial activity is both an economic right and a constitutional constraint on public power. The constitutional guarantee establishes the normative basis of protection, while administrative legislation and judicial review determine its practical effect. This study focuses on the transition from formal constitutional recognition to effective protection against arbitrary regulatory intervention. Constitutional adjudication forms part of the broader institutional context but is not examined as an independent empirical mechanism.

Kazakhstan's legislation recognises administrative discretion but subjects it to legality, statutory purpose, proportionality, and procedural safeguards. The research problem concerns the practical implementation of these requirements where an authority selects

a restrictive supervisory measure. The legality of a formally available power depends on the applicable legal grounds, the evidentiary record, and the reasoning required by the relevant legislation.

The article examines whether entrepreneurial freedom in Kazakhstan operates as a rule-of-law criterion through constrained administrative discretion, reasoned decision-making, and substantive judicial review. The study aims to systematise the principal functional areas in which regulatory bodies exercise discretion under Kazakhstan's administrative and entrepreneurial legislation, distinguish *ex ante* safeguards from judicial control, and formulate targeted measures to strengthen legal certainty. The selected ruling is used only to illustrate the institutional availability of judicial review and not to validate case-specific index scores. The study assumes that the actual protection of entrepreneurial freedom depends less on formal guarantees than on the consistent judicial application of reason-giving, proportionality, and legitimate expectations.

The central research question is how Kazakhstan's legislation structures the initiation, justification, selection, and review of regulatory measures affecting entrepreneurial activity.

The theoretical framework combines the rule-of-law doctrine, the theory of administrative discretion, the principle of proportionality, and the protection of legitimate expectations. Together, these approaches allow evaluation of whether restrictions on entrepreneurial freedom are lawful, justified, and institutionally controlled.

2 METHODOLOGY

2.1. Research Materials and Scope of Analysis

The study uses three categories of materials: a limited normative framework, one primary judicial ruling, and contextual analytical materials. These categories perform different functions and are not treated as a unified normative-empirical dataset.

The normative framework includes only three sources. The Constitution of the Republic of Kazakhstan[1] is used only to establish the legal status of entrepreneurial freedom. The Administrative Procedural and Process-Related Code[2] provides the general principles governing administrative discretion, proportionality, procedural participation, reason-

1 Constitution of the Republic of Kazakhstan (adopted 15 March 2026) <https://adilet.zan.kz/eng/docs/K2600000000> accessed 4 August 2026.

2 Administrative Procedural and Process-Related Code of the Republic of Kazakhstan 350-VI ZRK (adopted 29 June 2020) <https://adilet.zan.kz/eng/docs/K2000000350> accessed 4 August 2026.

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giving, and judicial review. The Entrepreneurial Code[3] identifies the general forms and risk-based logic of state supervision over business activity. The article does not provide a comprehensive article-by-article analysis of these acts or of sector-specific legislation.

The Commercial Code, consumer-protection legislation, and other sectoral statutes are not included in the source base because the present study does not analyse them systematically. References to subordinate regulation are limited to the general role of risk criteria and supervisory guidance and do not constitute a separate doctrinal analysis of individual by-laws.

The primary judicial material is the ruling of the Judicial Collegium for Administrative Cases of the Supreme Court of the Republic of Kazakhstan dated 21 February 2024 in administrative case 6001-24-00-6пп/1, involving Energo-upravlenie LLP.[4] It is used only for a limited reconstruction of one administrative dispute and is not treated as representative of Kazakhstan's administrative case law.

We excluded informational publications for the first quarter of 2024 and the first half of 2025 from the empirical analysis because they cover non-comparable reporting periods and use different indicators, categories, and denominators. Therefore, they cannot support horizontal comparisons, calculations of absolute or relative changes, or conclusions about judicial trends.

The informational material about cassation proceedings in 2022 was also excluded because its quantitative indicators could not be verified through an official judicial statistics source.

The World Justice Project Rule of Law Index 2025 is used separately as an external contextual benchmark.[5] It does not replace official judicial statistics and is not used to assess changes in Kazakhstan's administrative justice over time.

International scholarship is used to develop the doctrinal criteria of legality, necessity, proportionality, legal certainty, reason-giving, and judicial control. It does not form part of the empirical dataset.

The study has no longitudinal statistical period. Materials published in different years are not compared as a time series and are not used to assess changes in Kazakhstan's judicial practice.

3 Entrepreneurial Code of the Republic of Kazakhstan no 375-V ZRK (adopted 29 October 2015) <https://www.adilet.zan.kz/eng/docs/K1500000375> accessed 4 August 2026.

4 Administrative case 6001-24-00-6пп/1 (Supreme Court of the Republic of Kazakhstan, 21 February 2024). The ruling is available through the official Bank of Judicial Acts of the Judicial Cabinet of the Supreme Court of the Republic of Kazakhstan. It can be located by its case number. See *Bank of Judicial Acts* <https://office.sud.kz/courtActs/index.xhtml> accessed 4 August 2026.

5 '2025 WJP Rule of Law Index: Kazakhstan' (*World Justice Project*, 2026) <https://worldjusticeproject.org/rule-of-law-index/country/2025/Kazakhstan> accessed 4 August 2026.

***Table* 1. Research Materials and Their Analytical Role**

Material	Status in the study	Analytical role	Limitation
Constitution of the Republic of Kazakhstan	Normative source	Establishes the constitutional status of entrepreneurial freedom	No comprehensive constitutional analysis
Administrative Procedural and Process-Related Code	Normative source	Defines general limits of administrative discretion and judicial review	Selected provisions only
Entrepreneurial Code	Normative source	Identifies general forms of state supervision over business	No sector-by-sector analysis
Supreme Court ruling dated 21 February 2024, case 6001-24-00-6пп/1, involving Energo-upravlenie LLP	Primary judicial material	Limited reconstruction of one administrative dispute	Not representative of national case law; the complete administrative record was not examined
WJP Rule of Law Index 2025	External contextual source	Describes the broader institutional environment	Does not measure Kazakhstan's administrative courts

Note: The materials perform distinct normative, illustrative, and contextual functions. Only the Energo-upravlenie LLP ruling is analysed as an individual judicial case.

2.2. Research Design and Methodological Logic

The study uses constitutional-law analysis to identify the legal status of entrepreneurial freedom and its function as a constraint on public power. The legislation is analysed doctrinally and is not classified as empirical data. Systemic interpretation links this guarantee to administrative legislation and procedural safeguards. The statutory analysis distinguishes four dimensions: the legal source of authority, the purpose for which discretion is granted, the procedural safeguards governing its exercise, and the intensity of subsequent judicial review. On this basis, the analysis maps discretionary authority across five functional areas: initiation of regulatory intervention, factual and evidentiary assessment, selection and intensity of the measure, procedural participation and reason-giving, and administrative reconsideration or judicial correction. This classification is

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functional rather than sector-specific and does not claim to cover every form of regulatory authority established by Kazakhstan's legislation. International legal scholarship is used through a functional transferability test. A foreign concept is included only where it addresses a regulatory function also recognised in Kazakhstan's legislation, can be reformulated as an analytical criterion, and does not require institutional equivalence between the compared systems. The external materials identify standards such as reason-giving, proportionality, legal certainty, legitimate expectations, and judicial review; they do not provide rules directly applicable in Kazakhstan or constitute a full comparative-law analysis. Constitutional design is not treated as an independent object of analysis. Case-based assessment reconstructs the legal and procedural elements expressly recorded in the selected ruling. Author-developed evaluative criteria are kept analytically separate from the court's findings and conclusions.

The present study applies doctrinal interpretation, functional legal mapping, descriptive examination of contextual materials, and reconstruction of one illustrative judicial dispute. It does not perform cross-case comparison, intervention-group comparison, correlation analysis, regression modelling, sensitivity testing, double coding, or intercoder reliability assessment. The supporting materials deposited on Zenodo contains a generic prospective coding protocol for future research.[6] The present study does not examine the normative incorporation or practical application of its individual dimensions in Kazakhstan. The protocol was not applied to national legislation, administrative practice, or a body of judicial cases and produced no empirical findings.[7]

2.3. Case Selection and Unit of Analysis

The unit of analysis is the ruling of the Judicial Collegium for Administrative Cases of the Supreme Court of the Republic of Kazakhstan dated 21 February 2024 in administrative case 6001-24-00-6пп/1.[8] Energo-upravlenie LLP initiated the case against the Committee of State Revenue of the Ministry of Finance of the Republic of Kazakhstan and the Department of State Revenue for Pavlodar Region.

We selected the ruling because it identifies the contested supervisory measures, the procedural history, the parties' recorded arguments, and the judicial outcome. It is accessible through the official Bank of Judicial Acts by searching for case 6001-24-00-6пп/1.

6 Indira Ilyassova and others, 'Protection of Entrepreneurial Freedom as a Rule-of-Law Criterion: Administrative Discretion and Judicial Review in Kazakhstan' (*Zenodo*, 19 August 2026) <https://doi.org/10.5281/zenodo.22018727> accessed 4 August 2026.

7 Jarrod Hepburn, 'The Legal Justification for the Doctrine of Legitimate Expectations in International Investment Law' (2025) 36(1) European Journal of International Law 43 <https://doi.org/10.1093/ejil/chaf017> accessed 4 August 2026.

8 Administrative case 6001-24-00-6пп/1 (n 4).

The available material does not include the complete inspection order, the full statement of claim, all administrative records, the complete sector-specific legal framework, or any subsequent appellate or cassation ruling. The case is used only for a limited reconstruction and does not support case-specific or national generalisation.

2.4. Analytical Procedure Applied in the Present Study

The analysis was conducted in four stages. First, selected provisions of Kazakhstan's Constitution, the Administrative Procedural and Process-Related Code, and the Entrepreneurial Code were interpreted doctrinally to identify the legal status of entrepreneurial freedom and the general limits of administrative discretion.

Second, the identified standards were organised into five functional areas: initiation of regulatory intervention, factual and evidentiary assessment, selection and intensity of the measure, procedural participation and reason-giving, and administrative or judicial correction. This stage produced a functional legal mapping rather than a quantitative case classification.

Third, the Energo-upravlenie LLP ruling was examined through a limited factual and procedural reconstruction. Only information expressly contained in the available published text was used. The analysis did not reconstruct or infer missing administrative acts, claim materials, legal grounds, evidence, or judicial findings.

Fourth, the World Justice Project Rule of Law Index 2025 was examined descriptively as an external institutional benchmark. The analysis did not include quantitative indicators from the 2022 cassation material or the 2024–2025 informational publications. The analysis also did not construct a sectoral typology of dominant discretionary powers. The World Justice Project (WJP) rankings were not normalised, averaged, weighted, or treated as judicial statistics.

Statutory procedural actions, including requests for reasoned positions under Articles 91(5) and 138(5) of the Administrative Procedural and Process-Related Code, were not coded as indicators of deficient administrative reasoning, reasoning quality, or judicial intensity. Such conclusions require substantive examination of the court's review of facts, discretion, and proportionality.

The study did not compare cases or intervention groups. The study also did not apply correlation analysis, regression modelling, sensitivity testing, double coding, or intercoder reliability assessment. These procedures require a larger and independently coded judicial dataset. The supporting materials deposited on Zenodo present the prospective data structure, coding scales, reliability protocol, and modelling rules that future research may test.

The prospective coding framework comprises the Motivation Index (MI), Proportionality Index (PI), Trust Protection Index (TPI), Judicial Intensity Index (JII),

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Discretionary Risk Index (DRI), and Legal Protection Index (LPI). None of these indices was used to assign scores to the Energo-upravlenie LLP ruling or to the contextual materials examined in the present study.

No threshold-based typology of legal regimes was constructed, and the selected ruling was not assigned to any legal-regime category.

The study does not use personal data. The study examines judicial materials without identifying individuals or reproducing confidential information.

2.5. Limitations

First, the empirical component is limited to one published judicial ruling. The study does not use official longitudinal judicial statistics. The study excluded informational materials for the first quarter of 2024 and the first half of 2025 because their reporting periods, indicators, and denominators are not comparable. The article draws no conclusion concerning temporal dynamics or national judicial trends.

The dataset is insufficient for case-to-case comparison, intervention-group comparison, correlation analysis, regression modelling, or sensitivity testing. Examining one ruling does not permit testing causal relationships among administrative reasoning, proportionality, legitimate expectations, discretionary risk, and judicial review. The study also does not establish validated threshold values or classify legal regimes based on the proposed indices. No coding team was formed because a multi-case coding dataset was not created. Intercoder reliability was, therefore, neither calculated nor claimed.

The study does not claim representative coverage of Kazakhstan's administrative case law or support conclusions about recurring judicial patterns across different categories of regulatory disputes. Nor does the study examine procedural barriers, the admissibility or legal classification of administrative claims, or the consistency of judicial practice. The study draws no conclusions about how these factors affect the effectiveness of judicial protection.

Second, the Energo-upravlenie LLP case serves as an illustration rather than a representative sample of regulatory disputes in Kazakhstan. The prospective framework in the supporting materials deposited on Zenodo outlines how future multi-case research might code administrative reasoning, proportionality, legitimate expectations, discretionary risk, and judicial review. The present study did not test its measurement properties, weighting structure, intercoder reliability, construct validity, or sensitivity.

The study also does not establish whether MI, PI, TPI, JII, DRI, or LPI correspond to distinct legal institutions recognised by Kazakhstan's legislation. Their normative basis and practical application require separate article-by-article and case-law analysis.

The published ruling does not expressly address every element of the proposed MI, PI, TPI, JII, and DRI framework. Silence in the judicial text is therefore not coded as a substantive

defect. The article distinguishes between facts and conclusions stated by the court and analytical criteria developed by the authors.

The available material also does not reproduce the complete contested administrative acts, the full grounds of the claim, the sector-specific provisions governing the authority's supervisory powers, or the complete legal reasoning supporting the judicial outcome. These omissions prevent a case-specific assessment of administrative justification, proportionality, or discretionary risk.

Specifically, the published ruling does not provide sufficient information to determine whether the entrepreneur relied in good faith on an established administrative practice, whether such reliance qualified for legal protection, or whether the inspection caused recoverable economic loss. TPI is therefore not calculated for the selected case.

The study does not quantify litigation costs, compliance expenses, operational delay, reputational effects, or lost business opportunities associated with administrative intervention. It identifies the possible transaction burden of *ex post* protection conceptually rather than measuring its magnitude.

The study focuses on Kazakhstan and does not assume direct comparability with the European Union or the foreign jurisdictions discussed in the literature. International sources are used only where they identify a function also present in Kazakhstan's administrative framework, such as reason-giving, proportionality, legitimate expectations, or judicial control. Differences in constitutional structure, sources of law, judicial competence, and administrative procedure limit the transferability of specific doctrines and outcomes.

The study does not analyse decisions of the former Constitutional Council or the Constitutional Court. It makes no independent claim about the effectiveness of constitutional adjudication in protecting entrepreneurial freedom. Constitutional justice is considered only as part of the broader institutional framework within which administrative judicial protection operates.

Finally, international indices are used only as an external institutional benchmark. They help contextualise the legal environment but cannot establish legal causality. The article's main conclusions are grounded in legal norms, documented judicial reasoning, and case-based analysis.

The WJP rankings are used as published. The study does not transform ordinal country ranks into normalised scores or use them to calculate an integrated measure of judicial or entrepreneurial protection.

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3 LITERATURE REVIEW

The study uses international scholarship through a functional rather than transplant-oriented approach. The reviewed sources do not provide rules directly applicable in Kazakhstan. They identify analytical standards relevant to controlling administrative discretion, including legality, reason-giving, evidentiary sufficiency, proportionality, predictability, legitimate expectations, and judicial review. Their relevance to Kazakhstan depends on whether the national constitutional and administrative framework performs the same regulatory function.

Scholarship on entrepreneurial freedom generally distinguishes formal recognition of economic rights from their effective protection against public intervention. Across legal systems, recurring analytical requirements include foreseeability, a lawful regulatory purpose, reasoned decision-making, proportionality, and access to judicial review. These requirements are relevant to Kazakhstan because its legislation also recognises administrative discretion while subjecting its exercise to statutory purpose, proportionality, procedural safeguards, and judicial control. The literature is used to formulate evaluative criteria rather than to import foreign legal rules.[9]

Kazakhstan provides the primary legal context for the study.[10] The constitutional guarantee of entrepreneurial freedom establishes the general normative basis, while the Administrative Procedural and Process-Related Code and the Entrepreneurial Code regulate administrative discretion, supervisory intervention, procedural participation, proportionality, and judicial protection. Constitutional review and administrative adjudication perform different functions. The Constitutional Court assesses the constitutionality of normative legal acts, whereas administrative courts review public intervention in individual disputes.

Scholarship has also examined the institutional development of constitutional review in Kazakhstan by comparing the Constitutional Court with the former Constitutional Council and by assessing the Venice Commission's evaluation of the subsequent reform of the Constitutional Court. Other scholarship has offered a more critical historical interpretation of the transformation and institutional role of constitutional review bodies in Kazakhstan.

9 Xiezhong Cheng, 'Soft Law in the Prevention and Control of the COVID-19 Pandemic in China: Between Legality Concerns and Limited Participatory Possibilities' (2021) 12(1) European Journal of Risk Regulation 7 <https://doi.org/10.1017/err.2020.111> accessed 4 August 2026; Mariolina Eliantonio and Oana Ştefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12(1) European Journal of Risk Regulation 159 <https://doi.org/10.1017/err.2020.119> accessed 4 August 2026.

10 European Commission for Democracy through Law (Venice Commission), *Kazakhstan: Opinion on the Draft Constitutional Law on the Constitutional Court* (CDL-AD(2022)028, 25 October 2022) <https://www.coe.int/en/web/venice-commission/-/opinion-1099> accessed 4 August 2026.

These debates provide institutional background only and are not treated as an independent object of empirical analysis in the present study.[11]

International literature is relevant only where it addresses functions also present in Kazakhstan's legal system. Scholarship on proportionality structures the relationship between regulatory purpose, the selected measure, and the burden imposed on an entrepreneur. Research on reason-giving and judicial review informs the distinction between formal legality and substantive control of discretion. Studies of legitimate expectations clarify how predictability may be affected by changes in administrative practice. These concepts remain subject to Kazakhstan's legislation and institutional structure.

The Energo-upravlenie LLP ruling is not treated as evidence that the court examined all of these standards. It is used only to reconstruct the dispute and demonstrate the institutional availability of administrative judicial review. The international literature supports the theoretical framework but does not supplement facts or judicial findings absent from the published ruling.

Proportionality literature provides a functional standard for assessing restrictive public measures. Its transferable contribution lies in distinguishing suitability, necessity, and balancing, rather than in any jurisdiction-specific outcome. Applied to Kazakhstan, this framework helps explain the statutory requirement that administrative intervention correspond to its lawful purpose and should not impose a burden exceeding what is necessary. It does not determine the result of a particular dispute unless the relevant facts and reasoning are expressly available in the judicial record.[12]

Research on emergency regulation during the COVID-19 pandemic is relevant as a stress-test of administrative legality rather than as a direct model for Kazakhstan. These studies show how urgent governance may expand executive flexibility, rely on abbreviated procedures, and weaken transparency. The transferable conclusion is

11 Nora Webb Williams and Margaret Hanson, 'Captured Courts and Legitimized Autocrats: Transforming Kazakhstan's Constitutional Court' (2022) 47(4) Law & Social Inquiry 1201 <https://doi.org/10.1017/lsi.2021.85> accessed 4 August 2026.

12 Borja Sánchez Barroso, 'Beyond the Principle of Proportionality: Controlling the Restriction of Rights under Factual Uncertainty' (2023) 9(2) Oslo Law Review 74 <https://doi.org/10.18261/olr.9.2.1> accessed 4 August 2026; Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review: The Courts' Perspectives' (2021) 12(4) European Journal of Risk Regulation 792 <https://doi.org/10.1017/err.2021.47> accessed 4 August 2026; Lukas H Meyer and Santiago Truccone, 'Legitimate Expectations and Compensation in Changing Circumstances' (2025) 29(4) Journal of Ethics 635 <https://doi.org/10.1007/s10892-025-09514-y> accessed 4 August 2026; Niels Petersen, 'Alexy and the "German" Model of Proportionality: Why the Theory of Constitutional Rights Does Not Provide a Representative Reconstruction of the Proportionality Test' (2020) 21(2) German Law Journal 163 <https://doi.org/10.1017/glj.2020.9> accessed 4 August 2026; Piero Ríos Carrillo, 'Proportionality, Comparability, and Parity: A Discussion on the Rationality of Balancing' (2023) 29(4) Legal Theory 257 <https://doi.org/10.1017/S1352325223000186> accessed 4 August 2026.

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limited: urgency does not remove the need for a legal basis, evidence, reason-giving, and proportionality. The specific institutional arrangements developed in the European Union or individual European states are not treated as applicable to Kazakhstan without separate national analysis.[13]

Scholarship on soft law is relevant because administrative expectations may be shaped not only by formally binding acts but also by guidance, risk criteria, recommendations, and internal regulatory practices. Foreign studies show that such instruments may improve administrative flexibility while creating uncertainty where their legal status, publication, or reviewability remains unclear. Because such instruments may influence administrative behaviour without possessing the status of formally binding law, their effectiveness and legitimacy also depend on the clarity of their legal basis, the quality of the reasons supporting them, and the extent to which affected parties can understand and challenge their practical effects.[14] For Kazakhstan, this literature supports examination of whether risk-assessment criteria and supervisory guidance are accessible, predictable, and connected to statutory authority. It does not justify treating European soft law doctrines as direct sources of Kazakhstan law.

13 Alberto Alemanno, 'The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?' (2020) 11(2) European Journal of Risk Regulation 307 <https://doi.org/10.1017/err.2020.44> accessed 4 August 2026; Alberto Alemanno, 'Towards a European Health Union: Time to Level Up' (2020) 11(4) European Journal of Risk Regulation 721 <https://doi.org/10.1017/err.2020.106> accessed 4 August 2026; Ronan Cormacain and Ittai Bar-Siman-Tov, 'Global Legislative Responses to Coronavirus' (2020) 8(3) Theory and Practice of Legislation 253 <https://doi.org/10.1080/20508840.2020.1816261> accessed 4 August 2026; Vincent Delhomme and Tamara Hervey, 'European Union's Response to the Covid-19 Crisis and (the Strengthening of) EU Rule of Law' (2022) 41 Yearbook of European Law 48 <https://doi.org/10.1093/yel/yeac011> accessed 4 August 2026; Iris Goldner Lang, '"Laws of Fear" in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19' (2023) 14(1) European Journal of Risk Regulation 141 <https://doi.org/10.1017/err.2020.120> accessed 4 August 2026; Klaus Meßerschmidt, 'COVID-19 legislation in the light of the precautionary principle' (2020) 8(3) Theory and Practice of Legislation 267 <https://doi.org/10.1080/20508840.2020.1783627> accessed 4 August 2026; Kai P Purnhagen and others, 'More competences than you knew? The web of health competence for European Union action in response to the COVID-19 outbreak' (2020) 11(2) European Journal of Risk Regulation 297 <https://doi.org/10.1017/err.2020.35> accessed 4 August 2026.

14 Corina Andone and Florin Coman-Kund, 'Persuasive Rather than "Binding" EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis' (2022) 10(1) Theory and Practice of Legislation 22 <https://doi.org/10.1080/20508840.2022.2033942> accessed 4 August 2026; Mariolina Eliantonio, Emilia Korkea-Aho and Steven Vaughan, 'EJRR Special Issue Editorial: COVID-19 and Soft Law: Is Soft Law Pandemic-Proof?' (2021) 12(1) European Journal of Risk Regulation 1 <https://doi.org/10.1017/err.2021.1> accessed 4 August 2026; Emilia Korkea-Aho and Martin Scheinin, '"Could You, Would You, Should You?" Regulating Cross-Border Travel Through COVID-19 Soft Law in Finland' (2021) 12(1) European Journal of Risk Regulation 26 <https://doi.org/10.1017/err.2020.112> accessed 4 August 2026.

Literature on legitimate expectations clarifies a different aspect of legal certainty. It examines whether an individual or business reasonably relied on an official representation, authorisation, or stable administrative practice and whether a subsequent change required transitional or compensatory protection. In Kazakhstan, this concept must be interpreted through national administrative legislation and the factual record of each case. Foreign scholarship is used only to develop the proposed TPI coding dimensions and does not establish that protected reliance existed in the Energo-upravlenie LLP dispute.[15]

Comparative research on judicial review contributes three functional criteria relevant to the Kazakhstan context.[16] First, a court may distinguish formal competence from the lawful exercise of discretion. Second, review may examine whether the authority connected the factual record to the legal ground for intervention. Third, judicial scrutiny may address proportionality and procedural fairness where national law authorises such review. Studies from the Czech Republic, Spain, the United Kingdom, and other jurisdictions illustrate these possibilities, but their doctrinal tests and institutional outcomes are not directly transferable.

Research on Article 16 of the Charter of Fundamental Rights of the European Union (CFREU) is used only to clarify the distinction between recognition of entrepreneurial freedom and its permissible regulation in the public interest. Article 16 CFREU is not presented as a legal source applicable in Kazakhstan. Its relevance is conceptual: formal recognition of business freedom does not exclude regulation, but it increases the importance of legality, predictability, and reasoned judicial control.[17]

***Table* 2. Functional Relevance and Limits of International Scholarship for Kazakhstan**

Literature cluster	Transferable analytical contribution	Relevance to Kazakhstan	Limit of application
Proportionality	Suitability, necessity, and balancing	Interpretation of restrictions and selection of regulatory measures	Foreign proportionality outcomes do not determine national cases

15 Hepburn (n 7).

16 Jeovan Silva and Tomas Aquino Guimaraes, 'Clashes and Agreements Between Regulatory Agencies And Courts: The Influence on Regulatory Governance' (2024) 90(3) International Review of Administrative Sciences 529 <https://doi.org/10.1177/00208523231210478> accessed 4 August 2026.

17 Eduardo Gill-Pedro, 'Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law' (2022) 18(2) European Constitutional Law Review 183 <https://doi.org/10.1017/S1574019622000153> accessed 4 August 2026; Hilary Hogan, 'The Origins and Development of Article 16 of the Charter of Fundamental Rights' (2023) 2(4) European Law Open 753 <https://doi.org/10.1017/elo.2023.53> accessed 4 August 2026.

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Literature cluster	Transferable analytical contribution	Relevance to Kazakhstan	Limit of application
Administrative reason-giving	Connection between facts, legal grounds, purpose, and measure	Assessment of the reviewability of administrative acts	Requires confirmation in Kazakhstan's legislation and case materials
Soft law and guidance	Transparency, publication, legal status, and reviewability	Evaluation of risk criteria, instructions, and supervisory guidance	EU soft law doctrines are not direct sources of Kazakhstan law
Legitimate expectations	Public basis for reliance, good faith, predictability, and transitional safeguards	Development of the proposed TPI framework	Protected reliance must be established from national law and facts
Judicial review	Distinction between formal and substantive control of discretion	Analysis of administrative courts as an *ex post* safeguard	Foreign standards cannot be attributed to Kazakhstan's courts without evidence
Freedom to conduct a business	Relationship between economic freedom and public interest regulation	Conceptual interpretation of entrepreneurial freedom	Article 16 of the EU Charter is not applicable law in Kazakhstan
Emergency regulation	Risks of accelerated decision-making and reduced transparency	Identification of rule-of-law risks under urgent regulation	Pandemic governance is contextual and not directly generalisable

Note: compiled by the authors. International scholarship is used functionally and does not replace analysis of Kazakhstan's legislation or judicial practice.

The reviewed literature supports a limited analytical framework rather than a comparative evaluation of national legal systems. Its contribution lies in identifying criteria that can be tested against Kazakhstan's legislation and documented practice. The article does not assume institutional equivalence between Kazakhstan, the European Union, or individual foreign states. Where the national sources do not support a conclusion, the foreign literature is not used to fill the evidentiary gap.

4 RESULTS: NORMATIVE FRAMEWORK, INSTITUTIONAL CONTEXT, AND CASE-BASED OBSERVATIONS

4.1. Statutory Limits and Functional Areas of Administrative Discretion in Kazakhstan

Kazakhstan's Administrative Procedural and Process-Related Code expressly recognises administrative discretion as the authority to select among several legally permissible decisions. This authority is limited. Article 11 requires an administrative body to remain within statutory boundaries and to use discretion consistently with the purpose for which the power was granted.[18] The Code also subjects restrictive administrative action to proportionality and requires a fair balance between the affected party's interests and the public interest.

The Entrepreneurial Code supplements these general requirements.[19] Its principles require the intensity of state regulation to correspond to the degree of risk posed to legally protected interests. The Code also structures state control through risk-assessment criteria and distinguishes preventive control, scheduled measures, and unscheduled inspections. An unscheduled inspection must therefore be connected to a legally recognised ground and to specific facts requiring regulatory intervention.

The two codes perform different but complementary functions. The Entrepreneurial Code regulates the legal forms and grounds for supervisory intervention, while the Administrative Procedural and Process-Related Code sets out general requirements governing administrative decision-making and judicial review. These statutory standards provide the article's doctrinal framework. The selected ruling, however, is not treated as having expressly determined compliance with every standard identified in this framework.[20]

The statutory analysis identifies five principal functional areas of discretion relevant to supervisory intervention. These areas do not represent separate branches of law. They describe the successive decisions through which a regulatory measure is initiated, substantiated, selected, implemented, and subsequently reviewed. This classification allows us to distinguish the existence of legal authority from how that authority is exercised.

18 Administrative Procedural and Process-Related Code of the Republic of Kazakhstan 350-VI ZRK (n 2) art 11.

19 Entrepreneurial Code of the Republic of Kazakhstan no 375-V ZRK (n 3).

20 Luis E Mejía, 'Judicial review of regulatory decisions: Decoding the contents of appeals against agencies in Spain and the United Kingdom' (2021) 15(3) Regulation & Governance 760 <https://doi.org/10.1111/rego.12302> accessed 4 August 2026.

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***Table* 3. Principal Functional Areas of Administrative Discretion in Kazakhstan**

Functional area	Discretionary decision	Principal legal constraint	Risk to legal certainty
Initiation of regulatory intervention	Whether the statutory circumstances justify inspection, preventive control, or another regulatory response	Legally recognised trigger, statutory purpose, competence, and risk-based criteria	Intervention initiated on insufficiently specified grounds
Factual and evidentiary assessment	Which facts are relevant and whether the available information is sufficient for action	Completeness of fact-finding, verifiability of information, and connection between facts and the legal ground	Different authorities may apply inconsistent evidentiary thresholds
Selection and intensity of the measure	Which legally available measure should be used and how burdensome it should be	Proportionality, suitability, necessity, and correspondence between risk and regulatory intensity	Insufficient explanation of the legal and factual basis for selecting the measure
Procedural participation and reason-giving	How the affected entrepreneur is heard and how the final decision is explained	Prior participation, consideration of objections, identification of the legal basis, and reasoned administrative act	Formal observance of procedure without sufficient explanation of the decision
Administrative reconsideration and judicial correction	Whether the contested act should be maintained, modified, withdrawn, or annulled	Administrative appeal, judicial review, legality, procedural fairness, and statutory limits of discretion	Protection becomes dependent on *post factum* correction after costs have arisen

Note: compiled by the authors from the Administrative Procedural and Process-Related Code and the Entrepreneurial Code of the Republic of Kazakhstan. The classification is functional and non-exhaustive.

The mapping shows that discretion arises not only when an authority selects a final measure. It also appears at earlier stages: initiating intervention, assessing information, determining evidentiary sufficiency, and organising procedural participation. Legal certainty depends on the continuity of safeguards across the entire administrative process. A clear statutory basis may lose much of its preventive effect where evidentiary thresholds, measure-selection criteria, or reasoning requirements are applied inconsistently.

The functional mapping supports four targeted measures. First, sectoral and subordinate rules should specify the factual triggers and minimum evidentiary requirements applicable to intrusive supervisory measures. Open-ended risk categories should include verifiable criteria explaining when intervention is justified.

Second, administrative acts affecting entrepreneurial activity should clearly identify the relevant facts, applicable legal provisions, statutory purpose, reasons for selecting the measure, and responses to the entrepreneur's material objections, and address alternative measures only when applicable sector-specific legislation requires their consideration.

Third, risk-assessment criteria, checklists, methodological guidance, and changes in administrative practice should be published in an accessible and sufficiently stable form. This would improve predictability without eliminating the flexibility required for sector-specific regulation.

Fourth, judicial and administrative review outcomes should be used as institutional feedback. Recurring grounds for annulment or modification should inform revision to regulatory guidance, internal procedures, and reasoning standards. This would gradually shift protection from *post factum* correction toward preventing legally defective intervention.

Within the prospective framework in the supporting materials deposited on Zenodo, the proposed measures address regulatory triggers, evidentiary thresholds, measure-selection criteria, and prior procedural safeguards. Their applicability must be assessed under the relevant sector-specific legislation.

These proposals are general doctrinal directions and are not findings derived from the Energo-upravlenie LLP ruling. The study does not determine whether the applicable sector-specific legislation required consideration of alternative measures in that dispute.

4.2. External Institutional Context

The study does not compare judicial indicators for the first quarter of 2024 and the first half of 2025. The available publications use non-equivalent indicators and cover different reporting intervals; therefore, they cannot be used to calculate changes or identify temporal

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trends. The World Justice Project Rule of Law Index 2025 is retained only as an external institutional benchmark and is not treated as judicial statistics.[21]

Informational publications reproduced on non-governmental resources are not treated as official judicial statistics because their status, completeness, numerical precision, and temporal comparability cannot be independently confirmed. Accordingly, the analysis does not report the derived ratios proposed in an earlier draft. We also excluded a preliminary numerical result derived from those materials because its denominator, the number of cases decided on the merits, could not be independently verified. Under Articles 91(5) and 138(5) of the Administrative Procedural and Process-Related Code, submitting a reasoned position is a statutory procedural requirement where judicial proceedings may be initiated without a mandatory pre-trial appeal. The court's request reflects the exercise of a procedural power and duty. It does not, by itself, indicate inadequate reasoning in the contested administrative act or a need for stronger administrative justification.

The World Justice Project Rule of Law Index 2025 is used only as an external institutional benchmark and not as a measure of the performance of Kazakhstan's administrative courts. It is also not used as an external contextual benchmark. Its factor rankings illustrate the broader institutional environment in which administrative disputes arise, but they do not measure the effectiveness of Kazakhstan's administrative courts or establish causal relationships.

No conclusion about stability or change over time is drawn from these materials.

The supporting materials deposited on Zenodo include the proposed case registry, coding variables, index structure, and reliability requirements. We did not populate the registry in the present study, and we did not conduct any index-based comparisons or inferential analyses.

The WJP Index serves as an external benchmark because entrepreneurial freedom depends not only on national judicial statistics but also on the institutional environment in which regulatory decisions are made and challenged. Its factor-based structure is more relevant than the general country ranking alone, as business resilience is shaped by the interaction between enforcement quality, judicial effectiveness, limits on public power, and corruption control (Table 4).[22]

21 '2025 WJP Rule of Law Index: Kazakhstan' (n 5).
22 ibid

***Table* 4. Kazakhstan in the WJP Rule of Law Index 2025: Overall Position and Regional Context**

Indicator	Value
Overall ranking	66 out of 143
Regional ranking (Eastern Europe & Central Asia)	5 out of 15

Note: compiled by the authors.

Kazakhstan's 2025 WJP profile is mixed. For this study, the relevant factors are regulatory enforcement, civil justice, constraints on government powers, and the absence of corruption. For entrepreneurial freedom, the same decisive factors are applicable as they capture predictability, protection of economic interests, limits on public authority, and corruption-related discretion (Table 5).[23]

***Table* 5. Kazakhstan: Factor Rankings in the WJP Rule of Law Index 2025**

Factor	Rank (out of 143)
Civil Justice	36
Order and Security	42
Regulatory Enforcement	59
Absence of Corruption	64
Criminal Justice	67
Open Government	80
Fundamental Rights	98
Constraints on Government Powers	101

Note: compiled by the authors. The WJP rankings are reproduced in their original form. No normalisation, averaging, or composite score was applied because country ranks are ordinal positions and do not represent equal numerical intervals between institutional performance levels. Accordingly, no numerical threshold or category such as a "medium level" of institutional protection is assigned.

23 ibid

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The factor rankings suggest an institutional asymmetry. Kazakhstan's relative position in civil justice is stronger than its position in constraints on government powers. For entrepreneurial regulation, this configuration may increase the practical importance of judicial review where prior institutional controls are less effective. The rankings, however, do not establish that judicial protection fully compensates for weak *ex ante* constraints, nor do they measure the costs businesses bear before a dispute is resolved.

4.3. Limited Reconstruction of the Energo-upravlenie Case

The ruling of the Judicial Collegium for Administrative Cases of the Supreme Court of the Republic of Kazakhstan dated 21 February 2024 in administrative case concerns a claim brought by Energo-upravlenie LLP against the Committee of State Revenue of the Ministry of Finance and the Department of State Revenue for Pavlodar Region.[24] The claimant challenged Order 165 of the Committee of State Revenue dated 25 March 2022 and Directive 28 of the regional Department of State Revenue dated 6 April 2022 concerning an unscheduled thematic tax inspection.

The inspection covered the period from 1 January 2019 to 31 December 2021 and related to corporate income tax and value-added tax obligations. The published ruling records that the first-instance court partially granted the claim and annulled the contested order and directive. The Supreme Court ruling of 21 February 2024 left in force its earlier cassation ruling dated 15 June 2023 and dismissed the Prosecutor General's appeal.

However, the materials examined in this study do not reproduce the full content of those acts, the complete grounds stated in the claim, the complete administrative record, or the full legal reasoning supporting annulment. The study also does not examine any subsequent appellate or cassation review.

The available material does not permit the authors to determine the exact statutory or evidentiary grounds on which the contested acts were annulled. It also does not establish that the court found incomplete administrative reasoning, insufficient proportionality, vague legal grounds, or high discretionary risk.

Accordingly, no MI, PI, TPI, JII, DRI, or LPI value is assigned to the dispute. The case demonstrates only that a supervisory measure affecting entrepreneurial activity was judicially challenged and that the first-instance court granted partial relief.

24 Administrative case 6001-24-00-6пп/1 (n 4).

5 DISCUSSION

The results show that entrepreneurial freedom functions as a rule-of-law criterion through two practical dimensions: the predictability of administrative intervention and its reviewability before courts. Formal constitutional recognition is insufficient. What matters is whether intervention is reasoned, proportionate, evidence-based, and subject to substantive judicial control.

The legislative analysis shows that Kazakhstan's law contains identifiable standards governing discretion. The Administrative Procedural and Process-Related Code limits discretion by legality, statutory purpose, proportionality, and procedural fairness, while the Entrepreneurial Code regulates the grounds and forms of supervisory intervention. The selected case demonstrates the institutional availability of judicial review but does not establish a specific failure of administrative reasoning, proportionality, or measure selection.

The functional analysis identifies five points at which legal certainty may be affected: initiation of intervention, evidentiary assessment, selection of the regulatory measure, procedural participation and reasoning, and subsequent correction. This finding confirms that discretion is not confined to the final administrative act.

It is distributed across the regulatory process, and the applicable safeguards differ depending on the decision being made.

The proposed measures are limited to improving the clarity of regulatory grounds, evidentiary requirements, administrative reasoning, risk criteria, and institutional feedback. They do not establish that alternative measures were legally required in the dispute at hand.

Within Kazakhstan's institutional architecture, constitutional and administrative reviews perform distinct functions. Constitutional review concerns the conformity of normative legal acts with constitutional guarantees. Administrative courts examine the legality, evidentiary basis, reasoning, and proportionality of public intervention in individual disputes. The present findings concern the second mechanism and should not be generalised to constitutional adjudication.

The WJP indicators provide only broad external context. They do not establish a causal relationship between *ex ante* institutional constraints and the role of administrative courts. The present study does not claim that judicial review compensates for weaknesses in prior regulatory controls.

Such dependence produces an institutional cost. Even effective judicial review occurs only after the entrepreneur has faced an inspection, restriction, compliance burden, or legal dispute. Litigation consumes judicial resources and imposes delay, professional expenses, operational disruption, and uncertainty on the business. The available materials do not

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quantify these costs, but the distinction between preventive and corrective protection matters for evaluating institutional design.

The prospective coding protocol is not included in the substantive findings. The study does not demonstrate the normative recognition or practical operation of its dimensions in Kazakhstan.

The selected ruling confirms that an entrepreneur may challenge a supervisory administrative measure before the administrative courts. Beyond this procedural and institutional observation, the judicial act does not support a case-specific conclusion concerning the sufficiency of the statutory grounds, evidence, administrative reasoning, or proportionality assessment. These matters remain doctrinal criteria proposed by the authors and should not be presented as findings of the court.[25]

At the conceptual level, protecting legitimate expectations remains important because judicial annulment and regulatory predictability serve different functions. Annulment may remove or invalidate a contested measure. In contrast, reliance protection concerns whether an entrepreneur could reasonably organise its conduct based on an official position, established practice, authorisation, or other public representation.

Where a TPI value of zero is validly established, it would indicate that none of the identified reliance safeguards is present. In such circumstances, a favourable judicial outcome may not, of itself, address the disruption, compliance costs, delay, or possible loss of business opportunities incurred before judgement. However, the existence and recoverability of lost profits require separate evidence and cannot be inferred from the annulment of an administrative act alone. The selected ruling does not determine these matters.

International scholarship supports the analytical distinction between preventive regulation and corrective judicial review, but it does not determine how these mechanisms operate in Kazakhstan. Its conclusions are used only where they correspond to functions established by national legislation. The Kazakhstan-specific findings remain limited to the statutory framework, the contextual institutional indicators, and the procedural content expressly recorded in the selected ruling.[26]

25 Barroso (n 12); Petersen (n 12); Ríos Carrillo (n 12).

26 Cafaggi and Iamiceli (n 12); Cheng (n 9); Eliantonio and Ştefan (n 9); Pavel Ondřejek, 'Judicial Review of Restrictions on the Right to Conduct Business in the Czech Republic During the COVID-19 Pandemic: Lessons for Future Crises' (2026) 17(S1) European Journal of Risk Regulation 261 <https://doi.org/10.1017/err.2025.10055> accessed 4 August 2026; Dalia Vasarienė and Lyra Jakulevičienė, 'Freedom to Conduct Business During the COVID-19 Pandemic' (2021) 26(1) Tilburg Law Review 16 <https://doi.org/10.5334/tilr.246> accessed 4 August 2026.

6 CONCLUSION

The study indicates that the protection of entrepreneurial freedom should be examined through the relationship between *ex ante* regulation and *ex post* judicial review. The available materials do not permit a statistical assessment of this relationship across Kazakhstan's judicial system. The conclusion is limited to the doctrinal framework and the institutional availability of review demonstrated by the selected ruling. The study does not assess procedural admissibility, claim classification, or the stability of judicial practice, as these matters fall outside its evidentiary and methodological scope.

This configuration provides access to legal protection but shifts some regulatory risk to the stage after administrative intervention. An entrepreneur may obtain a favourable judicial outcome only after incurring procedural, financial, and operational costs. Judicial correction therefore cannot substitute for clear regulatory triggers, evidentiary thresholds, and measure-selection standards.

The policy priority is to strengthen preventive legal safeguards without weakening substantive judicial review. Within the proposed methodology, this requires a revised DRI focused on *ex ante* constraints, while JII remains a separate measure of *ex post* judicial control.

The statutory analysis identified five principal functional areas of discretion: initiation of regulatory intervention, factual and evidentiary assessment, selection and intensity of the measure, procedural participation and reason-giving, and administrative or judicial correction. This classification shows that legal uncertainty may arise at several successive stages, not only in the final administrative act.

Legal certainty may be strengthened through more precise regulatory triggers, minimum evidentiary thresholds, structured reasoning requirements, accessible risk-assessment criteria, and systematic incorporation of review outcomes into administrative guidance.

The Energo-upravlenie LLP ruling provides a limited illustration of first-instance judicial review. The available materials do not contain the complete contested acts, claim materials, sector-specific legal analysis, or full judicial reasoning. The study therefore draws no case-specific conclusion concerning administrative justification, proportionality, discretionary risk, or the legality of particular supervisory powers.

The analytical indices in the supporting materials deposited on Zenodo constitute a prospective methodological framework, not a result of the present study. Validating them requires a broader sample with complete administrative acts, evidentiary materials, party submissions, and judicial reasoning addressing every coding criterion.

The framework provided in the supporting materials deposited on Zenodo is a prospective coding protocol, not a causal model. It does not establish a national mechanism of entrepreneurial protection or demonstrate relationships among its components. Validation

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would require a broader analysis of legislation and multiple complete administrative and judicial case files. Accordingly, the revised study proposes neither a typology of legal regimes nor a case-specific regime classification.

The conclusions are based on a limited normative framework and one illustrative ruling. They should not be interpreted as a comprehensive assessment of Kazakhstan's commercial, consumer-protection, sectoral, or subordinate legislation, or as a representative evaluation of national administrative case law.

The prospective coding criteria are derived from the reviewed literature but have not been normatively mapped onto Kazakhstan's legislation or tested against national administrative and judicial practice. They should therefore be treated as a proposal for future methodological development.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАХИСТ СВОБОДИ ПІДПРИЄМНИЦЬКОЇ ДІЯЛЬНОСТІ ЯК КРИТЕРІЙ ВЕРХОВЕНСТВА ПРАВА: АДМІНІСТРАТИВНИЙ РОЗСУД ТА СУДОВИЙ КОНТРОЛЬ У КАЗАХСТАНІ

Індіра Ільясова*, Наркес Жексембаєва, Асхат Газаєв, Айнур Акімбаєва та Айдана Алдаберген

АНОТАЦІЯ

Передумови. *Свобода підприємницької діяльності є практичним критерієм верховенства права, оскільки втручання органів публічної адміністрації у здійснення підприємницької діяльності безпосередньо впливає на автономію, майнові інтереси та правову визначеність суб'єктів приватного права. Конституція Казахстану гарантує свободу підприємницької діяльності, однак її практична дієвість залежить від того, як органи публічної адміністрації обґрунтовують обмежувальні заходи та як суди перевіряють їхню законність, доказову базу і пропорційність. У статті досліджено взаємозв'язок між адміністративним мотивуванням, дискреційними рішеннями та судовим захистом у спорах, що стосуються підприємницької діяльності. Основну увагу зосереджено на тому, наскільки суди здатні перетворювати формальні гарантії на дієвий захист від необґрунтованих обмежень.*

Методи. *Дослідження поєднало обмежений доктринальний аналіз із розглядом одного опублікованого судового рішення, яке ілюструє застосування механізмів судового контролю у публічно-правовому спорі. Конституцію використано для визначення правового статусу свободи підприємницької діяльності, тоді як окремі положення Адміністративного процедурно-процесуального кодексу та Підприємницького кодексу використано для визначення загальних критеріїв здійснення адміністративного розсуду, дотримання принципу пропорційності, процедурних вимог і механізмів контролю. Судове рішення у справі ТОВ «Енерго-управління» є єдиним судовим рішенням, яке аналізується окремо. Емпіричний компонент дослідження обмежено одним оприлюдненим судовим актом. Індекс верховенства права Світового проєкту з правосуддя за 2025 рік (World Justice Project Rule of Law Index 2025) застосовано лише як зовнішній інституційний орієнтир. У дослідженні не використано повного масиву офіційних статистичних даних про діяльність судів і не проведено лонгітюдного статистичного аналізу. Робота не претендує на вичерпне нормативне охоплення, репрезентативний аналіз судової практики або статистичне узагальнення. Порівняння різних судових справ чи груп справ, визначених за характером регуляторного втручання, кореляційний аналіз, регресійне моделювання, аналіз чутливості, подвійне кодування та оцінювання міжкодувальної узгодженості не проводилися. Загальний протокол кодування для майбутніх досліджень*

наведено окремо в додатку А, розміщеному в додаткових матеріалах на платформі «Zenodo». Протокол не адаптували до законодавства Казахстану, не перевіряли на матеріалах національної судової практики та не застосовували в емпіричному аналізі.

Результати та висновки. *Обране судове рішення фіксує спір щодо позапланової податкової перевірки та судового контролю оскаржуваних адміністративних актів. Доктринальний аналіз виокремлює п'ять функціональних сфер реалізації дискреційних повноважень органами регулювання: ініціювання втручання, оцінювання доказів, вибір та інтенсивність заходу, процедурна участь і мотивування, а також подальше усунення помилок в адміністративному або судовому порядку. Це дає змогу реконструювати правові позиції учасників провадження, перебіг та результат розгляду справи, зафіксований у тексті опублікованого рішення. Зазначене рішення не використовується для доведення того, що втручання ґрунтувалося на нечітких законодавчих підставах, недостатності доказів або відсутності належної оцінки необхідності та пропорційності втручання, а також балансу між приватними та публічними інтересами, оскільки ці питання не були прямо вирішені в судовому акті. Такі критерії збережено лише як елементи авторської аналітичної моделі для майбутнього застосування до ширшого масиву матеріалів судової практики. Запропоновані правові заходи передбачають чіткіші регуляторні підстави, стандарти доказування, структуровані вимоги до мотивування, прозорі критерії оцінки ризиків та механізми інституційного врахування результатів адміністративного й судового перегляду. Отже, висновок щодо конкретної справи обмежується констатацією наявності інституційної можливості здійснення судового контролю у спорі, пов'язаному з підприємницькою діяльністю.*

Ключові слова: *свобода підприємницької діяльності; верховенство права; адміністративний розсуд; судовий контроль; принцип пропорційності; правова визначеність.*

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Research Article

DIGITAL INHERITANCE OF SOCIAL MEDIA ACCOUNTS: BALANCING PRIVACY RIGHTS AND SUCCESSION UNDER UAE AND EUROPEAN LAW

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ABSTRACT

Background: *Social media accounts increasingly combine economic value, personal communications, intellectual property, and data concerning both account holders and third parties. After death, heirs may seek access to administer the estate while platforms invoke privacy, confidentiality, or contractual restrictions. The legal problem is especially difficult because Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, known as the General Data Protection Regulation (GDPR), does not itself govern the personal data of deceased persons; European national approaches remain fragmented, and UAE law contains modern succession and data protection rules but no express regime for social media inheritance. This study examines whether, and under what conditions, social media accounts should pass to heirs, and how legal systems can reconcile succession with post-mortem privacy.*

Method: *The article uses doctrinal, analytical, and functional comparative methods. It examines the GDPR, Article 8 of the European Convention on Human Rights, French post-mortem data legislation, German Federal Court of Justice case law on a deceased person's Facebook account, the UAE Personal Data Protection Law, and the current UAE Personal Status Law. Secondary sources were restricted to scholarship directly addressing digital succession, post-mortem privacy, digital assets, platform contracts, and online-account inheritance. Germany and France serve as contrasting European models, while the UAE offers a case study of legislative silence at the intersection of succession and data protection.*

Results and Conclusions: *The comparison shows that neither automatic inheritance nor absolute privacy provides an adequate solution. The article proposes a functional classification distinguishing personal, commercial, and mixed accounts, together with a structured judicial balancing test. It further identifies six comparative principles: separating account transmissibility from content disclosure; respecting lifetime digital directives; protecting third-party communications; ensuring proportionate judicial access; preventing platform terms from defeating mandatory rights; and addressing cross-border enforceability. These principles are relevant not only to UAE reform but also to European and international legal development. Digital inheritance should therefore be treated as an access-to-justice problem requiring transparent platform procedures, legally supervised remedies, and regulatory coordination across succession, privacy, contract, and data protection law.*

1 INTRODUCTION

The rapid expansion of digital technologies has fundamentally transformed property, privacy, and legal identity. Social media accounts, cloud storage, email services, and other digital platforms no longer function merely as communication tools; rather, they constitute valuable digital assets containing personal information, financial interests, intellectual property, and records of an individual's social and professional life. Consequently, an account holder's death no longer ends legal questions about digital data. Instead, it generates a new category of disputes relating to the ownership, management, and succession of digital assets, particularly social media accounts, whose legal nature remains uncertain in many jurisdictions.[1]

Digital inheritance has emerged as one of the most challenging contemporary issues at the intersection of succession law, privacy law, data protection, and digital rights. The central legal dilemma is whether social media accounts should be treated as inheritable

1 Natalie M Banta, 'Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death' (2014) 83(2) Fordham Law Review 799 <https://ir.lawnet.fordham.edu/flr/vol83/iss2/16> accessed 30 June 2026; Paweł Szwajdler, 'Digital Assets and Inheritance Law: How to Create Fundamental Principles of Digital Succession System?' (2023) 31(2) International Journal of Law and Information Technology 144 <https://doi.org/10.1093/ijlit/eaad014> accessed 30 June 2026.

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assets forming part of the deceased's estate or as highly personal rights protected by the deceased's right to privacy even after death. This tension becomes particularly complex where digital accounts simultaneously contain personal communications, commercially valuable content, intellectual property, and sensitive personal data belonging not only to the deceased but also to third parties.[2]

Within the European legal framework, this debate has acquired increasing significance following the adoption of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, known as the General Data Protection Regulation (GDPR), and the development of national approaches to digital succession. The GDPR protects living data subjects and, through recital 27, expressly leaves Member States free to provide rules concerning the personal data of deceased persons.[3] Article 8 of the European Convention on Human Rights protects private and family life and correspondence and forms part of the broader European privacy framework, although it does not itself establish a comprehensive regime for digital inheritance or a general post-mortem data right.[4] European legal systems therefore remain far from uniform: some recognise transmissibility of digital account relationships, while others place greater weight on privacy, contractual restrictions, or specific post-mortem data rules.[5]

The German Federal Court of Justice (Bundesgerichtshof) has become one of the leading judicial authorities in this field after recognising that a Facebook account may form part of the deceased's estate and pass to the heirs under the ordinary rules of succession.[6] In contrast, other legal systems have adopted a more restrictive approach, giving greater weight to privacy interests and contractual obligations governing digital services. This divergence illustrates the absence of internationally accepted legal principles governing digital

2 JC Buitelaar, 'Post-Mortem Privacy and Informational Self-Determination' (2017) 19(2) Ethics and Information Technology 129 <https://doi.org/10.1007/s10676-017-9421-9> accessed 30 June 2026; Edina Harbinja, 'Legal Aspects of Transmission of Digital Assets on Death' (PhD thesis, University of Strathclyde 2017) <https://doi.org/10.48730/hkaa-8435> accessed 30 June 2026.

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 - GDPR) [2016] OJ L 119/1 <http://data.europa.eu/eli/reg/2016/679/oj> accessed 30 June 2026.

4 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) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 30 June 2026.

5 Law of the French Republic no 78-17 of 6 January 1978 'On Data Processing, Data Files and Individual Liberties' (amended 27 June 2026) arts 84, 85 <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000886460/> accessed 30 June 2026.

6 Case III ZR 183/17 (Bundesgerichtshof, 12 July 2018) ECLI:DE:BGH:2018:120718UIIIZR183.17.0; Case III ZB 30/20 (Bundesgerichtshof, 27 August 2020) ECLI:DE:BGH:2020:270820BIIIZB30.20.0.

inheritance and highlights the continuing uncertainty surrounding the legal status of social media accounts after death.[7]

The legal position in the United Arab Emirates presents a different challenge. While the UAE has adopted an advanced legislative framework for the protection of personal data through Federal Decree-Law 45 of 2021 on the Protection of Personal Data, and has continuously modernised its digital legislation, no explicit statutory provisions regulate the inheritance of social media accounts or determine the legal relationship between the heirs, digital platforms, and the deceased's digital assets. Consequently, disputes concerning digital inheritance remain subject to the interaction between succession law, data protection legislation, contractual platform policies, and the general principles governing privacy and personal rights.[8]

Although digital inheritance has attracted increasing scholarly attention, existing literature remains fragmented. Most studies examine digital privacy or succession law independently. At the same time, few provide an integrated legal analysis that balances the deceased's right to privacy, heirs' proprietary interests, digital platforms' contractual autonomy, and the broader requirements of legal certainty. Furthermore, relatively limited attention has been devoted to comparative analysis between UAE legislation and the evolving European legal framework governing digital inheritance.[9]

Against this background, this study examines the legal status of social media accounts after their owners' death through a comparative analysis of UAE and European law. It evaluates whether such accounts should be treated as inheritable digital assets or protected personal rights. It assesses how existing legislative frameworks balance digital privacy, succession rights, and the legitimate interests of digital platform providers. By integrating comparative legal analysis with contemporary developments in data protection and digital rights, the study aims to contribute to emerging scholarship on digital inheritance while developing comparative principles to guide UAE reform and inform European and international debates on lawful access to a deceased user's digital environment.

7 Angelika Fuchs, 'What Happens to Your Social Media Account when You Die? The First German Judgments on Digital Legacy' (2021) 22(1) ERA Forum 1 <https://doi.org/10.1007/s12027-021-00652-y> accessed 30 June 2026.

8 UAE Federal Decree-Law 45 of 2021 'Concerning the Protection of Personal Data' (adopted 20 September 2021) [2021] Official Gazette 712; UAE Federal Decree-Law 41 of 2024 'On the Issuance of the Personal Status Law' (adopted 1 October 2024) [2024] Official Gazette 785(2).

9 Ahmad Abdullah Ahmad Al Ali and Nashwa Ahmad Mohammed, 'Legal Characterization of Electronic Inheritance Matters and Its Impact on Determination of Applicable Law in United Arab Emirates' (2025) 20(1) International Journal of Criminal Justice Sciences 68 <https://doi.org/10.5281/zenodo.20105> accessed 30 June 2026; Edina Harbinja, Marisa McVey and Lilian Edwards, 'Post-Mortem Privacy and Digital Legacy: A Qualitative Enquiry' (2024) 21 SCRIPTed 4 <https://doi.org/10.2218/scrip.210024.4> accessed 30 June 2026; Suzan R Hofstede, 'Digital Inheritance in Comparative Law' (2026) 2(1) Eurasian Journal of Comparative Law 1 <https://izlik.org/JA25UR87KN> accessed 30 June 2026.

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2 RESEARCH METHODOLOGY

This research adopts a doctrinal and comparative legal methodology. Its central question is how legal systems should determine access to, and succession of, social media accounts after the account holder's death when proprietary, contractual, privacy, data protection, and third-party interests overlap. The study asks three related questions: (1) which components of a social media account can properly be treated as part of an estate; (2) how post-mortem privacy and third-party confidentiality should limit succession-based access; and (3) which comparative principles can reduce uncertainty for heirs, platforms, and courts across different legal systems.

Source selection was deliberately limited to materials that could answer those questions. Primary sources include the GDPR and its express treatment of deceased persons, Article 8 of the European Convention on Human Rights, French legislation governing post-mortem data directives, the German Federal Court of Justice decisions on access to a deceased Facebook account, the UAE Personal Data Protection Law, and the current UAE Personal Status Law. These sources were selected because they represent distinct regulatory techniques: data protection exclusion coupled with national discretion, human rights protection, lifetime directives, universal succession through case law, and a legal system in which succession and data protection rules exist but do not expressly regulate social media inheritance.

Secondary sources were selected for direct substantive relevance to digital succession, post-mortem privacy, digital assets, online-account contracts, and comparative inheritance law. The revised source base therefore prioritises scholarship by Harbinja, Buitelaar, Banta, Mikk and Sein, Fuchs, Maspes, Castillo Parrilla, Szwajdler, and recent comparative work on digital inheritance. The analysis excluded sources in which the expression "digital inheritance" referred to cultural-heritage preservation, technological replication, or other non-succession contexts.

The comparative method is functional rather than merely jurisdictional. It compares how each system addresses the same practical problems: the transferability of contractual rights, the treatment of communication content, the protection of third-party data, the effect of the deceased's prior instructions, and the availability of judicial remedies when platforms deny or restrict access. This approach avoids assuming that any single national solution can be transplanted into another legal order. Instead, it identifies regulatory functions that can be implemented through different doctrinal mechanisms.

The study does not claim to provide an exhaustive survey of all European jurisdictions, nor does it empirically measure the frequency of digital inheritance disputes. Germany and France serve as contrasting European examples because Germany has developed a strong universal succession approach through case law. In contrast, France has enacted express rules enabling individuals to give binding directions about their personal data after death.

The resulting framework is therefore normative and comparative: it aims to derive legally defensible principles for access to justice in digital-estate disputes, rather than propose a single uniform substantive rule for all jurisdictions.

3 LEGAL FRAMEWORK GOVERNING DIGITAL PRIVACY AND DIGITAL INHERITANCE

Understanding the legal regulation of digital inheritance requires examining the legal concepts on which it is founded, particularly digital privacy and the legal nature of digital assets. The increasing integration of digital technologies into everyday life has fundamentally altered the traditional understanding of succession by introducing assets that combine proprietary, contractual, and personality-related characteristics. Consequently, determining whether social media accounts should pass to heirs requires a careful examination of the legal status of digital privacy, the classification of digital assets, and the interaction between succession law, data protection legislation, and contractual obligations imposed by digital service providers. This section therefore establishes the legal framework necessary for analysing digital inheritance under both UAE and European law before examining the comparative approaches adopted by different legal systems.[10]

3.1. The Legal Nature of Digital Privacy

The right to privacy constitutes one of the fundamental human rights recognised in both international human rights law and domestic legal systems. Traditionally, privacy has been understood as protecting an individual's personal sphere against arbitrary interference by public authorities or private actors. However, the rapid expansion of digital technologies has significantly transformed the scope of this right. Personal communications, photographs, videos, cloud storage, biometric information, and social media activities have become integral components of an individual's digital identity, thereby extending the concept of privacy beyond physical spaces into the digital environment.

Digital privacy has consequently evolved into an autonomous legal interest requiring protection independent of traditional property rights. Recent empirical research further confirms that post-mortem privacy remains an underdeveloped area of law despite growing public awareness of digital legacy planning. It shows that individuals increasingly expect legal protection for their digital identity after death, while current legal frameworks still provide fragmented and inconsistent solutions. Unlike tangible property, digital information frequently contains highly personal, confidential, and relational data that

10 José Antonio Castillo Parrilla, 'The Legal Regulation of Digital Wealth: Commerce, Ownership and Inheritance of Data' (2021) 29(5) European Review of Private Law 807 <https://doi.org/10.54648/erpl2021042> accessed 30 June 2026; Szwajdler (n 1).

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concern not only the account holder but also third parties. Accordingly, access to digital accounts after death raises complex legal questions concerning personal rights, informational self-determination, and post-mortem privacy.[11]

Within the European legal framework, Article 8 of the European Convention on Human Rights protects privacy by guaranteeing respect for private and family life and correspondence. The Convention does not expressly regulate digital inheritance, but its privacy protections shape the legal environment in which disputes over digital communications arise. The GDPR provides the principal EU framework for personal data processing; importantly, recital 27 states that the Regulation does not apply to the personal data of deceased persons and allows Member States to provide rules for such processing. National law therefore remains central to post-mortem data governance and digital succession.[12]

The UAE has likewise strengthened legal protection for digital privacy through Federal Decree-Law 45 of 2021 concerning the Protection of Personal Data, reflecting the country's commitment to a modern legal framework for protecting personal data in an increasingly digital economy. Although the legislation establishes extensive safeguards governing the collection, processing, and disclosure of personal data, it does not expressly regulate the legal status of digital accounts after their owners' deaths. Consequently, important legal questions remain concerning the relationship between privacy rights, succession law, and digital inheritance.[13]

Accordingly, digital privacy should no longer be viewed solely as an individual personal right but rather as a multidimensional legal concept intersecting with data protection, succession law, contractual obligations, and fundamental human rights. This interaction forms the foundation upon which contemporary legal debates concerning digital inheritance continue to evolve.

3.2. Digital Assets and Digital Inheritance

The emergence of digital technologies has fundamentally altered the traditional concept of property and succession. Unlike conventional assets, digital assets frequently combine economic value with personal information, contractual rights, and intellectual property, making their legal classification considerably more complex. Social media accounts constitute one of the most prominent examples of this new category of digital assets because they simultaneously function as repositories of personal communications, commercially valuable content, and legally protected personal data.[14]

11 Buitelaar (n 2); Harbinja, McVey and Edwards (n 9).
12 Council of Europe, *European Convention on Human Rights* (n 4) art 8; Buitelaar (n 2).
13 UAE Federal Decree-Law 45 of 2021 (n 8).
14 Castillo Parrilla (n 10); Banta (n 1); Szwajdler (n 1).

From a legal perspective, digital assets cannot be treated as a homogeneous category. Some possess purely economic value, such as cryptocurrency, domain names, monetised online businesses, and commercially operated social media accounts. Others primarily contain highly personal information, including private correspondence, photographs, videos, personal documents, and confidential communications. This distinction significantly affects whether the asset becomes part of the deceased's estate or remains protected by post-mortem privacy considerations.

Accordingly, the legal debate surrounding digital inheritance extends beyond the ordinary rules governing succession. It requires balancing several competing legal interests, including heirs' proprietary interests, the deceased's right to privacy, contractual obligations arising from platform terms of service, and the rights of third parties whose personal data may also be contained in the relevant digital account.

For this reason, contemporary legal scholarship increasingly distinguishes between personal digital assets and commercial digital assets. Personal digital accounts are primarily intended for private communication and the expression of individual identity, whereas commercial digital accounts function as income-generating assets that may constitute part of the deceased's patrimony. This distinction has become increasingly important in determining whether digital accounts should be inherited under ordinary succession rules or subjected to additional restrictions arising from privacy and data protection legislation.[15]

Distinguishing Personal and Commercial Social Media Accounts

The legal treatment of social media accounts for succession purposes largely depends upon their underlying legal nature. Not all digital accounts perform the same function, nor should they be governed by identical legal rules. A fundamental distinction must therefore be drawn between personal social media accounts, which primarily serve private and communicative purposes, and commercial social media accounts, which constitute economically valuable digital assets capable of generating income.[16]

Personal social media accounts generally contain private correspondence, photographs, videos, personal memories, family interactions, and other forms of intimate digital expression. These accounts are closely connected to the individual's personality and private life and frequently contain sensitive personal data relating not only to the deceased but also to relatives, friends, and other third parties. Consequently, unrestricted inheritance of such

15 Ilaria Maspes, 'Digital Inheritance, Right of the Heirs to Access to the Deceased User's Account, Non-Transferability Clauses: An Overview in the Light of Two Judgments Issued by Italian Courts' (2022) 8(1) The Italian Law Journal 407 <https://air.unimi.it/handle/2434/948114> accessed 30 June 2026; Tiina Mikk and Karin Sein, 'Digital Inheritance: Heirs' Right to Claim Access to Online Accounts Under Estonian Law' (2018) 27 Juridica International 117 <https://doi.org/10.12697/JI.2018.27.12> accessed 30 June 2026.

16 Hofstede (n 9); Szwajdler (n 1).

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accounts may significantly interfere with post-mortem privacy, informational self-determination, and the confidentiality of communications.

In contrast, commercial social media accounts perform fundamentally different functions. These accounts operate as business assets through advertising revenue, digital marketing, commercial partnerships, sponsored content, brand promotion, or electronic commerce. In many cases, the economic value of these accounts depends on audience size, market reputation, consumer trust, and accumulated digital goodwill. Consequently, commercial accounts increasingly resemble intangible business assets that can form part of the deceased's estate under the ordinary principles governing succession.

Nevertheless, the distinction between personal and commercial accounts rests solely on whether the account generates financial income. Certain professional accounts, despite producing economic value, may simultaneously contain confidential information protected by legal or professional obligations. Accounts maintained by lawyers, physicians, psychologists, financial advisers, or other professionals may include privileged communications or sensitive personal data belonging to clients or patients. In such circumstances, unrestricted inheritance could violate professional confidentiality, data protection legislation, and third-party privacy rights, even where the account itself has substantial commercial value.

Accordingly, this study argues that the legal classification of social media accounts should depend upon their predominant legal function rather than their technical characteristics. Accounts primarily serving personal communication should receive stronger privacy protection. In contrast, commercially operated accounts may, in principle, be treated as inheritable digital assets, provided appropriate safeguards protect confidential information and third-party rights. Such a functional approach offers a balanced solution for reconciling succession rights with digital privacy in both UAE and European legal systems.

4 COMPARATIVE LEGAL APPROACHES TO DIGITAL INHERITANCE

The lack of internationally uniform rules governing digital inheritance has created significant differences between national legal systems. While some jurisdictions recognise certain digital assets as inheritable property, others prioritise privacy rights and contractual obligations imposed by digital platform providers. The European legal landscape is particularly significant because it combines data protection law, human rights principles, and national succession rules. Examining these approaches provides valuable guidance for evaluating the current UAE legal framework and identifying possible legislative reforms.[17]

17 ibid; Hofstede (n 9).

4.1. European Legal Approaches

European legal systems have adopted different approaches to inheriting digital assets, reflecting the absence of harmonised legislation governing the legal status of social media accounts after death. Although the GDPR provides a comprehensive framework for protecting personal data, it does not establish uniform rules concerning the succession of digital assets or the post-mortem management of digital accounts. Consequently, Member States retain considerable discretion in determining whether digital assets should be treated as inheritable property or remain protected by privacy and contractual principles.[18]

Germany represents one of the most influential jurisdictions in this field following the landmark decision of the Federal Court of Justice (Bundesgerichtshof) in 2018 concerning access to a deceased person's Facebook account. The court held that digital accounts generally pass to heirs under the ordinary rules of succession, like letters, diaries, and other inheritable property. The court rejected Facebook's argument that privacy obligations prevented inheritance, emphasising that contractual rights and obligations normally transfer to heirs unless legislation expressly provides otherwise.[19]

Other European jurisdictions have adopted more cautious approaches. France, for example, has incorporated specific provisions on digital data after death into its data protection legislation, allowing individuals during their lifetime to determine how their digital data will be managed after death. In the absence of such instructions, access by heirs remains subject to statutory limitations intended to protect both the deceased's privacy and the legitimate interests of family members.[20]

These different legislative approaches demonstrate that European legal systems increasingly seek to reconcile succession rights with privacy protection rather than treating them as mutually exclusive legal interests. Instead of adopting absolute solutions, modern legislation increasingly favours proportionality, allowing access where justified while maintaining safeguards designed to protect confidential communications, personal dignity, and the rights of third parties.

4.2. The UAE Legal Position

The legal position in the United Arab Emirates differs considerably from the evolving European approach. While the UAE has established an advanced legislative framework for protecting personal data through Federal Decree-Law 45 of 2021 on the Protection of Personal Data, no legislation expressly regulates the inheritance of digital assets or

18 Regulation (EU) 2016/679 (n 3) recital 27, which states that the Regulation does not apply to the personal data of deceased persons and permits Member States to provide rules for such processing.

19 Case III ZR 183/17 (n 6); Fuchs (n 7).

20 Law of the French Republic no 78-17 of 1978 (n 5) art 85.

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determines the legal status of social media accounts after their owners' deaths. As a result, disputes concerning digital inheritance remain governed indirectly by the interaction between succession law, data protection legislation, contractual obligations, and the general principles protecting privacy and personal rights.[21]

The UAE Personal Data Protection Law establishes comprehensive safeguards governing the collection, processing, disclosure, and transfer of personal data. These provisions reflect the legislator's commitment to protecting informational privacy and strengthening confidence in the digital economy. Nevertheless, the legislation primarily regulates the processing of personal data during the data subject's lifetime and remains largely silent on the legal consequences after death. Consequently, neither heirs nor digital platform providers possess clear statutory guidance concerning access to the deceased's digital accounts or the extent to which digital assets form part of the estate.[22]

This legislative silence creates significant legal uncertainty. On the one hand, heirs may invoke the general principles of succession law to argue that economically valuable digital accounts should pass together with the remainder of the deceased's estate. On the other hand, digital platforms may rely on contractual terms of service or data protection obligations to refuse access. At the same time, concerns about post-mortem privacy may justify limiting disclosure of highly personal information contained in the account.

Unlike several European jurisdictions that have gradually developed judicial and legislative solutions for digital inheritance, UAE law has not yet established a coherent legal framework to reconcile these competing interests. Consequently, disputes are likely to be resolved through general legal principles rather than specific statutory rules, increasing legal uncertainty for heirs, digital platform providers, and courts alike.

This legislative gap demonstrates the growing need for a dedicated legal framework governing digital inheritance in the UAE. Such legislation should clearly distinguish between personal and commercially valuable digital assets, regulate the rights and obligations of heirs and digital service providers, and establish procedural safeguards capable of protecting both digital privacy and legitimate succession rights.[23]

21 UAE Federal Decree-Law 45 of 2021 (n 8).

22 ibid. The statute contains no express post-mortem digital-account regime.

23 Al Ali and Mohammed (n 9). Their analysis relied on Federal Law 28 of 2005, which has since been replaced by Federal Decree-Law 41 of 2024. See also Elhag Mohamed Elhag Eldosh, 'Digital Estate Management in UAE Law: An Original Legal Jurisprudential Study' (2026) 14(2) Malaysian Journal of Syariah and Law 375 <https://doi.org/10.33102/mjsl.vol14no2.1096> accessed 30 June 2026.

4.3. Comparative Synthesis: From National Rules to Common Regulatory Functions

The comparison reveals that the apparent conflict between inheritance and privacy is better understood as a problem of legal architecture. Germany demonstrates that a social media contract and its stored communications can, in principle, fall within universal succession. In contrast, France demonstrates that post-mortem data governance can be structured around the deceased's prior directions and limited heir access. The GDPR, meanwhile, does not itself govern the personal data of deceased persons, leaving Member States room to legislate. These approaches are doctrinally different, but they converge on the need for a legally supervised pathway rather than unilateral platform discretion.[24]

This convergence has an access-to-justice dimension. Heirs need a predictable route to establish standing, prove entitlement, and obtain the information needed to identify or administer estate assets. Platforms need rules that clarify when disclosure is lawful and when confidentiality must prevail. Third parties whose messages or personal data are embedded in an account need safeguards against unnecessary disclosure. A regulatory system that leaves all three questions to private terms of service risks producing inconsistent outcomes based on platform design rather than legal principle.

For comparative purposes, five common regulatory functions emerge. First, the law should distinguish the transfer of the account relationship from unrestricted disclosure of every item of content. Second, it should give meaningful effect to the account holder's lifetime instructions. Third, it should protect third-party communications through necessity and proportionality limits. Fourth, it should provide a judicial or similarly independent mechanism for contested cases. Fifth, it should require platforms to maintain transparent, intelligible procedures for post-mortem requests. These functions can be implemented differently in civil-law, common-law, European, and Middle Eastern systems without erasing their doctrinal differences.

The UAE is particularly well suited to this functional approach. Its current Personal Status Law, Federal Decree-Law 41 of 2024, treats the estate as property and financial rights left by the deceased. However, it does not specifically classify social media accounts or post-mortem data. The law came into force in 2025 and replaced the earlier Federal Law 28 of 2005. Any contemporary proposal for UAE reform should therefore be anchored in the 2024 legislation rather than the repealed framework.[25] Table 1 summarises the principal comparative differences and convergences relevant to the proposed framework.

24 Maspes (n 15); Mikk and Sein (n 15).

25 UAE Federal Decree-Law 41 of 2024 (n 8) arts 200–202. This Decree-Law replaced UAE Federal Law no 28 of 2005 'Regarding personal status' (19 November 2005) [2005] Official Gazette 439.

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***Table* 1. Comparative Legal Approaches to Post-Mortem Social Media Accounts**[26]

Jurisdiction / source	Succession position	Privacy and deceased's instructions	Access and platform implications
United Arab Emirates	General succession law can encompass property and financial rights, but current legislation does not specifically classify social media accounts or post-mortem account data.	The Personal Data Protection Law protects personal data but does not create a dedicated post-mortem digital privacy regime. No general statutory digital-directive mechanism is established for social media accounts.	Heirs and platforms lack a dedicated statutory procedure for proving entitlement, determining scope of disclosure, or separating inheritable value from confidential content.
European Union / GDPR baseline	The GDPR does not harmonise digital succession. Succession consequences remain primarily a matter for Member State law.	Recital 27 states that the GDPR does not apply to the personal data of deceased persons and allows Member States to provide rules for such data.	Platform duties depend on national succession, contract, privacy, and procedural law; EU data protection law does not itself create a uniform heir access right.
Germany	The Federal Court of Justice recognised the deceased user's Facebook contractual relationship as transferable to heirs under universal succession.	Privacy and telecommunications-confidentiality arguments did not justify a categorical exclusion of succession; however, access remains subject to the legal interests implicated by account content.	The 2018 judgement established transferability; the 2020 enforcement decision required access that enables heirs to use the account in a manner functionally equivalent to the deceased user, subject to the judgement.
France	French law does not rely solely on ordinary succession rules; post-mortem data management is specifically addressed by data protection legislation.	Article 85 of the French Data Protection Act permits individuals to issue general or specific instructions concerning retention, erasure, and communication of personal data after death.	Heirs may exercise defined post-mortem data rights in specified circumstances, giving platforms a statutory basis for processing certain requests while preserving limits tied to privacy and the deceased's wishes.

26 Source: Authors' synthesis based on the UAE Federal Decree-Law 45 of 2021 (n 8); UAE Federal Decree-Law 41 of 2024 (n 8); Case III ZR 183/17 (n 6); Case III ZB 30/20 (n 6); Law of the French Republic no 78-17 of 1978 (n 5) art 85.

5 RECONCILING PRIVACY RIGHTS AND SUCCESSION: A COMPARATIVE REGULATORY FRAMEWORK

The comparative analysis demonstrates that neither absolute inheritance nor absolute privacy protection provides an adequate legal solution for digital inheritance disputes. Treating all social media accounts as inheritable property risks violating the deceased's privacy and third-party rights, whereas denying heirs access may unjustifiably deprive them of economically valuable digital assets that form part of the estate. Consequently, a balanced legislative approach is required, one capable of reconciling competing legal interests while ensuring legal certainty for heirs, digital platforms, and judicial authorities.

5.1. A Functional Legal Classification of Social Media Accounts

This study proposes that a single legal rule should not govern social media accounts. Instead, their legal treatment should depend upon their predominant legal function. Under this functional approach, digital accounts may be divided into three principal categories. Table 2 operationalises this functional classification for succession and access decisions.

The first category comprises purely personal accounts, whose primary purpose is private communication, family interaction, and personal expression. Because these accounts contain highly personal information and confidential communications, they should continue to receive the highest degree of privacy protection after death, with heirs' access remaining subject to strict judicial supervision.

The second category includes commercially operated accounts generating measurable economic value through advertising revenue, sponsorship agreements, digital marketing, electronic commerce, or other business activities. Such accounts should generally be treated as inheritable digital assets forming part of the deceased's estate, subject to safeguards protecting third-party confidential information.

The third category consists of mixed accounts that simultaneously perform personal and commercial functions. These accounts require individual judicial assessment that balances the deceased's privacy interests against the legitimate proprietary interests of heirs, taking into account the proportion of commercial activity, the nature of the stored information, and the potential impact on third parties.

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Table 2. **Functional Classification and Presumptive Legal Treatment of Social Media Accounts**[27]

Account type	Predominant function	Presumptive succession treatment	Access standard	Core safeguards
Personal	Private communication, family interaction, memories, and identity expression.	No automatic unrestricted transfer of content. Succession interests should be recognised only to the extent compatible with privacy and applicable law.	Restricted or purpose-specific access; judicial authorisation where necessary, especially for intimate or disputed content.	Deceased's instructions; third-party privacy; confidentiality of communications; data minimisation; proportionality.
Commercial	Revenue generation, advertising, sponsorship, e-commerce, brand value, or other measurable economic activity.	Presumptively inheritable as an economic digital asset or contractual interest, subject to platform terms and mandatory law.	Heirs should receive the access reasonably necessary to preserve, value, administer, or transfer the economic interest.	Protection of third-party data; business confidentiality; intellectual property rights; verification of heirship and authority.
Mixed	Substantial personal and commercial functions coexist in the same account.	No categorical rule; the inheritable economic component should be separated, where feasible, from highly personal or confidential content.	Structured case-by-case balancing using the nature of the account, economic value, deceased's instructions, heir interests, third-party privacy, and platform obligations.	Proportionality; selective disclosure; technical segregation of content where feasible; judicial or independent oversight for contested access.

27 Source: Authors' proposed comparative framework, developed from the doctrinal analysis in Sections 3 to 5. The classifications are analytical categories rather than categories presently codified in a single jurisdiction.

5.2. Balancing Test between Privacy and Succession

Building upon comparative European experience, this study proposes that courts should apply a structured balancing test when resolving disputes concerning digital inheritance. Rather than granting automatic access or automatic refusal, judicial authorities should evaluate each case against clearly defined legal criteria.

These criteria should include:

(1) the legal nature of the digital account;

(2) whether the account possesses independent economic value;

(3) the degree of personal and confidential information contained within the account;

(4) the existence of instructions left by the deceased concerning the management of digital assets after death;

(5) the legitimate interests of heirs;

(6) the privacy rights of third parties whose communications or personal information may be affected; and

(7) the contractual obligations arising from the platform's terms of service.

Applying these criteria enables courts to reconcile succession rights with digital privacy while ensuring proportionality, legal certainty, and respect for fundamental rights.

5.3. Comparative and Transnational Legislative Principles

The proposed framework should not be understood as a set of recommendations addressed only to the UAE legislator. The comparative evidence supports a broader set of principles that can inform national law, European debates, and platform governance wherever succession rights intersect with digital privacy.

First, legal systems should separate whether an account relationship is transmissible from whether heirs are entitled to inspect all account content. Transferability may follow from succession law, yet confidentiality, third-party privacy, professional secrecy, or the deceased's express instructions can still limit disclosure of particular communications. This distinction allows inheritance and privacy to operate cumulatively rather than as mutually exclusive rules.

Second, lifetime autonomy should receive substantial weight. Individuals should be able to issue clear, revocable directions concerning preservation, deletion, transfer, memorialisation, or disclosure of digital material after death. France provides a useful legislative model because Article 85 permits general and specific post-mortem data directives and recognises a role for heirs in implementing them where appropriate. Similar

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mechanisms could be incorporated into succession legislation, data protection legislation, or legally recognised digital-will systems in other jurisdictions.[28]

Third, judicial access should be calibrated to necessity and proportionality. Where an heir seeks access to administer a commercially valuable account, identify an estate asset, or resolve a concrete legal claim, a court should be able to order targeted disclosure. In contrast, a request motivated only by curiosity should not automatically justify access to intimate communications. This is particularly important where communications contain data or secrets belonging to living third parties.

Fourth, platform terms should not be permitted to defeat mandatory succession rights or statutory post-mortem directives through blanket non-transferability clauses. At the same time, legislation should not require platforms to disclose content without a lawful basis. Clear statutory safe harbours can reduce the incentive for excessive refusal while protecting platforms that comply in good faith with verified requests and judicial orders. Scholarship on private ordering in digital estates has long identified the risks created when platform contracts effectively determine the fate of digital assets without adequate public law safeguards.[29]

Fifth, lawmakers should adopt technologically neutral definitions. Regulation should apply to digital accounts, stored content, access credentials, monetised channels, cloud-based assets, and functionally equivalent services without tying the rule to a particular social media brand. This is essential because platforms and business models change more quickly than succession legislation.

Sixth, cross-border disputes require rules on jurisdiction, applicable law, and recognition of orders. A deceased user may reside in one country, hold citizenship in another, contract with a platform established elsewhere, and store data in multiple locations. Comparative reform should therefore connect substantive digital succession rules with private international law and procedural cooperation. The objective is not worldwide uniformity, but sufficient interoperability to prevent an heir from possessing a substantive right that cannot practically be enforced against a foreign platform.[30]

For the UAE, these principles support targeted legislative clarification within the current succession and data protection framework. For European jurisdictions, they support greater coherence between national post-mortem rules and the GDPR-based data protection environment. Internationally, they identify a minimum architecture for fair digital-estate administration: user autonomy, differentiated asset classification, third-party protection, platform transparency, and effective judicial remedies.

28 Law of the French Republic 78-17 of 1978 (n 5) art 85.

29 Banta (n 1).

30 See generally, Hofstede (n 9); Szwajdler (n 1).

6 DISCUSSION: ACCESS TO JUSTICE, PLATFORM POWER, AND COMPARATIVE LEGAL DEVELOPMENT

Digital inheritance is not only a substantive private law problem. It is also an access-to-justice problem because the practical value of an inheritance right depends on whether heirs can identify the asset, establish entitlement, secure cooperation from the service provider, and obtain an enforceable remedy. A rule stating that an account is inheritable is incomplete if the heir cannot access it meaningfully; conversely, a platform procedure that permits download or memorialisation cannot substitute for a legal determination of ownership, confidentiality, or succession.

The German Facebook litigation illustrates this distinction. The Federal Court of Justice first recognised the contractual relationship as inheritable. It later clarified that meaningful access could not be reduced to delivering a static data copy where the heir was entitled to use the account environment in a legally relevant manner. The case shows that remedy design matters as much as abstract classification.[31]

The comparative analysis also challenges the assumption that privacy necessarily ends at death. Although the GDPR expressly excludes deceased persons from its direct personal scope, post-mortem interests remain legally significant through national legislation, confidentiality rules, personal interests, the privacy of living correspondents, and the deceased's autonomous choices made during their life. Recent empirical work on digital legacy likewise shows that users, practitioners, and regulators experience continuing uncertainty about post-mortem privacy and platform practices.[32]

This suggests that future regulation should avoid two extremes. A property-only model risks transforming intimate communications into ordinary estate inventory. A privacy-only model may freeze economically valuable assets, frustrate estate administration, and give platforms excessive power. The functional classification proposed in this article is intended to avoid both outcomes by asking what legal function a particular account or component of an account performs.

The framework also has implications beyond the UAE-Europe comparison. Digital platforms operate transnationally, while succession remains predominantly national. The resulting mismatch means that even well-designed domestic legislation can be undermined by jurisdictional fragmentation. A practical international agenda should therefore

31 Jenny Gesley, 'Germany: Federal Court of Justice Rules Digital Social Media Accounts Inheritable' (*Library of Congress*, 7 September 2018) <https://www.loc.gov/item/global-legal-monitor/2018-09-07/germany-federal-court-of-justice-rules-digital-social-media-accounts-inheritable/> accessed 20 June 2026. Discussing the BGH follow-up ruling on meaningful account access.

32 Harbinja, McVey and Edwards (n 9).

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encourage interoperable procedures for death verification, heir authentication, recognition of court orders, preservation of disputed data, and targeted disclosure. These procedural elements are particularly relevant to jurists and policymakers concerned with access to justice because they determine whether rights can actually be exercised across borders.

Finally, the analysis indicates that legislative reform should be accompanied by public-facing estate planning tools. Users should be informed, in clear language, of available legacy settings and the legal effect of those settings. Lawyers and notaries should treat digital accounts as a routine component of estate planning. Courts should have authority to tailor orders to the type of account and the sensitivity of its contents. Platforms should publish transparent criteria and preserve data while bona fide disputes are pending. Together, these measures translate comparative legal principles into an administrable system rather than leaving digital inheritance to ad hoc negotiation.

7 CONCLUSION

This study has shown that digital inheritance cannot be resolved by asking a single binary question about whether a social media account is "property" or "privacy". Accounts combine contractual rights, economic interests, personal communications, intellectual property, and data concerning both the deceased and living third parties. Effective regulation must therefore distinguish among these functions and provide a legal process that can balance them.

The comparative findings extend beyond a proposal for UAE reform. Germany demonstrates the capacity of ordinary succession doctrine to encompass digital account relationships; France demonstrates the value of express post-mortem data directives; the GDPR demonstrates that European data protection law leaves space for Member States to regulate deceased persons; and the UAE demonstrates the uncertainty that remains where modern succession and data protection statutes do not expressly connect those regimes to social media accounts. The lesson is not that one model should be copied wholesale, but that coherent digital succession systems require the same core regulatory functions: classification, user autonomy, third-party protection, transparent platform obligations, and enforceable remedies.

The article proposes a functional three-part classification of personal, commercial, and mixed accounts, supported by a structured judicial balancing test. It further derives transnational principles separating transmissibility from disclosure, giving weight to lifetime directions, limiting access by necessity and proportionality, constraining contractual clauses that defeat mandatory rights, using technologically neutral definitions, and addressing cross-border enforcement.

For the UAE, these findings support targeted reform anchored in Federal Decree-Law 41 of 2024 on Personal Status and Federal Decree-Law 45 of 2021 on Personal Data Protection. Reform should expressly address the status of digital accounts, the effect of digital-will instructions, platform duties, and judicial authority to order proportionate access. For European legal systems, the findings support greater coherence between national succession law, *post-mortem* data rules, and platform practices rather than reliance on the GDPR as if it supplied a complete answer.

More broadly, digital inheritance should be understood as an access-to-justice issue at the intersection of succession, privacy, contract, data protection, and cross-border procedure. The long-term objective should be neither automatic inheritance nor automatic secrecy. It should be a legally supervised framework in which economically legitimate succession claims can be realised without treating personal communications and third-party data as ordinary property. Such a framework offers a durable basis for national reform and for international convergence as digital assets become an increasingly ordinary part of deceased persons' estates.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЦИФРОВЕ СПАДКУВАННЯ ОБЛІКОВИХ ЗАПИСІВ У СОЦІАЛЬНИХ МЕРЕЖАХ: БАЛАНС МІЖ ПРАВОМ НА ПРИВАТНІСТЬ І СПАДКУВАННЯМ ЗА ЗАКОНОДАВСТВОМ ОАЕ ТА ЄВРОПЕЙСЬКИХ ДЕРЖАВ

Енас Мохаммед Аль-Кодсі*, Сумая Аль-Джахурі, Хабіба Аль-Шамсі, Абуельвафа Ібрагім та Омар Юнес

АНОТАЦІЯ

Передумови. *Облікові записи в соціальних мережах дедалі частіше поєднують у собі економічну цінність, приватне листування, об'єкти інтелектуальної власності, персональні дані як власників облікових записів, так і третіх осіб. Після смерті власника облікового запису спадкоємці нерідко вимагають надання доступу до нього для належного управління спадщиною, тоді як онлайн-платформи посилаються на необхідність захисту приватності, конфіденційності або на договірні обмеження. Ця правова проблема значно ускладнюється тим, що Загальний регламент про захист даних (GDPR) не поширюється на персональні дані померлих осіб, підходи національних правових систем європейських держав залишаються неоднорідними, а законодавство ОАЕ, попри наявність сучасних норм у сфері спадкування та захисту персональних даних, не містить спеціального правового режиму спадкування облікового запису в соціальних мережах. У цьому*

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і на яких підставах, а також як правові системи можуть узгодити спадкове правонаступництво із захистом приватності після смерті особи.

Методи. *У статті застосовано догматичний (формально-юридичний), аналітичний та функціонально-порівняльний методи. Досліджено положення GDPR, статті 8 Конвенції про захист прав людини і основоположних свобод, законодавство Франції щодо захисту цифрових даних після смерті особи, судову практику Федерального верховного суду Німеччини у справі стосовно доступу до облікового запису померлої особи у Facebook, Закон ОАЕ про захист персональних даних та чинний Закон ОАЕ про особистий статус. Аналіз вторинних джерел обмежено науковими працями, безпосередньо присвяченими цифровому спадкуванню, посмертній приватності, цифровим активам, договірним умовам онлайн-платформ та успадкуванню облікових записів. Німеччину та Францію розглянуто як контрастні європейські моделі, тоді як ОАЕ є прикладом відсутності спеціального законодавчого регулювання на перетині спадкового права та права захисту персональних даних.*

Результати та висновки. *Порівняльний аналіз свідчить, що ні модель автоматичного спадкування, ні абсолютизація права на приватність не забезпечують належного вирішення проблеми. Автори пропонують функціональну класифікацію, яка розмежовує особисті, комерційні та змішані облікові записи, а також структурований алгоритм судового зважування конкуруючих прав та інтересів. Крім того, виокремлено шість порівняльно-правових принципів: розмежування переходу права на обліковий запис і розкриття його змісту (контенту); врахування цифрових розпоряджень особи, зроблених за життя; захист конфіденційності комунікацій за участю третіх осіб; забезпечення пропорційного доступу на підставі судового рішення; недопущення позбавлення спадкоємців прав, гарантованих імперативними нормами права, на підставі стандартних договірних умов онлайн-платформ; подолання колізій та забезпечення виконання судових рішень у транскордонних правовідносинах. Зазначені принципи мають значення не лише для реформування законодавства ОАЕ, а й для розвитку європейського та міжнародного права. Отже, цифрове спадкування слід розглядати як проблему забезпечення доступу до правосуддя, що потребує реалізації прозорих процедур, запроваджених онлайн-платформами, судового контролю за застосуванням засобів правового захисту та узгодженого регуляторного підходу на перетині норм спадкового, договірного права, законодавства про захист приватності та персональних даних.*

Ключові слова: *Цифрове спадкування; облікові записи в соціальних мережах; посмертна приватність; спадкове право; GDPR; законодавство ОАЕ; доступ до правосуддя.*

ABSTRACT IN ARABIC*

پژوهشی مقاله

الميراث الرقمي لحسابات وسائل التواصل الاجتماعي: الموازنة بين حقوق الخصوصية وأحكام الميراث في القانونين الإماراتي والأوروبي

إيناس محمد القدسي*، سمية الجهوري، حبيبة الشامسي، أبو الوفا إبراهيم، وعمر يونس

الملخص

الخلفية

أدى التوسع المتسارع في التقنيات الرقمية إلى تحويل حسابات وسائل التواصل الاجتماعي إلى أصول رقمية تجمع بين القيمة الشخصية والاقتصادية والعاطفية. وبعد وفاة صاحب الحساب، يثور التساؤل حول ما إذا كان الحساب ينتقل إلى الورثة بوصفه جزءًا من التركة، أم يظل محميًا بمقتضى الحق في الخصوصية. وبينما بدأت بعض الدول الأوروبية في تطوير حلول تشريعية وقضائية للميراث الرقمي، لا تزال المعالجة القانونية متباينة، كما لا يتضمن التشريع الإماراتي إطارًا صريحًا ينظم مصير حسابات التواصل الاجتماعي بعد الوفاة. وتهدف الدراسة إلى تحديد الطبيعة القانونية لهذه الحسابات، وبيان كيفية الموازنة بين الخصوصية الرقمية للمتوفى، والمصالح المشروعة للورثة، والتزامات المنصات الرقمية.

المنهجية

تعتمد الدراسة منهجًا قانونيًا تأصيليًا وتحليليًا ومقارنًا. وتحلل التشريعات الإماراتية المتعلقة بحماية البيانات الشخصية والميراث، وتقارنها بالأدوات القانونية الأوروبية ذات الصلة، ولا سيما اللائحة العامة لحماية البيانات، وبعدد من التشريعات الوطنية والأحكام القضائية الأوروبية. كما تتناول الدراسة الشروط والسياسات التي تعتمدها أبرز منصات التواصل الاجتماعي، بهدف تحديد أوجه التشابه والاختلاف والفجوات التنظيمية في معالجة الميراث الرقمي.

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النتائج والاستنتاجات

أظهرت الدراسة أن غياب قواعد تشريعية صريحة للميراث الرقمي يسبب حالة من عدم اليقين بشأن ملكية حسابات التواصل الاجتماعي وإمكان انتقالها إلى الورثة. كما كشفت المقارنة عن تعدد الاتجاهات القانونية بين اعتبار الحسابات أصولًا قابلة للميراث، والنظر إليها بوصفها حقوقًا شديدة الارتباط بشخص صاحبها وتستحق حماية مستمرة للخصوصية. وتبين كذلك أن سياسات المنصات، بمفردها، لا توفر حلًا كافيًا؛ لأنها لا تحقق درجة اليقين والقوة الإلزامية التي يوفرها التنظيم التشريعي. وخلصت الدراسة إلى ضرورة التمييز وظيفيًا بين الحسابات الشخصية، والحسابات ذات القيمة التجارية، والحسابات المختلطة؛ فالحساب التجاري يمكن، من حيث الأصل، أن يدخل في التركة مع حماية بيانات الغير، بينما تظل المراسلات الشخصية محمية بعد الوفاة، ما لم يوافق صاحب الحساب مسبقًا على الكشف عنها أو يصدر إذن قضائي لسبب قانوني ملزم. وتقترح الدراسة اعتماد اختبار قضائي للموازنة يراعي طبيعة الحساب وقيمته الاقتصادية ودرجة احتوائه على بيانات شخصية، وتعليمات المتوفى، ومصالح الورثة، وحقوق الغير، وشروط المنصة. كما توصي بإصدار تنظيم إماراتي خاص يجيز إعداد وصية أو توجيهات للميراث الرقمي، ويلزم المنصات بوضع إجراءات شفافة لطلبات الورثة، بما يحقق التوازن بين حقوق الميراث والخصوصية والأمن القانوني.

الكلمات المفتاحية

الميراث الرقمي؛ حسابات وسائل التواصل الاجتماعي؛ الخصوصية الرقمية؛ اللائحة العامة لحماية البيانات؛ الأصول الرقمية؛ قانون الميراث؛ القانون الإماراتي؛ القانون المقارن.

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Research Article

WHO AUTHORISES SURVEILLANCE? COERCIVE DIGITAL SURVEILLANCE, THE RULE OF LAW, AND ACCESS TO JUDICIAL OVERSIGHT: A CENTRAL AND EASTERN EUROPEAN PERSPECTIVE

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ABSTRACT

Background: *Debates on digital surveillance are largely centred on privacy and data protection. However, the fundamental constitutional issue with coercive digital surveillance lies less in the severity of the interference than in who authorises it, and the oversight to which it is subject. In other words, the issues are essentially the separation of powers and access to justice.*

Method: *The study uses a comparative doctrinal approach. Four countries selected through purposive sampling, Poland, Hungary, Ukraine, and the United Kingdom, are analysed based on the European Parliament's PEGA Inquiry, the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), and reports by the European Commission.*

Results and Conclusions: *The shift of the authority to authorise surveillance from the legislature to the executive, and from there to lower-level administration and, increasingly, to private actors, has necessitated an examination of the authorisation architecture through four key hinges: the legislative reserve, independent prior authorisation, effective ex post oversight, and delegation safeguards. The study shows how digital surveillance challenges each hinge individually and how this manifests in the case study. The study's contribution lies in reframing digital surveillance primarily as a matter of authority allocation, identifying the four hinges of the authorisation architecture, and proposing a cumulative authorisation test tiered to the intensity of the intervention. Within this framework, access to justice becomes a prerequisite for legitimacy; the criterion, meanwhile, becomes transferable across different regimes. The case studies bear this out: in Poland and Hungary, all four hinges are failing simultaneously; in Ukraine, three are being rebuilt under EU accession conditionality; and in the United Kingdom, strengthening a single hinge is not enough to compensate for weakness in the others. The comparison shows that no matter how meticulously a proportionality review is conducted, it cannot correct a defect at the authorisation stage.*

1 INTRODUCTION

The revelation that the Pegasus spyware[1] was used against opposition politicians, lawyers, and journalists in Poland and Hungary in 2021 has brought digital surveillance back onto the agenda of European public law.[2] The debate has largely centred on the balance between privacy and the protection of personal data. However, the thought-provoking aspect of the incident is not the severity of the intrusion into an individual's private sphere, but rather the question of who authorises such an intrusion and to what (administrative or judicial) oversight it is subsequently subject. This is because this surveillance measure, which completely infiltrates the devices, such as telephones and computers, of the person under surveillance, has in many cases been implemented directly by security units attached to the executive, without independent judicial prior authorisation and without provision for effective *ex post* oversight. Yet, according to the established case law of the European Court

1 Pegasus is commercial spyware developed by the Israeli NSO Group that provides full access to a target device's microphone, camera, messaging apps, and location data without the owner's knowledge. The European Parliament's PEGA Committee of Inquiry investigated the use of this software in Europe between 2022 and 2023; the Committee found that the software was used systematically in Poland and Hungary against civilians, including opposition politicians, lawyers, and journalists. See European Parliament PEGA Committee, *Report of the Investigation of Alleged Contraventions and Maladministration in the Application of Union Law in Relation to the Use of Pegasus and Equivalent Surveillance Spyware* (A9-0189/2023, 22 May 2023) paras 5, 18, 82, 111 <https://www.europarl.europa.eu/doceo/document/A-9-2023-0189_EN.html> accessed 20 July 2026.

2 For the scope and European dimension of these revelations, see ibid.

of Human Rights (ECtHR), an intervention of this nature must, in principle, be subject to independent and, preferably, judicial prior review.[3]

However, the events in question go beyond isolated instances of abuse. They indicate a deeper, structural shift. Digital technologies are shifting what we term in this study the 'coercive surveillance authority' from the legislature to the executive, from high-level decision-making to lower-level administrative practice, and finally to private actors outside the public sector.[4] Indeed, the same trend has manifested itself in welfare state practices. Social welfare systems have evolved into interventionist algorithmic infrastructures that automatically profile citizens to verify eligibility and impose direct sanctions in the event of irregularities.[5] At this point, a privacy-centred approach can only see one side of the coin; it weighs up the severity of the intervention but often overlooks the institutional architecture that legitimises it, that is, by which body and through which procedure the authority is granted.

In this context, this study addresses digital surveillance not merely as a matter of rights violations, but as an issue of the constitutional allocation of authority and access to oversight. In this regard, the first question is not whether the intervention is proportionate, but who is constitutionally authorised to authorise it, and to what independent oversight the decision is subject. From this perspective, digital surveillance touches directly on the core of the separation of powers and access to justice.

The authorisation architecture rests on four hinges: the legislature sets the fundamental rule; an independent authority pre-approves the measure; implementation remains subject to effective *ex post* oversight and a right of appeal; and public accountability persists even when authority is delegated to private actors. Digital surveillance, however, challenges each of these hinges in turn. Bulk and automated authorisations reduce prior authorisation to a mere formality; 'black box' systems render *ex post* oversight ineffective; and the delegation of infrastructure to private providers disperses accountability.[6]

3 *Szabó and Vissy v Hungary* App no 37138/14 (ECtHR, 12 January 2016) para 77 <https://hudoc.echr.coe.int/eng?i=001-160020> accessed 20 July 2026 (requirement for independent, preferably judicial, prior review).

4 Maarten Bouwmeester, 'Checks and Balances under Pressure in the Welfare State' (2025) 27(2) European Journal of Social Security 102-3 <https://doi.org/10.1177/13882627251330438> accessed 20 July 2026; Ryan Calo and Danielle Keats Citron, 'The Automated Administrative State: A Crisis of Legitimacy' (2021) 70(4) Emory Law Journal 832-3 <https://scholarlycommons.law.emory.edu/elj/vol70/iss4/1> accessed 20 July 2026. Regarding the transfer to private actors, see also Sarah Brayne, Sarah Lageson and Karen Levy, 'Surveillance Deputies: When Ordinary People Surveil for the State' (2023) 57(4) Law & Society Review 482 <https://doi.org/10.1111/lasr.12681> accessed 20 July 2026.

5 Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights* (UN Doc A/74/493, 11 October 2019) para 3 <https://docs.un.org/en/a/74/493> accessed 20 July 2026.

6 Regarding the reduction of prior authorisation to a mere token gesture, see Jennifer Cobbe, 'Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making' (2019) 39(4) Legal Studies 643 <https://doi.org/10.1017/lst.2019.9> accessed 20 July 2026 (referring to the art 29 Working Party, emphasising that human oversight must be 'meaningful,

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The literature on this subject is extensive but fragmented. The notion that authorising surveillance constitutes a separation-of-powers problem is not new. However, this debate has largely been reduced to a single question: whether the power to authorise should reside in the executive or the judiciary, and it has often been examined within a single legal system. In this vein, Clapham's emphasis on the separation of powers, Zalnieriute, Moses, and Williams's analysis of the rule-of-law values, Cobbe's critique of judicial review, and Brayne, Lageson, and Levy's analysis of proxy actors have each remained separate strands illuminating a single aspect. The contribution of this study lies in integrating these strands into a single, cumulative architecture of authorisation and linking this architecture to a tiered criterion based on the intensity of intervention.[7] Some of the studies examine the impact of automated decision-making on the rule of law.[8] Another part addresses the distortion of the balance of powers in favour of the executive, whilst yet another examines the surveillance regime of a specific country. Conversely, there is a gap in the literature for an integrated approach that does not limit the authorisation of coercive digital surveillance solely to the power to grant prior authorisation; that combines the legislative reserve, *ex post* oversight and special representatives within a single framework; that compares this in the context of Central and Eastern Europe and the European Union; and that proposes a workable standard.

The study's thesis is that intrusive digital surveillance can be legitimate only within a four-condition authorisation framework. In this context, first, the legislature must regulate the measure's fundamental framework in a manner that is accessible and foreseeable. Second, the measure must be subject to independent judicial or quasi-judicial prior authorisation. Third, the measure must be subject to effective *ex post* oversight and a right of appeal. Fourth, public accountability must be safeguarded even when authority is delegated to private actors. This study transforms these four conditions into a graduated criterion based on the intensity of the intervention, namely the 'legislative reserve, judicial prior authorisation, effective *ex post* oversight and appeal, and safeguards against delegation' test.

This study does not claim to replace the debate centred on privacy and proportionality. Rather, it points to a prerequisite that must be fulfilled beforehand. Before weighing the

rather than just a token gesture'). Regarding the rendering of human oversight ineffective in black-box systems, see Madalina Busuioc, 'Accountable Artificial Intelligence: Holding Algorithms to Account' (2021) 81(5) Public Administration Review 833 <https://doi.org/10.1111/puar.13293> accessed 20 July 2026 (the human intermediary becoming a 'hollow check' in automated decisions). Regarding the delegation to private providers and the fragmentation of accountability, see Brayne, Lageson and Levy (n 4) 482.

7 Nicholas Clapham, 'The Authorisation of Surveillance: A Separation of Power?' (*UK Constitutional Law Association Blog*, 25 June 2015) <https://ukconstitutionallaw.org/2015/06/25/nicholas-clapham-the-authorisation-of-surveillance-a-separation-of-power/> accessed 20 July 2026.

8 For a general overview, see Cobbe (n 6); Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) Modern Law Review 425 <https://doi.org/10.1111/1468-2230.12412> accessed 20 July 2026.

severity of an intervention, it must be clear who authorised it and within which institutional framework. If this step is overlooked, the proportionality test risks obscuring the more fundamental question of authorisation.

The remainder of the study proceeds as follows: the second chapter sets out the study's aim, research questions, and methodology; the third chapter justifies why a shift from privacy to authorisation is necessary; and the fourth chapter analyses the four hinges of authorisation. In the fifth chapter, this analysis is applied to Central and Eastern Europe and the European Union; in the sixth chapter, a graduated framework is constructed. The seventh chapter addresses potential objections, while the eighth chapter presents our conclusions.

2 AIMS, RESEARCH QUESTIONS AND METHODOLOGY

In the context of coercive digital surveillance, the central issues, before any discussion of proportionality, are who grants the authority and under what institutional conditions. This study aims to transform these conditions into an evaluation criterion. This aim is articulated in two questions: (1) Under which institutional conditions can the authorisation of coercive digital surveillance be considered legitimate? (2) How do these conditions actually operate and erode across different types of European regimes?

The study adopts a comparative doctrinal approach, focusing on Central and Eastern Europe. This is because Poland and Hungary provide two examples where the politically motivated use of Pegasus intersects with a broader pattern of democratic backsliding.[9] Ukraine, meanwhile, holds particular significance in terms of its reform and European Union harmonisation process. ECtHR and CJEU case law form a common legal basis. The United Kingdom is considered a counter-example.

The four countries included in the comparison, Poland, Hungary, Ukraine, and the United Kingdom, were selected using a purposive sampling method, based on three complementary criteria. The first criterion is the adequacy of sources. In all four countries, documented and publicly available primary sources on authorisations for digital surveillance after 2020 exist.

The second criterion is the countries' legal position vis-à-vis the European safeguards regime. Poland and Hungary are EU Member States that, whilst subject to this regime, are eroding it from within. Ukraine, meanwhile, is a candidate country where efforts are being

9 For a conceptual framework on democratic backsliding, see Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) Journal of Democracy 5 <https://doi.org/10.1353/jod.2016.0012> accessed 20 July 2026. On the use of Pegasus in Poland, see Marcin Rojszczak, 'EU Criminal Law and Electronic Surveillance: The Pegasus System and Legal Challenges It Poses' (2021) 29(3-4) European Journal of Crime, Criminal Law and Criminal Justice 292-3 <https://doi.org/10.1163/15718174-bja10027> accessed 20 July 2026. Regarding Hungary, see European Parliament PEGA Committee, *Report* (n 1) paras 82, 83.

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made to establish the same safeguards from the outside. The United Kingdom, whilst outside the EU, is a stable legal system subject to European Convention on Human Rights (ECHR) scrutiny, with no signs of democratic regression.

The third criterion is that the sample must encompass both the 'most similar' and the 'most dissimilar' system designs. Poland and Hungary constitute the 'most similar' pair; both are members of the Visegrád Group[10] and the use of Pegasus has been documented in both. This pair demonstrates how all four 'hinges' can become dysfunctional simultaneously. Ukraine and the United Kingdom, in contrast, form the most dissimilar pair: in one, the accession process imposes reform pressure, while in the other, an established institutional balance prevails. This allows us to test whether the criterion applies only to democracies in decline.

The sources on which the analysis is based have also been selected in accordance with these criteria. For Poland and Hungary, we use the European Parliament's PEGA Inquiry and ECtHR case law; for the United Kingdom, the judicial and academic literature on the Investigatory Powers Act 2016; and for Ukraine, the European Commission's enlargement reports, and academic analyses. Primary sources (case law, legislation, and official reports) establish the normative framework of the criterion, while secondary literature explains how these hinges are eroded.

3 A SHIFT IN FRAMEWORK: FROM PRIVACY TO AUTHORISATION

Debates on digital surveillance are largely conducted in the language of privacy. This doctrine essentially asks: is the interference directed towards a legitimate aim and is it proportionate? However, this question assumes that authorisation has already been granted and merely discusses its limits. Yet questions precede this: 'who was constitutionally authorised to authorise this intervention?' and 'to what independent scrutiny was the decision subject?' This is, in fact, less a question of privacy than one of the separation of powers.[11] Moreover, underlying this is the principle of legality, which provides that rights and freedoms may only be restricted by law.[12] This principle also forms the basis for the legislative reserve discussed below.

10 The Visegrád Group is a regional cooperation platform established in 1991 by Poland, Hungary, the Czech Republic, and Slovakia to coordinate their integration into the EU and NATO. Today, the term also refers to the joint political and cultural grouping of these four countries.

11 For a contemporary theoretical analysis of the separation of powers, see Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013) 8 <https://doi.org/10.1093/acprof:oso/9780199602117.002.0008> accessed 20 July 2026. For the classical formulation of the doctrine, see MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 14. For the classical origins of the separation of powers, see Charles de Montesquieu, *The Spirit of the Laws* (Anne M Cohler, Basia C Miller, and Harold S Stone eds, CUP 1989) bk 11, ch 6.

12 For the principle that rights and freedoms may only be restricted by law (legality), see Council of Europe, *European Convention on Human Rights*: *as amended by Protocols 11, 14, and 15; supplemented by Protocols 1, 4, 6, 7, 12, 13, and 16* (ECtHR 2013) art 8(2) <https://www.echr.coe.int/

A privacy framework is necessary; however, it is insufficient on its own. Indeed, as Solove's detailed map also demonstrates, privacy theory provides a nuanced analysis of the harms caused by interference. However, the solution it offers, namely proportionality, data minimisation, and purpose limitation, operates after the authorisation decision.[13] Two regimes with the same privacy safeguards can differ entirely in terms of who authorises the surveillance. The privacy lens alone, however, cannot reveal this difference.

The first bridging concept that makes this difference visible is domination. Megiddo redefines the harm caused by unchecked digital power not as an intervention but as a form of domination.[14] Pettit's republican theory of non-domination, meanwhile, provides the normative foundation for this: what matters is not whether power is actually abused, but whether it is subject to control. In this respect, an unchecked capacity for surveillance constitutes domination, even if it is never abused. Indeed, it renders the citizen dependent on the arbitrary will of another.[15]

The second bridge is securitisation. As Graziani demonstrates, digital technologies normalise exceptional forms of governance by framing them as security practices. This framing shifts decision-making authority to the executive branch, to specialist units attached to the executive, such as border agencies, and to automated systems. Authority thus remains outside the scope of both democratic deliberation and judicial oversight.[16] In this way, securitisation explains which political mechanism is being used to bypass the architecture of authorisation.

The third dimension is private-sector power. In Zuboff's analysis, surveillance capacity is largely concentrated in commercial actors. When combined with domination and

documents/d/echr/convention_eng> accessed 20 July 2026; Charter of Fundamental Rights of the European Union (ratified 7 December 2000) [2012] OJ C 326/391, art 52(1) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT> accessed 20 July 2026. In the context of covert surveillance, this requirement is not satisfied by a purely formal legal basis alone; it also requires the 'quality of law', namely accessibility, predictability, and safeguards against arbitrariness. See *Malone v United Kingdom* App 8691/79 (ECtHR, 2 August 1984) paras 66, 67 <https://hudoc.echr.coe.int/fre?i=001-57533> accessed 20 July 2026; *The Sunday Times v United Kingdom* App 6538/74 (ECtHR, 26 April 1979) para 47 <https://hudoc.echr.coe.int/eng?i=001-57584> accessed 20 July 2026. However, the ECHR's concept of 'law' encompasses unwritten law and does not require a formal legislative monopoly; the legislative reserve argued for in this study derives not from this minimum standard of the Convention, but from the principle of the separation of powers.

13 Daniel J Solove, *Understanding Privacy* (Harvard UP 2008) 101-4 <https://ssrn.com/abstract=1127888> accessed 20 July 2026.

14 Tamar Megiddo, 'Online Activism, Digital Domination, and the Rule of Trolls' (2020) 58(2) Columbia Journal of Transnational Law 433-7 <https://dx.doi.org/10.2139/ssrn.3459983> accessed 20 July 2026.

15 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997) 32 <https://doi.org/10.1093/0198296428.001.0001> accessed 20 July 2026.

16 Chiara Graziani, 'Technosecuritisation: Digital Technologies and the Securitisation of EU Migration Law' (2026) 28(1) European Journal of Migration and Law 35-6 <https://doi.org/10.1163/15718166-12340215> accessed 20 July 2026.

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securitisation, the question of 'who authorises' can be entirely removed from the realm of public law.[17] This point forms the theoretical backdrop to the 'shift to private actors' discussed in section 4.4.

Reframing the issue in terms of authorisation offers three advantages. First, it makes visible the shift of power between the branches of government and towards private actors. To put it more plainly, it reveals the shift in surveillance authority from the legislature to the executive and to private actors, that is, the shift in power underlying the question 'who authorises?'. Second, it links surveillance directly to the tradition of the rule of law and access to justice, which is particularly important in Central and Eastern Europe. Finally, it produces a transferable criterion for assessment across different regimes. This framework does not exclude privacy; on the contrary, it situates it within the context of a prior constitutional issue.[18] To put it more concretely, when a telephone is hacked using Pegasus, the main issue is not the extent to which privacy has been infringed. Rather, it is who authorised this measure and how much scrutiny is it subject to.

4 THE FOUR HINGES OF AUTHORISATION

The authorisation framework rests on four hinges, and digital surveillance challenges each of them individually. These hinges are addressed in turn under the four sub-headings below: the legislative reserve, independent prior authorisation, effective *ex post* oversight, and delegation to private actors. Each corresponds to one leg of the criterion to be established in Chapter Six.

4.1. Legislative Reserve

The first hinge of the authorisation architecture is the legislative reserve. A legislative body with democratic legitimacy must lay down fundamental and rights-restricting decisions about who may be monitored, on what grounds, and within what limits, through accessible and predictable rules. These decisions cannot be left entirely to the executive, nor can they be embedded within a technical framework. This requirement stems from both the 'quality of law' criterion sought by the ECtHR and the constitutional principle that fundamental matters fall within the remit of the legislature, in particular that rights and freedoms may be restricted only by law.

Case law clearly sets out this criterion. The ECtHR requires that secret surveillance regimes be based on a legal foundation that is accessible and foreseeable to the extent that it enables

17 Shoshana Zuboff, *The Age of Surveillance Capitalism* (Public Affairs 2019) ch 18.

18 These three findings form the basis for the four-pronged analysis in ch. 4 and the graduated standard in ch. 6.

citizens to regulate their behaviour accordingly.[19] The CJEU also considers it essential that data retention and access regimes be governed by clear and precise rules.[20] The German Federal Constitutional Court, in its 1983 Census ruling, regarded the requirement that any interference with the processing of data be linked to a specific legal basis as a core safeguard of the right to informational self-determination.[21]

Digital surveillance erodes this foundation in two ways. First, rule-making authority shifts from the legislature to the executive. As Bouwmeester has demonstrated, in areas where automated systems are deployed, rule-making powers are increasingly being drawn towards the executive and are moving beyond the scope of legislative oversight.[22] Consequently, fundamental choices such as threshold values, targeting criteria and exceptions are shifting from legislation to administrative configuration.

Second, the rule itself is being transformed into 'code'. The operative norm is no longer the text of the law; it is the system's design, thresholds, training data, and model logic. Moreover, these choices are being made not by the legislature, but by developers and suppliers. As Calo and Citron emphasise, automation undermines the assumptions of expertise and accountability upon which the administration's legitimacy is based.[23] Yet, in a state governed by the rule of law, the authority to determine the fundamentals of the surveillance regime lies precisely with the legislature at this preliminary design stage.

This is not merely an abstract concern. In the context of the digital welfare state, automated systems have been implemented without their impact on fundamental rights being sufficiently debated in parliament.[24] Indeed, in the case of SyRI in the Netherlands, the regulation based on risk profiling was found by the courts to be in breach of Article 8 of the ECHR because it failed to meet the criteria of predictability and transparency. In other

19 *Roman Zakharov v Russia* App 47143/06 (ECtHR, 4 December 2015) paras 228, 229 <https://hudoc.echr.coe.int/fre?i=001-159324> accessed 20 July 2026; *Szabó and Vissy v Hungary* (n 3) para 59.

20 Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* (CJEU, 8 April 2014) para 54 <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:62012CJ0293> accessed 20 July 2026; Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others* (CJEU, 6 October 2020) [2020] OJ C 433/3, para 132 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2020_433_R_0003> accessed 20 July 2026.

21 *Volkszählungsurteil* (German Federal Constitutional Court, 15 December 1983) BVerfGE 65/1, headnote 2 (3) and grounds (8) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html> accessed 20 July 2026.

22 Bouwmeester (n 4) 102-3.

23 Calo and Citron (n 4) 803-4. For ensuring that the design is compatible with the rule of law and designers' accountability, see Zalnieriute, Bennett Moses and Williams (n 8) 443-4.

24 Alston (n 5) paras 3, 4, 43.

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words, the problem lies not in the implementation, but in the fact that the fundamental framework was not properly established by law from the outset.[25]

All this does not imply that any form of delegation of powers is problematic. The key point is that the fundamental choices determining the extent of the intervention must remain within the legislative reserve. Indeed, the approach taken by Enqvist and Naarttijärvi, which examines proportionality separately at each stage of automation, also supports this graduated logic.[26] The fact that the EU Artificial Intelligence Act (AI Act) sets fundamental limits[27] directly at the legislative level regarding certain forms of oversight provides a model worth following. Essentially, when the legislative reserve is eroded, the two hinges that follow it also lose their foundation. Oversight can operate only in relation to an existing rule.

4.2. Independent Prior Authorisation

The second hinge is independent approval, which applies before any intervention. The constitutional logic here is straightforward: the body seeking to monitor must not be the same as the body authorising the monitoring. Before any interventionist or coercive measure is implemented, an authority independent of the requesting body must approve it, in accordance with the criteria of necessity and proportionality, preferably a judicial body. However, the phrase 'preferably judicial' does not imply an absolute requirement for a court order; rather, it refers to the structural independence of the prior authorisation body from the unit carrying out the surveillance and the binding nature of its decision. Prior authorisation by an independent administrative authority whose decision is binding also meets this criterion. Prior authorisation is the threshold at which legality is tested before the intervention.

The ECtHR has consistently upheld this principle. In the Klass judgment, it stated that covert surveillance cannot be accepted without independent oversight.[28] In the Szabó and

25 Case C-09-550982 *NJCM and Others v The Netherlands (SyRI)* (District Court of The Hague, 5 February 2020) ECLI:NL:RBDHA:2020:1878 <https://www.julia-project.eu/database/case-law/241> accessed 20 July 2026; Rachovitsa and Niclas Johann, 'The Human Rights Implications of the Use of AI in the Digital Welfare State: Lessons Learned from the Dutch SyRI Case' (2022) 22(2) Human Rights Law Review 5-6 <https://doi.org/10.1093/hrlr/ngac010> accessed 20 July 2026.

26 Lena Enqvist and Markus Naarttijärvi, 'Discretion, Automation, and Proportionality' in Markku Suksi (ed), *The Rule of Law and Automated Decision-Making* (Springer 2023) 160-70 <https://doi.org/10.1007/978-3-031-30142-1_7> accessed 20 July 2026.

27 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) 300/2008, (EU) 167/2013, (EU) 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, art 5 <http://data.europa.eu/eli/reg/2024/1689/oj> accessed 20 July 2026.

28 *Klass and Others v Germany* App 5029/71 (ECtHR, 6 September 1978) paras 55, 56 <https://hudoc.echr.coe.int/eng?i=001-57510> accessed 20 July 2026.

Vissy v. Hungary judgment, it found a regime in which a body subordinate to the executive authorised itself to be inadequate, as it lacked independent and, preferably, judicial prior review.[29] The Grand Chamber, in the Big Brother Watch judgment, required the oversight of an independent authority at every stage of mass data retention.[30]

Digital surveillance erodes this threshold in three ways. First, authorisation moves away from the individual and takes on a collective character. In this case, consent ceases to be a concrete decision directed at a specific person and becomes a blanket authorisation covering an entire category of data. Prior authorisation, meanwhile, is reduced to a mere formality. Indeed, as Porcedda demonstrates, courts occasionally legitimise this collective surveillance by approving the automated analysis of metadata themselves.[31]

Second, prior authorisation lacks independent and effective oversight. In the Pegasus case, security units subordinate to the executive in Poland implemented this measure, which completely infiltrates the device. Although access to the content of communications is formally subject to judicial authorisation, it has been established both in the case law of the ECtHR and in the European Parliament's PEGA Inquiry that effective and independent prior oversight is not in place.[32] It is precisely this structure that the Szabó and Vissy judgment rejected.

Third, remote access undermines the traditional logic of authorisation and search warrants. Ghappour shows that remote network searches conducted by law enforcement on the dark web shift the question of 'who decides' beyond the search-warrant framework. For when the location of the target is unknown, the competent authority required to grant authorisation also becomes unclear.[33]

A concrete example of what should be the case appears in recent EU legislation. Indeed, the EU AI Act generally prohibits real-time remote biometric identification for law enforcement purposes in public spaces. In the limited circumstances where it is

29 *Szabó and Vissy v Hungary* (n 3) para 85.

30 *Big Brother Watch and Others v the United Kingdom* Apps 58170/13, 62322/14 and 24960/15 (ECtHR, 25 May 2021) para 356 <https://hudoc.echr.coe.int/fre?i=001-210077> accessed 20 July 2026.

31 Maria Grazia Porcedda, 'Automated Analysis in the AFSJ and Digital Single Market Monitoring: An Effaced Nexus' in Eleni Kosta and Irene Kamara (eds), *Data Retention in Europe and Beyond* (OUP 2025) 424 <https://doi.org/10.1093/9780191998980.003.0028> accessed 20 July 2026.

32 In the Polish regime, see Rojszczak, 'EU Criminal Law' (n 9) 299; see also Marcin Rojszczak, 'Surveillance, Legal Restraints and Dismantling Democracy: Lessons from Poland' (2021) 17(1) Democracy and Security 4-7 <https://doi.org/10.1080/17419166.2020.1841367> accessed 20 July 2026. Regarding the failure of effective and independent prior review, see *Pietrzak and Bychawska-Siniarska and Others v Poland* Apps 72038/17 and 25237/18 (ECtHR, 28 May 2024) <https://hudoc.echr.coe.int/eng?i=002-14333> accessed 20 July 2026; and European Parliament PEGA Committee, *Report* (n 1), paras 27, 28.

33 Ahmed Ghappour, 'Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web' (2017) 69(4) Stanford Law Review 1079, 1082.

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permitted, the measure is subject to prior authorisation by a competent judicial authority or an independent administrative authority with binding decision-making powers, as well as an assessment of necessity and proportionality and a prior fundamental rights impact assessment.[34] Finally, the prior authorisation requirement is not only being weakened but is also shifting in nature. This is because it is increasingly private providers who are actually deciding on access requests.[35]

4.3. Ex Post Oversight and Effective Remedies: The Collapse of Access to Justice

The third hinge is the review that comes into play after the measure is implemented: the affected individual's ability to challenge the measure's legality before an independent authority, and the ability of review bodies to scrutinise its implementation meaningfully. This is, in fact, access to justice itself, the most concrete promise of the rule of law. In this study, access to justice is used primarily to mean effective judicial review and the right of appeal. Within this framework, the two concepts are considered complementarily. Digital surveillance and automated decision-making, however, undermine this promise in three respects.

The first of these is opacity. As machine learning-based systems rely on a complex web of calculations, the reasoning behind their decisions often cannot be explained to either the affected individual or the regulator. This 'black box' eliminates the conditions of justification and testability upon which judicial oversight relies.[36] The second is scale: whilst automated decisions are produced at an industrial pace, subsequent oversight operates on an individual basis and at a human pace. The third is the risk of diffusion of responsibility. When responsibility for a decision is divided among the designer, the supplier, the administration, and the final official, it becomes difficult to identify who to hold to account. As Busuioc emphasises, whilst this complexity does not absolve public administrators of responsibility, ensuring accountability in practice is becoming increasingly difficult.[37]

These dynamics are not abstract. In Australia's 'Robo-Debt' programme, a system that automatically matched income data wrongly charged hundreds of thousands of people. The programme's legality could not be effectively scrutinised for years, and the fault was only acknowledged after a major public and judicial backlash. Carney, who analyses the process through seven distinct failures, describes this collapse as 'the seven veils of failed guarantees of the rule of law'.[38]

34 Regulation (EU) 2024/1689 (n 27) arts 5(1)(h), 5(3), 27 (for the fundamental rights impact assessment).

35 Porcedda (n 31) 423-4.

36 Calo and Citron (n 4) 830-2; Cobbe (n 6) 636-8.

37 Busuioc (n 6) 829-30.

38 Terry Carney, 'Robo-Debt Illegality: The Seven Veils of Failed Guarantees of the Rule of Law?' (2019) 44(1) Alternative Law Journal 4-5 <https://doi.org/10.1177/1037969X18815913> accessed 20 July 2026.

The child benefit scandal in the Netherlands (Toeslagenaffaire) also exhibits a similar pattern. Automated risk profiling wrongly labelled thousands of families as suspected of irregularities. Neither the administrative courts nor parliament recognised the problem for years. Bouwmeester demonstrates that the root cause of the collapse lies not in automation itself, but in its combination with rigid welfare conditionality, that is, the linking of access to benefits to increasingly onerous conditions, intensive monitoring, and strict sanctions, coupled with the executive's tendency to disregard constitutional checks and balances.[39]

The problem is not unique to social welfare administration. In the United Kingdom, the expansion of surveillance and security powers has gone hand in hand with the erosion of effective accountability amid rights violations. In this context, Webber has examined the process of expanding digital surveillance capacity in the United Kingdom under the heading of 'institutionalised impunity'.[40] The common thread running through all these examples is that, whilst *ex post* oversight exists in form, it has been hollowed out in practice.

As regards access to justice, the issue is two-fold. An effective remedy requires not only the existence of a court, but also the ability of the affected person to substantiate their claim, that is, to have access to the grounds for the decision. Opacity, however, undermines the 'equality of arms' that is essential at this stage. As Enqvist and Naarttijärvi have demonstrated, proportionality reviews must be carried out separately at different stages of automation, and no stage should be entirely devoid of human judgement.[41] For this reason, the right to an explanation and the right to human intervention are not merely formal safeguards, but prerequisites for the functioning of *ex post* oversight.[42]

This breakdown is particularly evident in Central and Eastern Europe. The requirement for judicial oversight in the covert surveillance regime, established by the Polish Constitutional Tribunal's judgment K 23/11 (2014), has been eroded by subsequent legislative measures. With the Tribunal rendered ineffective, an effective *ex post* oversight body under domestic law has, in practice, ceased to exist. The ECtHR confirmed this pattern in its judgment in Pietrzak and Bychawska-Siniarska v. Poland, finding three separate violations of Article 8 of the Convention in relation to Poland's operational control regime, the retention and use of communications data, and the covert surveillance regime under the Counter-Terrorism Act.[43] The judgment constitutes a direct and concrete confirmation of the collapse of access to justice, in that it accepts on its merits the applicants' claim that the oversight of the secret services is illusory. Indeed, the Court identifies a fundamental flaw: national law lacks an effective remedy capable of challenging the legitimacy of the surveillance measure.

39 Bouwmeester (n 4) 112-3.

40 Frances Webber, 'Impunity Entrenched: The Erosion of Human Rights in the UK' (2022) 63(4) Race & Class 60 <https://doi.org/10.1177/03063968221083193> accessed 20 July 2026.

41 Enqvist and Naarttijärvi (n 26) 168.

42 Paweł Szwajdler, 'Automated Judicial Decision-Making Systems and New Legal Principles' [2026] Constitutional Political Economy 13 <https://doi.org/10.1007/s10602-025-09490-3> accessed 20 July 2026.

43 *Pietrzak and Bychawska-Siniarska and Others v Poland* (n 32).

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CJEU case law also supports this line of reasoning. The Court has required not only prior limitations but also independent *ex post* oversight and an effective remedy in regimes governing the mass storage and access to data. Notification is the de facto prerequisite for this chain. Indeed, if the data subject is not informed within the earliest reasonable time after the surveillance has ended, the right of appeal will remain merely theoretical.[44] However, there is a fundamental point highlighted in this section. Namely, however robust *ex post* oversight may be, it is not sufficient on its own. In the Robo-Debt and Toeslagenaffaire cases, the courts have finally acted. However, by the time this stage is reached, irreparable damage has already been done.

4.4. The Role of Private Actors

The fourth hinge concerns authority delegation. Even if private actors effectively perform coercive oversight, public accountability must be safeguarded. Yet digital surveillance is increasingly transferring this function to operators, platforms, technology suppliers, and even ordinary citizens. This creates an accountability gap that falls outside the scope of public law oversight.

The private actors to whom authority has been delegated fall into four categories. The first are the infrastructure providers who actually implement storage and access orders and act as gatekeepers at the point of access to data. The second are the technology suppliers who design the system's operating rules, that is, its thresholds and logic. The third are ordinary individuals carrying out surveillance on behalf of the state. Indeed, Brayne, Lageson, and Levy refer to these as 'surveillance agents', whilst Borges Monroy analyses this network as a delegated order.[45] Fourth, there is the self-governance of technology itself. As Eisenberger demonstrates, technological self-governance can erode the conditions of the rule of law by shifting norm-setting from the public sphere to private design.[46]

This mechanism often remains invisible. Porcedda demonstrates that whilst courts and EU law assign a custodial role to private electronic communications and information society services, this role becomes obscured in legal analysis. This is because the private

44 Case C-311/18 *Data Protection Commissioner v Facebook Ireland and Schrems* (CJEU, 16 July 2020) paras 186, 187 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62018CJ0311> accessed 20 July 2026; Charter of Fundamental Rights of the European Union (n 12) art 47. For the post-measure notification obligation, see *Roman Zakharov v Russia* (n 18) paras 286–288; *Szabó and Vissy v Hungary* (n 3) para 86.

45 Brayne, Lageson and Levy (n 4) 482; Isadora Borges Monroy, 'The Surveillance Complex: Deputised Law and Order in Advanced Democracies' [2025] Information, Communication & Society 4 <https://doi.org/10.1080/1369118X.2025.2505696> accessed 20 July 2026.

46 Iris Eisenberger, 'Technology's Self-Governance' in Roger Brownsword and Larry A DiMatteo (eds), *The Cambridge Handbook of the Governance of Technology* (CUP 2026) 34 <https://doi.org/10.1017/9781009522519.004> accessed 20 July 2026.

actor making critical access decisions operates without being bound by the authorisation framework of public law.[47]

Legislation, meanwhile, reinforces this shift: the e-Evidence Regulation, which has applied since 18 August 2026, directs cross-border electronic evidence orders (European Production and Preservation Orders) directly to private providers and designates them as the enforcing parties. Consequently, the executing state's cross-border judicial intermediary role is bypassed, and the burden of actually facilitating access, along with the decision whether to authorise access, falls squarely on the private provider.[48] Zuboff's analysis of surveillance capitalism also serves as a reminder that this private power has risen not merely to an instrumental role, but to a rule-setting position.[49]

5 COMPARATIVE APPLICATION: CENTRAL AND EASTERN EUROPE AND THE EU AXIS

When applied to different regimes, the four hinges break down in various ways. Bermeo's 'democratic backsliding taxonomy' clarifies this analysis. According to this, contemporary backsliding does not occur through a coup, but through the covert and gradual expansion of executive power.[50] Digital surveillance, meanwhile, serves as both a means and an indicator of this expansion, and is becoming most acutely visible in Central and Eastern Europe, where the rule of law is under pressure. The country profiles in this section are based on legislation and case law in force in July 2026.

Poland and Hungary are paradigmatic examples. The European Parliament's PEGA inquiry has established that various EU governments have used Pegasus and similar spyware against journalists, politicians, and public officials, and that this poses a threat to the principles of democracy and the rule of law.[51] The issue rests on four hinges: the measure lacks a clear legal basis (4.1). Security agencies under the executive branch are authorising their own actions without independent judicial prior authorisation (4.2). *Ex post* oversight remains

47 Porcedda (n 31) 424, 449.

48 Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for Electronic Evidence in Criminal Proceedings and for the Execution of Custodial Sentences Following Criminal Proceedings [2023] OJ L 191/118, rec 9, art 10 <http://data.europa.eu/eli/reg/2023/1543/oj> accessed 20 July 2026. For the position of the Pegasus supplier, see Rojszczak, 'EU Criminal Law' (n 9) 315-6.

49 Zuboff (n 17) ch 18, pt IV.

50 Bermeo (n 9) 10-1.

51 European Parliament Recommendation of 15 June 2023 to the Council and the Commission Following the Investigation of Alleged Contraventions and Maladministration in the Application of Union law in Relation to the Use of Pegasus and Equivalent Surveillance Spyware (2023/2500(RSP)) [2024] OJ C 2024/494, paras 14, 17 <http://data.europa.eu/eli/C/2024/494/oj> accessed 20 July 2026. For detailed findings, see European Parliament PEGA Committee, *Report* (n 1).

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merely formal (4.3). The private contractor establishing the technical capacity, meanwhile, is beyond the scope of accountability (4.4). As regards Hungary, the Szabó and Vissy judgment[52] found this structure to be in breach of the Convention.

Poland illustrates the extent of this erosion. As early as 2014, in its ruling K 23/11, the Polish Constitutional Tribunal (Trybunał Konstytucyjny) found the regime governing covert surveillance and access to stored data to be partially unconstitutional and imposed a requirement for judicial oversight. However, subsequent legislation eroded these safeguards; the oversight required for access to communications content has weakened since 2016, and this process has coincided with the period during which the ruling party rendered the Constitutional Tribunal ineffective.[53] Indeed, in 2024, the ECtHR once again found Poland's covert surveillance legislation to be in breach of the Convention.[54] This overlap is particularly evident in the context of Central and Eastern Europe: an executive branch that renders the courts ineffective also tends to expand its surveillance powers. Consequently, subsequent judicial review is doubly weakened due to both a lack of transparency and the erosion of judicial independence. The CJEU has also addressed the undermining of judicial independence in Poland as a rule of law issue.[55] In conclusion, the most critical issue for access to justice is that the court to which a victim of surveillance can turn has been weakened by the authorities responsible for expanding surveillance.

Ukraine is in a unique position: as a candidate country, it is in the middle of the EU accession process, yet it operates under ongoing martial law conditions. The European Commission's 2024 Enlargement Report highlights concrete issues in three of the hinges of the authorisation framework. On the legislative reserve, parliamentary oversight has largely been confined to closed meetings and has effectively become dysfunctional. Regarding

52 *Szabó and Vissy v Hungary* (n 3) (breach of art 8; operative part of the judgment).

53 During the 2015–2016 period, the ruling party (PiS) prevented judges who had been lawfully elected from taking up their posts at the Constitutional Court and appointed its own candidates; it subsequently rendered the Court largely ineffective through regulations that made its decision-making process more cumbersome (requiring a qualified majority, hearing cases solely in the order in which they were received, and a high quorum for meetings) and by failing to publish certain of the Court's decisions in the Official Gazette. With the appointment of a president close to the government at the end of 2016, the Court effectively lost its status as an independent oversight body. For a detailed analysis, see Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) ch 3 (The remaking of the Constitutional Tribunal; judicial appointments 64-70, non-publication of decisions 75-7 and 93-4).

54 Case K 23/11 (Polish Constitutional Tribunal, 30 July 2014); see Agnieszka Grzelak, 'Data Retention Saga Continues: Decision of the Polish Constitutional Tribunal of 30 July 2014 in Case K 23/11' (2016) 22(3) European Public Law 479-82 <https://doi.org/10.54648/euro2016030> accessed 20 July 2026; *Pietrzak and Bychawska-Siniarska and Others v Poland* (n 32) (breach of art 8 in regimes of covert surveillance, data retention and access).

55 Case C-619/18 *European Commission v Republic of Poland* (CJEU, 24 June 2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62018CJ0619> accessed 20 July 2026. (Irremovability and independence of judges; art 19(1) TEU). For an analysis of the EU's intervention, see Sadurski (n 53) ch 8 ('Europe to the Rescue').

independent prior authorisation, the National Anti-Corruption Bureau of Ukraine (NABU), the main anti-corruption investigative body, has been deprived of its autonomous wiretapping capabilities, making the authorisation decision dependent on other authorities. As regards access to justice, concerns about the rule of law and press freedom have been raised over surveillance practices targeting journalists in government-controlled regions. The main pressure in rebuilding these hinges stems from the rule of law conditionality attached to the country's candidate status by the EU.[56]

EU law is the common ground across these national landscapes. The CJEU's case law on data retention and access, the Law Enforcement Directive, the EU AI Act and the e-Evidence Regulation (applicable since 18 August 2026) provide a supranational authorisation framework binding on member states and candidate countries.[57] The gap between European Union standards and national implementation, however, is the fault line of the rule of law. Compliance with the European Union also constitutes the primary lever for closing this gap.

The United Kingdom stands as a counter-example outside this framework. The Investigatory Powers Act of 2016, which followed the Anderson Report,[58] introduced a 'double lock' model that combines ministerial approval for surveillance authorisation with the approval of an independent judicial commissioner.[59] Thus, the executive's monopoly on prior authorisation was broken for the first time. However, during the same period, surveillance powers were expanded and effective accountability was eroded.[60] Even the Grand Chamber's

56 On the EU's rule of law conditionality and Ukraine, see Maryna Rabinovych, 'EU Enlargement Policy Goes East: Historical and Comparative Takes on the EU's Rule of Law Conditionality vis-à-vis Ukraine' (2024) 16 Hague Journal on the Rule of Law 715 <https://doi.org/10.1007/s40803-024-00223-6> accessed 20 July 2026. For concerns regarding monitoring during wartime, see European Commission, *Ukraine 2024 Report* (SWD(2024) 699, 30 October 2024) 30, 35, 40 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52024SC0699> accessed 20 July 2026

57 Joined Cases C-293/12 and C-594/12 (n 20); Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* (CJEU, 21 December 2016) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62015CJ0203> accessed 20 July 2026; Joined Cases C-511/18, C-512/18 and C-520/18 (n 20); Directive (EU) 2016/680; Regulation (EU) 2024/1689 (n 27) annex III; Regulation (EU) 2023/1543 (n 48) arts 9, 10. For the impact of EU data retention case law on national regimes, see Eurojust, *The Effect of Court of Justice of the European Union Case-Law on National Data Retention Regimes and Judicial Cooperation in the EU* (European Union 2024) pt 4.3 <https://doi.org/10.2812/2621651> accessed 20 July 2026.

58 David Anderson, *A Question of Trust: Report of the Investigatory Powers Review* (*GOV.UK*, 11 June 2015) <https://www.gov.uk/government/publications/a-question-of-trust-report-of-the-investigatory-powers-review> accessed 20 July 2026. — An independent reform report that comprehensively reviewed the UK's surveillance powers and recommended that all warrants be subject to authorisation by Judicial Commissioners.

59 Clapham (n 7); UK Investigatory Powers Act (2016) s 23 ("double lock", authorisation by Judicial Commissioners) <https://www.legislation.gov.uk/ukpga/2016/25/contents> accessed 20 July 2026.

60 *Big Brother Watch and Others v the United Kingdom* (n 30) (s 8(4) bulk interception regime's breach of Art 8; operative paragraph).

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finding of a breach of the Convention in the Big Brother Watch judgment failed to prevent the erosion of internal accountability.[61] Indeed, the 2024 amending legislation enacted following the judgment introduced a new regime for bulk datasets with low privacy expectations, thereby expanding surveillance powers.[62] The United Kingdom thus serves both as proof that pre-authorisation reform is feasible and as a warning that strengthening a single hinge is insufficient to safeguard the others. This reinforces the study's central argument that conditions must be assessed cumulatively.

One further point should be added at this stage. Indeed, including the United Kingdom in the sample serves as a test not only in terms of regime type (EU member, candidate, non-member) but also in terms of differences in legal systems (common law or civil law tradition). Although the four-hinged architecture is framed in the terminology of continental European public law, institutional equivalents in the United Kingdom, such as the 'double lock' and the Investigatory Powers Tribunal, demonstrate that the criterion's portability extends beyond regime type to encompass legal traditions as well.

6 AUTHORISATION ARCHITECTURE: A GRADUATED STANDARD

The preceding sections point to a common conclusion: the legitimacy of coercive digital surveillance cannot be reduced to a single proportionality test. Proportionality review is, of course, necessary. However, it operates both after the authorisation decision has been made and remains largely undefined. This section aims to establish a structural criterion before the proportionality assessment. Under this criterion, legitimacy depends on the simultaneous fulfilment of four cumulative conditions, and the threshold for each rises with the intensity of the intervention. Who decides which tier a measure falls into is also part of this framework.[63] Indeed, this determination is made not by the unit requesting the measure, but by the pre-approval authority. They operate in sequence rather than in competition. The four conditions determine whether the authorisation is constitutionally available; proportionality then governs how an authorised measure is applied in the individual case. A favourable proportionality assessment cannot rescue a measure that fails the authorisation test, whereas one that passes it remains fully subject to proportionality review at every stage.

61 For a general discussion of the erosion of rights and accountability in the United Kingdom, see Webber (n 40) 60.

62 UK Investigatory Powers (Amendment) Act (2024) <https://www.legislation.gov.uk/ukpga/2024/9/contents> accessed 20 July 2026.

63 This model of four cumulative conditions is a proposal put forward in this study, developed with inspiration from the four-stage distinction in Enqvist and Naarttijärvi's proportionality analysis (legislative, systemic, decision-making and ex post proportionality); see Enqvist and Naarttijärvi (n 26).

The logic behind the criterion we have established is straightforward. Where proportionality alone is insufficient, we need a concrete tool to complement it. This study establishes that tool as a criterion that classifies the supervisory measure into four tiers according to the intensity of the intervention and assesses the four conditions with progressively greater rigour at each tier. The following paragraphs first define these four levels. The four conditions are set out individually, followed by an illustration of the criterion's cumulative and tiered operation using an example, and finally, it is applied to three specific measures.

The scaling variable is intervention intensity. Within this framework, four levels can be distinguished: Level 1, targeted access to metadata; Level 2, the interception of targeted content and communications; Level 3, bulk or automated analysis; and Level 4, device infiltration, equipment tampering, and real-time biometric identification. As the level increases, each of the four conditions listed below becomes more stringent.[64]

In this regard, the first condition is the legislative reserve. Primary legislation must lay down fundamental rules; as the level increases, the law must also be more certain. The minimum safeguards required by the ECtHR about covert surveillance, namely, the definition of offences and categories of persons, time limits, and rules governing examination, use, storage, and destruction, provide a concrete measure of this clarity.[65]

The second condition is independent prior authorisation. At lower levels, an independent administrative authority issuing binding decisions may suffice. However, at higher levels, an independent judicial body must grant authorisation, following an individual assessment specific to the person concerned and a concrete examination of the criteria of necessity and proportionality. In this context, the prior authorisation model established by the EU AI Act for real-time biometric identification is a concrete example of the standard required at the higher level.[66]

The third condition is effective *ex post* oversight and redress. The data subject must be notified where possible; must have access to the reasoning behind the decision; and must have recourse to an independent supervisory body and an effective judicial remedy. In the case of automated and bulk processing, this condition also encompasses systemic auditability and the rights to explanation and human intervention.[67]

64 For a comparative example of a tiered regulatory architecture based on risk intensity, see Regulation (EU) 2024/1689 (n 27) arts 5, 6 et seq.

65 *Weber and Saravia v Germany* App 54934/00 (ECtHR, 29 June 2006) para 95 <https://hudoc.echr.coe.int/eng?i=001-76586> accessed 20 July 2026; *Roman Zakharov v Russia* (n 19) para 231.

66 Regulation (EU) 2024/1689 (n 27) arts 5(1)(h), 5(3); *Klass and Others v Germany* (n 28) para 51; *Szabó and Vissy v Hungary* (n 3) para 77.

67 Charter of Fundamental Rights of the European Union (n 12) art 47; Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* (CJEU, 16 July 2020), paras 186, 187 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62018CJ0311> accessed 20 July 2026. For the rights to explanation and human intervention, see Szwajdler (n 42) 33-5; Busuioc (n 6) 825-8; Cobbe (n 6) 641.

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The fourth and final condition concerns safeguards for delegating authority. Where authority is delegated to private actors, public law obligations, namely transparency, accountability, responsibility, and independent oversight, must be transferred along with the authority.[68]

Together, these four conditions operate in two ways, both cumulatively and progressively. Consequently, the proposed criterion is two-dimensional. In this respect, each condition must be met collectively, while the threshold for each rises in line with the intensity of the intervention. Failure to meet any one condition negates the measure's legitimacy at that level. The threshold, meanwhile, rises in line with the intensity of the intervention. For example, Pegasus is classified at the highest level (Level 4) because it fully infiltrates the device. In this respect, it fails to meet all four conditions; indeed, it lacks a clear legal basis, independent judicial prior authorisation, and effective *ex post* oversight. Furthermore, the supplier remains entirely outside any accountability mechanism.[69]

In contrast, targeted access to metadata, which remains at Level 1 due to its narrow scope, can satisfy the criterion with less onerous requirements. This demonstrates that the criterion is not an outright ban, but a graduated threshold of legitimacy.

Table 1. **Application of the authorisation criterion by tier**

Condition	Targeted measure (Levels 1–2)	Bulk / automated / device intrusion (Levels 3–4)
Legislative reserve	Clear legal basis; definition of offence and person categories	In addition: detailed specification in law of thresholds, time limits, data types, and destruction rules
Independent prior authorisation	Independent administrative or judicial prior authorisation; necessity and proportionality	Individualised judicial prior authorisation; additional safeguards throughout the process in the case of blanket authorisation
Effective *ex post* oversight	Notification (where possible) and effective judicial remedy	In addition: independent supervisory body, systemic accountability, right to explanation and human intervention
Proxy safeguards	Legal/contractual liability for the private actor taking over	In addition: transparency, auditability, and independent oversight of the private actor

68 Porcedda (n 31) 423-5, 436; Eisenberger (n 46) 22-5.

69 European Parliament, *Investigation of the Use of Pegasus and Equivalent Surveillance Spyware* (PE 747.923, 7 June 2023) <https://www.europarl.europa.eu/thinktank/mt/document/EPRS_ATA(2023)747923> accessed 20 July 2026; Rojszczak, 'EU Criminal Law' (n 9) 290-300.

Applying the table to the Pegasus case concretely demonstrates the criterion's diagnostic function. As the measure is classified at the highest level (Level 4) due to its complete infiltration of the device, it is subject to the strict conditions set out in the second column of the table. In the Polish implementation, none of the four conditions was met. Regarding the legislative scope, the threshold, duration, and data type are not tied to a detailed legal framework. With regard to independent prior authorisation, no individualised judicial authorisation has been obtained.

Regarding *ex post* oversight, neither notification nor an effective remedy has been implemented. As for safeguards regarding the provider, the supplier has been exempted from transparency and auditability obligations. Taken together, these four shortcomings, under the criterion we propose, undermine the regime's legitimacy. Of these shortcomings, the inadequacy of the legal framework, independent prior authorisation and *ex post* oversight has also been explicitly recognised by the ECtHR in its judgment in Pietrzak and Bychawska-Siniarska v. Poland as grounds for a violation of Article 8.[70]

In this context, the criterion can be illustrated using three examples. The first example concerns the retention and subsequent retrieval of mass communications metadata, which falls under Level 3 (mass/automated analysis). Here, the legislative framework must provide the clear and precise rules required by the CJEU, with prior authorisation requiring an independent authorisation for each access request, whilst *ex post* oversight requires notification and an effective remedy. Unless these safeguards are in place, the regime cannot be considered legitimate, however 'proportionate' it may be presented. The second example is real-time facial recognition in public spaces, which falls under the highest tier, namely Tier 4. The measure is subject to the threshold established by the AI Act (judicial or administrative prior authorisation, strict temporal and spatial limits, and a prior fundamental rights impact assessment). If this threshold is not met, the measure cannot be authorised. The third example is personalised, targeted interception of communications based on a court order. This may be lawful under Level 2 with standard minimum safeguards.[71]

The principle of legitimacy underpinning this criterion is non-domination: an unchecked surveillance capacity is not legitimate, even if it is never abused. For it renders the citizen dependent on an arbitrary will.[72] The third condition ensures access to justice, whilst the criterion offers a doctrine that is transferable across different types of regimes without being tied to a specific constitutional order.

70 *Pietrzak and Bychawska-Siniarska and Others v Poland* (n 32).

71 Joined Cases C-293/12 and C-594/12 (n 20) on metadata retention and the Court of Justice's minimum conditions and Joined Cases C-511/18, C-512/18 and C-520/18 (n 20). For real-time biometrics, see Regulation (EU) 2024/1689 (n 27) arts 5(1)(h), 5(3). For traditional minimum safeguards, see *Weber and Saravia v Germany* (n 65) para 95.

72 Pettit (n 15) 22. For end-to-end safeguards in bulk interception, see *Big Brother Watch and Others v the United Kingdom* (n 30) paras 350–360.

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7 OBJECTIONS AND LIMITATIONS

The proposed criterion must pre-emptively address the four anticipated objections. The first of these is the objection about security and efficiency: surveillance saves lives, whilst structural conditions paralyse law enforcement. The response to this is as follows: the criterion does not prohibit surveillance but merely channels it. Emergencies can be addressed both through the tiered structure and via exceptional procedures of the kind envisaged by the EU AI Act.[73]

The second objection is that the courts already carry out proportionality reviews. However, proportionality presupposes a valid authorisation and only applies thereafter. The criterion, in contrast, prioritises the structural question that precedes it. Indeed, the fact that the ECtHR itself supplements proportionality with minimum safeguards confirms this priority.[74]

The third objection is that the legislature cannot keep pace with rapid technological change. In response, the 'reserved sphere' encompasses fundamental choices rather than technical details. Certainty is a gradual process, and a legitimate delegation of authority is possible with safeguards. The issue is not merely delegation of powers, but preventing the legislature from effectively abdicating its duty to set fundamental limits. Indeed, Enqvist and Naarttijärvi also emphasise that proportionality review must begin at the legislative stage, and that a legal framework failing to provide minimum safeguards will create a lack of proportionality across the entire system.[75]

The fourth objection is that Poland, Hungary, Ukraine, and the United Kingdom cannot be compared. However, the criterion asks the same four structural questions, irrespective of the regime. In this respect, it is not a means of substantive harmonisation, but rather a diagnostic tool. Consequently, the differences are not a flaw, but a finding in their own right. It is also necessary to note a limitation of the comparison: the findings regarding Ukraine are largely based on reports from EU institutions. To that extent, they warrant caution.

Finally, we must acknowledge a limitation. The framework regulates authorisation. Whether a particular form of surveillance should exist at all, that is, substantive red lines, is a separate issue. Indeed, the fact that the EU AI Act prohibits certain applications, such as social scoring for law enforcement purposes or real-time remote biometric identification in public spaces, demonstrates that some measures cannot be legitimate even if authorised.[76]

73 For the emergency use procedure, see Regulation (EU) 2024/1689 (n 27) art 5(3).

74 *Roman Zakharov v Russia* (n 19) paras 231, 232; *Weber and Saravia v Germany* (n 65) para 95.

75 Enqvist and Naarttijärvi (n 26) 161-3.

76 For prohibited applications, see Regulation (EU) 2024/1689 (n 27) art 5(1).

8 CONCLUSION

The constitutional question is not whether we are being monitored. The real issues are who authorises the monitoring and what checks and balances are in place for this decision. Shifting the focus away from privacy and treating digital surveillance as a matter of allocating authority and access to justice brings to light the wound that the lens of privacy overlooks. The crux of the matter lies not in the surveillance of the individual, but in where the will that commands this surveillance originates and to what limits it is bound. Assessing the gravity of a privacy breach remains incomplete insofar as it overlooks the institutional chain that lends legitimacy to that breach: the decision-making body, the authority that grants prior authorisation, and the body that carries out subsequent oversight.

On this basis, the study proposes a graduated authorisation criterion. Accordingly, four cumulative conditions have been established, with thresholds that tighten in line with the intensity of the intervention. The four conditions are: the legislative reserve (where fundamental choices are subject to democratic representation), independent prior authorisation (separation of the authorising body from the authorised body), effective *ex post* oversight and recourse (judicial review of the decision), and safeguards of representation (public accountability even in the case of delegation to the private sector), which collectively ensure both democratic legitimacy before authorisation and access to justice thereafter. This criterion makes access to justice a prerequisite for legitimacy and has transferable value across regimes. Harmonisation with the European Union serves as the primary lever for re-establishing this architecture in Central and Eastern Europe. The question of who can authorise the surveillance state concerns the rule of law itself.

Through a study of four countries selected using purposeful sampling, this research has revealed the four hinges of this authorisation architecture and how digital surveillance strains each of them. Examples from Central and Eastern Europe show that this architecture is progressively eroded along a continuum. Pegasus, meanwhile, has shown that, at the end of the spectrum, all four hinges can collapse simultaneously. The UK example, conversely, illustrates the same lesson: strengthening a single hinge (the 'double lock' model) was insufficient to protect the others; even being a party to the Convention and the Grand Chamber's finding of non-compliance failed to prevent the erosion of internal accountability.

A limitation of this study must also be clearly stated here. The proposed framework is structural-normative in nature. A detailed case study concerning national constitutional court rulings, specific Pegasus deployments, or the actual functioning of independent oversight bodies falls outside the scope of this study. Future studies could examine how national supreme courts address the authorisation architecture through doctrinal case studies, and the effectiveness of independent pre-approval and *ex post* oversight bodies through empirical research. How national courts interpret the biometric authorisation regime under the EU AI Act is also a fruitful area to monitor. The proposed criteria enable these future studies to use a common analytical framework.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ХТО НАДАЄ ДОЗВІЛ НА СПОСТЕРЕЖЕННЯ? ПРИМУСОВЕ ЦИФРОВЕ СПОСТЕРЕЖЕННЯ, ВЕРХОВЕНСТВО ПРАВА ТА ДОСТУП ДО СУДОВОГО НАГЛЯДУ: ДОСВІД КРАЇН ЦЕНТРАЛЬНОЇ ТА СХІДНОЇ ЄВРОПИ

Адем Ерсін Байра* та Ніхат Булут

АНОТАЦІЯ

Передумови. *Дискусії щодо цифрового спостереження переважно зосереджені на захисті права на приватність і персональних даних. Проте фундаментальна конституційно-правова проблема примусового цифрового спостереження полягає не стільки в серйозності втручання, скільки в тому, хто саме надає дозвіл на його здійснення та яким механізмам контролю воно підлягає. Іншими словами, йдеться насамперед про поділ влади та доступ до правосуддя.*

Методи. *Дослідження ґрунтується на порівняльно-доктринальному підході. У ньому проаналізовано чотири юрисдикції — Польщу, Угорщину, Україну та Сполучене Королівство, відібрані методом цільової вибірки. Джерельну базу становлять матеріали розслідування Європейського парламенту в межах діяльності комітету PEGA, судова практика Європейського суду з прав людини (ЄСПЛ) і Суду справедливості Європейського Союзу (СЄС), а також звіти Європейської комісії.*

Результати та висновки. *Поступове перенесення повноважень щодо надання дозволів на спостереження від законодавчої влади до виконавчої, а надалі — до нижчих ланок управління та дедалі частіше до приватних суб'єктів, зумовило необхідність дослідження системи санкціонування крізь призму чотирьох ключових елементів: вимоги законодавчого регулювання (legislative reserve), незалежного попереднього санкціонування, ефективного подальшого (ex post) контролю та запобіжників від надмірного делегування повноважень. У дослідженні продемонстровано, як цифрове спостереження створює системні виклики для кожного із цих елементів та як ці проблеми проявляються в досліджуваних юрисдикціях. Науковий внесок дослідження полягає в переосмисленні цифрового спостереження насамперед як проблеми розподілу повноважень, у визначенні чотирьох ключових елементів системи санкціонування та розробленні кумулятивного тесту належності санкціонування, вимоги якого диференціюються залежно від інтенсивності втручання. У межах цієї концепції доступ до правосуддя є необхідною передумовою легітимності, а запропонований критерій може застосовуватися в різних типах політичних режимів. Порівняльний аналіз підтверджує цей висновок: у Польщі та Угорщині всі чотири елементи одночасно демонструють системні недоліки; в Україні три з них перебувають у процесі відновлення та перебудови згідно з умовами вступу до ЄС; у Сполученому Королівстві посилення лише одного з елементів виявилося недостатнім для компенсації недоліків інших елементів системи. Дослідження доводить, що навіть найретельніша перевірка пропорційності втручання не може усунути недоліків, допущених на етапі надання дозволу.*

Ключові слова: *цифрове спостереження; поділ влади; верховенство права; доступ до правосуддя; автоматизоване ухвалення рішень; Pegasus; Центральна та Східна Європа.*

ABSTRACT IN TURKISH*

Araştırma Makalesi

GÖZETİMİ KİM YETKİLENDİRİR? ZORLAYICI DİJİTAL GÖZETİM, HUKUK DEVLETİ VE YARGISAL DENETİME ERİŞİM — ORTA VE DOĞU AVRUPA'DAN BİR BAKIŞ

Adem Ersin Bayra*, Nihat Bulut

ÖZET

Arka Plan: *Dijital gözetime ilişkin tartışmalar büyük ölçüde mahremiyet ve kişisel verilerin korunması ekseninde yürütülmektedir. Oysa zorlayıcı dijital gözetimin asıl anayasal sorunu, müdahalenin ağırlığından ziyade bu müdahaleyi kimin yetkilendirdiği ve müdahalenin hangi denetime tabi kılındığıdır. Yani mesele esasen bir kuvvetler ayrılığı ve adalete erişim meselesidir.*

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Metodoloji: *Çalışma karşılaştırmalı doktriner bir yöntemle yürütülmektedir. Amaçlı örnekleme ile seçilmiş dört ülke (Polonya, Macaristan, Ukrayna ve Birleşik Krallık) Avrupa Parlamentosu PEGA Soruşturması, Avrupa İnsan Hakları Mahkemesi ile Avrupa Birliği Adalet Divanı içtihadı ve Avrupa Komisyonu raporları üzerinden çözümlenmektedir.*

Bulgular ve Sonuçlar: *Gözetime izin verme yetkisinin yasamadan yürütmeye, oradan idarenin alt birimlerine ve giderek özel aktörlere kayışı, yetkilendirme mimarisinin dört menteşe üzerinden ele alınmasını gerektirmiştir. Bunlar yasama saklı alanı, bağımsız ön onay, uygulama sonrası etkili denetim ve yetki devri güvenceleridir. Çalışmada dijital gözetimin her menteşeyi nasıl ayrı ayrı zorladığı ve örneklemde nasıl somutlaştığı ortaya konulmaktadır. Çalışmanın katkısı, dijital gözetimi öncelikle bir yetki tahsisi meselesi olarak yeniden çerçevelemek, yetkilendirme mimarisinin dört menteşesini adlandırmak ve müdahalenin yoğunluğuna göre kademelenen kümülatif bir yetkilendirme ölçütü önermektir. Bu çerçevede adalete erişim bir meşruiyet önkoşuluna dönüşmekte, ölçüt ise farklı rejim tipleri arasında taşınabilir hâle gelmektedir. Örnek olaylar da bunu doğrulamaktadır. Polonya ve Macaristan'da dört menteşe aynı anda işlevini yitirmekte, Ukrayna'da bunlardan üçü AB katılım koşulluluğu altında yeniden kurulmakta, Birleşik Krallık'ta ise tek bir menteşenin güçlendirilmesi diğerlerindeki zayıflığı telafi etmeye yetmemektedir. Karşılaştırma, ölçülülük denetimi ne kadar titizlikle yapılırsa yapılsın yetkilendirme aşamasındaki bir kusurun giderilemeyeceğini göstermektedir.*

Anahtar Kelimeler: *adalete erişim; dijital gözetim; hukuk devleti; kuvvetler ayrılığı; otomatik karar alma; Orta ve Doğu Avrupa; Pegasus.*

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Research Article

RESTRUCTURING OF COMPANIES: AN INSIGHT INTO SAUDI ARABIAN BANKRUPTCY LAW

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ABSTRACT

***Background**: In 2018, Saudi Arabia enacted a new Bankruptcy Law, shifting its insolvency framework from a liquidation-oriented regime to one prioritising corporate rescue. By introducing preventive settlement and financial restructuring procedures, alongside mechanisms like automatic and conditional moratoriums, the law aims to balance business continuity with creditor protection. Despite these developments, there is a lack of research evaluating these mechanisms against global standards. This study addresses this gap by analysing how Saudi Arabia's restructuring procedures balance stakeholder interests and promote economic stability.*

***Method**: This study employs doctrinal, comparative, and case study methods. The doctrinal approach examines primary and secondary legal sources. At the same time, the comparative analysis contrasts Saudi Arabia's corporate restructuring rules with those of the UK, the UAE, and the EU. The theoretical framework is underpinned by institutional theory, which explains the adaptation of national legal systems to global standards, and the creditor-debtor agency theory, which is used to assess the balance of stakeholder interests within insolvency proceedings.*

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***Results and Conclusions**: The findings reveal that while Saudi Arabia successfully aligns with international restructuring practices, its system remains overly court-centric and discretionary compared to EU frameworks. For legal practitioners and businesses, the court's rigorous approach requires strict compliance with procedural requirements but ultimately boosts investor confidence. To effectively manage complex restructurings, the study recommends limiting court intervention by making moratoriums non-discretionary. Furthermore, the Saudi framework should introduce class-based voting to prevent minority obstruction, establish standardised rules for prioritising new financing, and broaden debt discharge provisions.*

1 INTRODUCTION

In the past few decades, rescuing companies and helping them recover during financial trouble has become more important in international insolvency discussions. Organisations like the World Bank, UNCITRAL, and the IMF have supported reforms to business rescue to improve economic stability and the relationship between creditors and debtors.[1] Similar to the Company Voluntary Arrangement (CVA) and Administration of the United Kingdom and the Preventive Composition, the Bankruptcy Law in Saudi Arabia includes a Protective Settlement Procedure defined under the law as: 'a procedure which aims to facilitate an agreement between the debtor and his creditors to settle his debts, where the debtor maintains the right to manage his business.'[2] The Financial Restructuring Procedure enables financially distressed companies to reorganise their obligations under the oversight of a court-appointed trustee. It ensures a fair and supervised restructuring process.[3] The restructuring provisions facilitate aligning the Saudi Arabian legal framework with international practices. Strong moratoriums and automatic stay clauses effectively shield businesses from creditor actions during restructuring.

The Saudi Bankruptcy Law 2018 provides two important insolvency-related rescue measures: preventive settlement and financial restructuring to strengthen corporate rescue mechanisms.[4] The rescue mechanisms are based on international best practices to provide struggling businesses with alternative options.[5] The Saudi Arabian bankruptcy law commenced with the introduction of the Law of Commercial Courts of 1931,[6] followed in

1 Faisal Ibrahim F Alfawzan, 'Critical Examination of Saudi Restructuring Law in the Light of United Kingdom and United States Experiences' (PhD thesis, University of Leeds 2022).

2 Saudi Arabia Royal Decree no M/50 of 28/05/1439H 'Bankruptcy Law' (adopted 14 February 2018) art 1 <https://laws.moj.gov.sa/en/legislation/_ZXh1it653k5JuoCi4LEZQ> accessed 25 May 2026.

3 ibid

4 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.

5 Faisal Alfawzan, 'Moratorium As a Crucial Component of Corporate Restructuring Under Saudi Bankruptcy Law: Critical Examination with Reference to the UK and US Experiences' (2024) 39(4) Arab Law Quarterly 355, doi:10.1163/15730255-bja10158.

6 Saudi Arabia Royal Decree no M/32 of 15/01/1350H 'Commercial Court Law' (adopted 2 June 1931).

1995 by the Protective Settlement of Bankruptcy Law.[7] However, Saudi Arabia's new comprehensive 2018 law abrogated all the previous bankruptcy laws and provides an opportunity to reorganise businesses through preventive settlement and financial restructuring.[8] Alboheth argued that the new law favours debtors, unlike earlier laws that favoured creditors.[9] However, a close examination of the law shows that it takes a balanced approach. Some sections help debtors, while others protect creditors' rights, demonstrating that the law seeks to consider both sides fairly.[10]

The bankruptcy law promotes business rehabilitation and debtor protection. For example, the provisions concerning secured creditors and priority claims demonstrate a continued commitment to creditor rights. The same types of arrangements can be seen in the UK Administration and CVA,[11] which help companies restructure without immediate liquidation.[12] Preventive and financial restructuring tools are used in other countries, such as the United States.[13] In the EU, the law before the 2019 Directive was not debtor- or restructuring-friendly; the EU Preventive Restructuring Frameworks Directive (EU) 2019/1023[14] changed the traditional approach and introduced a restructuring framework that is debtor-friendly, like the USA's Chapter 11.[15] The Directive introduces pre-bankruptcy mechanisms to help companies in distress. The law comprises insolvency and restructuring law to address the needs of businesses.[16] It is a 'hybrid' restructuring procedure that combines out-of-court and in-court elements to allow informal negotiation between the

7 Saudi Arabia Royal Decree no M/16 of 4/9/1416H 'Bankruptcy Protective Settlement Law' (adopted 24 January 1996).

8 Center for Legal Studies and Research, 'The Evolution of Saudi Bankruptcy Law Based on International Best Practices' (*Saudi Center for Legal Studies and Research*, 21 May 2025) [in Arabic] <https://iamaeg.net/ar/publications/articles/the-saudi-bankruptcy-law> accessed 25 May 2026.

9 Hamza E Albaheth, 'Corporate Rescue Culture in Saudi Arabia and Egypt: A Comparative Review of New Bankruptcy Laws' (2021) 16(2) International Journal of Criminal Justice Sciences 103, doi:10.5281/zenodo.4756064.

10 Saudi Arabia Royal Decree no M/50 (n 2).

11 UK Insolvency Act 1986, c 45, pt I (Company Voluntary Arrangements), pt II (Administration) <https://www.legislation.gov.uk/ukpga/1986/45/contents> accessed 25 May 2026.

12 UK Government, 'Company Voluntary Arrangements' (*GOV.UK*, 2026) <https://www.gov.uk/company-voluntary-arrangements> accessed 25 May 2026.

13 Center for Legal Studies and Research (n 8).

14 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the Efficiency of Procedures Concerning Restructuring, Insolvency, and Discharge of Debt, and Amending Directive (EU) 2017/1132 (Directive on Restructuring and Insolvency) [2019] OJ L172/18.

15 US Code, title 11, ch 11 <https://www.govinfo.gov/app/collection/uscode> accessed 25 May 2026.

16 David Christoph Ehmke and others, 'The European Union Preventive Restructuring Framework: A Hole in One?' (2019) 28(2) International Insolvency Review184, doi:10.1002/iir.1344; Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19(3) European Business Organization Law Review 615, doi:10.1007/s40804-018-0113-7.

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debtor and its creditors. It allows judicial and administrative authorities to oversee the restructuring process and compliance with the Directive.[17]

The research is significant because of the global shift toward preventive restructuring and rescue-based regulation, as well as the lack of literature in this area. To address the research objective, this study investigated literature on insolvency law, focusing on recent post-reform work that assesses the philosophy, regulatory direction, and contemporary relevance. The key literature concerns the European Union's Preventive Restructuring Directive 2019/1023. The Directive modernised restructuring across the EU, including Germany. It emphasised early intervention mechanisms to reduce liquidations.[18] The German StaRUG framework,[19] that followed the EU Directive, hailed the introduction of sophisticated tools like cross-class cramdown and early restructuring access. However, it may increase procedural costs and affect accessibility for small businesses.[20] Nonetheless, Teti et al**.** found that preventive restructuring helps companies survive amid weaker financial performance.[21] The EU Directive provides debtors with a second chance through restructuring tools to maximise business value.[22]

There is a dearth of literature on Saudi restructuring law. With the introduction of the new law, some argue that the Bankruptcy Law 2018 is important for diversifying the economy and improving investor confidence.[23] The literature also analysed the Bankruptcy Law and the challenges in implementing it, comparing it with UK laws.[24] However, no comparative study has been conducted as part of a case study. Hence, this research will fill the gap in the literature.

17 Karen McMaster and others, 'Litigation, Legislation, and Case Law Developments Shape European Restructuring Markets' (*A&O Shearman*, 25 January 2025) <https://www.aoshearman.com/en/insights/litigation-legislation-and-case-law-developments-shape-european-restructuring-markets> accessed 25 May 2026.

18 Jessica Schmidt, 'Preventive Restructuring Frameworks: Jurisdiction, Recognition and Applicable Law' (2022) 31(1) International Insolvency Review 81, doi:10.1002/iir.1447.

19 German Act on the Stabilisation and Restructuring Framework for Companies 'Unternehmensstabilisierungs- und –restrukturierungsgesetz' (StaRUG) (adopted 22 December 12.2020) [2020] BGBl I 3256 <https://www.gesetze-im-internet.de/starug/BJNR325610020.html> accessed 25 May 2026.

20 Horst Eidenmüller, 'What Can Restructuring Laws Do? Geopolitical Shocks, the New German Restructuring Regime, and the Limits of Restructuring Laws' (2023) 24(2) European Business Organization Law Review 231, doi:10.1007/s40804-023-00271-9.

21 Emanuele Teti and others, 'The Efficiency of Preventive Restructuring Procedures: Evidence from France' (2024) 33(2) Strategic Change 79, doi:10.1002/jsc.2564.

22 Ana Maria Fagetan, 'Corporate Insolvency Laws in Selected Jurisdictions: US, England, France, and Germany: A Comparative Perspective' (2025) *14*(2) *Laws* 21, doi:10.3390/laws14020021.

23 Alfawzan, 'Moratorium (n 5).

24 Abdullah Nasser A Aldahmash, 'The Petition for a Liquidation Procedure and the administrative Liquidation Procedure: A Comparative Analysis Study in Saudi and UK Insolvency Law' (2026) 68(4) International Journal of Law and Management 628, doi:10.1108/IJLMA-10-2024-0384.

This study analysed the restructuring provisions under Saudi Law and compared them with those of the United Kingdom, the United Arab Emirates, and the European Union Directive. It is intended to identify any gaps in Saudi Arabia's legal framework and suggest changes to strengthen Saudi Arabia's business rescue options. As such, the research addressed the following research questions:

1. Do Saudi restructuring rules support business rescue while trying to balance the rights of creditors and debtors?
2. Compared with the laws in the UK, the UAE, and the EU, where do Saudi laws stand?
3. What kind of legal or procedural changes can be made to improve the current restructuring process in Saudi Arabia?

The originality of this research lies in the analysis of four jurisdictions from different legal traditions at different stages of bankruptcy law development. The research is novel, as it assessed Saudi Arabian law alongside that of the Gulf Cooperation Council (GCC) countries and advanced restructuring principles in Europe and the UK. Further, the research addressed business restructuring rather than liquidation and examined the possibility of legal transplantation of concepts available in the UK and the EU. The theoretical contribution of this research is significant, as the study advanced comparative insolvency scholarship by using institutional theory and creditor-debtor agency theory to understand the convergence of insolvency law. The functional comparison of the main aspects of restructuring provides insights into the effectiveness and transferability of the concepts.

The rest of the study is organised as follows. Section 3 examines the moratorium mechanism; Section 4 analyses creditor voting procedures; Section 5 explores access to debtor financing; Section 6 discusses debt discharge and fresh-start mechanisms, and Section 7 concludes the study with recommendations.

2 METHODOLOGY

This study adopted doctrinal, comparative, and case study methods to assess corporate restructuring rules in Saudi Arabia and compare them with those of the United Kingdom, the United Arab Emirates, and the EU.[25] The doctrinal research method examines primary legal sources such as legislation and regulations, alongside secondary sources, including scholarly literature, policy reports, and legal commentaries.[26] The UK and the

25 Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Law and Method, doi:10.5553/rem/.000010; Yusuff Jelili Amuda and Shahad Ahmed Al-Nasser, Amuda YJ and Al-Nasser SA, 'Exploring Encounters and Prodigies of Islamic Banks in Non-Muslim States: Towards Enhancing Regulatory Frameworks of the Islamic Banking System' (2024) 68(2) International Journal of Law and Management 245, doi:10.1108/IJLMA-11-2023-0250.

26 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83, doi:10.21153/dlr2012vol17no1art70.

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EU have been selected because they have passed complex restructuring laws. The EU Directive provides better coordination in insolvency than interfering with national laws. The EU Restructuring Directive affected all EU countries, including the UK, a former EU member.[27] Saudi Arabia can learn from them to improve its legal framework. The UAE shared similar cultural, economic, and regional priorities and undertook significant insolvency reforms to help the economy and attract investors. A comparison will help to identify best practices and potential legislative improvements.

Overall, comparative analysis will help to identify the strengths, weaknesses, and developmental opportunities within restructuring frameworks, particularly in creditor-debtor rights and corporate rescue mechanisms. A comparative analysis was used to understand legal development in advanced and similar countries, providing possible recommendations to improve Saudi Arabia's legislative framework.[28] The doctrinal, comparative approach can help suggest procedural and legal enhancements to the restructuring of businesses in line with international standards.

This study is based on two main theories: institutional theory[29] and creditor-debtor agency theory.[30] Institutional theory helps explain how legal systems develop and adapt to global standards. This phenomenon is especially relevant to the 2018 introduction of bankruptcy law in Saudi Arabia. The creditor-debtor agency theory focuses on the struggle between debtors who want to retain control of their business and creditors who want to get paid, especially when the company is facing insolvency or undergoing restructuring.[31] In this study, institutional theory influenced changes in Saudi bankruptcy law by introducing standard practices in restructuring and bankruptcy. The creditor-debtor theory is incorporated into Saudi Arabia's insolvency laws, which balance protecting debtors, respecting creditor rights, and helping companies keep operating by comparing them to practices in other countries.

The doctrinal and comparative legal research methodology used to understand and assess restructuring legal frameworks is supported by institutional theory, creditor-debtor agency

27 Reinhard Bork, 'Pre-Insolvency Moratoria: A Legal Comparison' [2021] European Insolvency and Restructuring Journal 1, doi:10.54195/eirj.15090.

28 Dalia Kadry Ahmed Abdelaziz, 'The Reliability of Witness Testimony in Violent Crimes in the Context of Post-Traumatic Stress Disorder: An Analytical Study Through Legal Practices' (2025) 4(1) Journal of Ecohumanism 4281, doi:10.62754/joe.v4i1.6311; Houda Alhoussari, 'Between Urgency and Exception: Rethinking Legal Responses to the Ecological Crisis' (2025) 14(2) Laws 26, doi:10.3390/laws14020026; Jawahitha Sarabdeen, 'Saudi Arabian Legal Framework on the Use of Social Media in Entrepreneurial Marketing' (2025) 12 Social Sciences & Humanities Open 102242, doi:10.1016/j.ssaho.2025.102242.

29 Maria Roszkowska-Menkes, 'Institutional Theory' in Samuel O Idowu and others (eds), *Encyclopedia of Sustainable Management* (Springer Cham 2023) 1983, doi:10.1007/978-3-031-25984-5_389.

30 Simone M Sepe, 'Directors' Duty to Creditors and the Debt Contract' (2007) 1(2) Journal of Business & Technology Law 553.

31 ibid

theory, and stakeholder relationships within insolvency proceedings. Integrating these methodologies and theories helps connect findings to the research. The doctrinal analysis examines restructuring laws and procedures; the comparative approach identifies the philosophical and institutional differences between the Saudi legal system and other legal systems. Institutional theory links governance and restructuring to economic reforms.[32] Whereas the creditor-debtor agency theory is used to assess stakeholder relationships and creditor protection.[33] The conclusions are derived from the methodology, and the theories can guide reform recommendations.

3 MORATORIUM MECHANISM

A key restructuring tool is the moratorium, or automatic stay. A moratorium is a mechanism that prevents creditors from exercising their claims while a company works to recover. That is, it grants temporarily distressed companies relief by suspending all creditor enforcement actions and legal proceedings against the company and its assets.[34] Preventive settlements are vulnerable to creditor pressure since automatic stays apply to financial restructuring in Saudi Arabia.[35] Under the Saudi Bankruptcy Law, preventive settlement procedures do not automatically trigger a moratorium. Instead, the debtor must formally request a moratorium from the Commercial Court, accompanied by a report from an appointed officeholder indicating that the proposed settlement is likely to be accepted by creditors and is feasible to implement. If the court allows the request and grants the moratorium, the court may impose a moratorium for up to ninety days, extendable by thirty-day increments. However, the total duration cannot exceed 180 days.[36]

In contrast, financial restructuring procedures under the same law automatically impose a moratorium upon initiation, providing immediate and comprehensive protection against creditor enforcement actions.[37] Hence, in preventive settlements, debtors may be more vulnerable to creditor pressure as protection from enforcement actions is not guaranteed and depends on the court's approval. Bankruptcy law is less rigid and takes a balanced

32 Douglass C North, *Institutions, Institutional Change and Economic Performance* (CUP 2012) doi:10.1017/CBO9780511808678.

33 Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure' (1976) 3(4) Journal of Financial Economics 305, doi:10.1016/0304-405X(76)90026-X.

34 Alfawzan, 'Moratorium (n 5).

35 Albaheth (n 9).

36 Saudi Arabia Royal Decree no M/50 (n 2) art 18.

37 Amar Meher, 'Saudi Arabia: Key Developments of the Bankruptcy Law and Latest Trends' (*Global Restructuring Review (GRR)*, 11 April 2024) <https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2024/article/saudi-arabia-key-developments-of-the-bankruptcy-law-and-latest-trends> accessed 25 May 2026.

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approach, allowing an automatic moratorium during financial restructuring rather than preventive settlement procedures.

UAE and UK laws also took a similar approach to the Saudi mechanism. However, they focused more on the type of creditors than the type of bankruptcy procedure. The UK imposes liabilities in Section 214 of the Insolvency Act 1986[38] if the directors did not stop trading or take appropriate measures to protect creditors.[39] Failure will lead to sanctions for wrongful trading.[40] The debtor can initiate the CVA process to continue trading or can apply for restructuring or a scheme of arrangement. However, if the company is in liquidation, the liquidator can propose any of the processes. The involvement of a restructuring practitioner is mandatory, unlike in Germany, where they are appointed if the moratorium affects creditors' rights and they want to use the cross-class cramdown rule.[41]

EU Preventive Restructuring Frameworks Directive (EU) 2019/1023 models Chapter 11[42] features of the debtor-in-possession regime, including the stay of creditors and cross-class cramdown, to obtain possible approvals for restructuring. It requires member countries to have an early-warning tool to help companies in financial difficulty. The tool should provide a framework for operating during the reconstruction process and controlling assets. It should also allow companies to seek a moratorium while negotiating a restructuring plan. Article 6 allows a stay of enforcement of all claims for up to four months. The stay can be extended if necessary.

The Saudi and EU systems provide the moratorium as a stabilising mechanism, though they differ significantly in their philosophies and applications.[43] In Saudi Arabia, the moratorium in preventive settlement procedures is discretionary, and in general, the application is highly court-centric to ensure fairness. The EU system seems to be structured and provides clear procedures for predictability and less judicial intervention.[44]

38 UK Insolvency Act (n 11) s 214.

39 Eugenio Vaccari, 'Changes to UK Insolvency Rules in the Wake of Covid-19: A Much-Needed Help for Businesses or an Unjustified Harm to the Rule of Law?' in Carla Ferstman and Andrew Fagan (eds), *Covid-19, Law and Human Rights: Essex Dialogues* (A Project of the School of Law and Human Rights Centre, University of Essex 2020) 127, doi:10.5526/xgeg-xs42_017.

40 Mingyang Chen, 'A Shift in the Duties of Directors when the Company is on the Verge of Bankruptcy' (2023) 2(2) International Journal of Asian and African Studies 39, doi:10.32996/ijaas.2023.2.2.4.

41 Bork (n 27).

42 Directive (EU) 2019/1023 (n 14).

43 Eidenmüller (n 20).

44 Schmidt (n 18).

4 CREDITOR VOTING

In corporate restructuring, countries have different rules for determining whether creditor approval is required. In Saudi Arabia, the Bankruptcy Law specifies that a financial restructuring plan needs to be approved by creditors in the same class who hold two-thirds of the total debt value.[45] Nevertheless, for approval to count, those supporting the vote must also include creditors who hold more than half of the debt from unrelated parties, if any. In contrast, the United Kingdom distinguishes between two mechanisms:

1. A scheme of arrangement: all classes of creditors must approve the plan by a vote of those holding not less than 75% in value within each class.[46]

2. In a restructuring plan under Part 26A of the Companies Act 2006, a class is considered to have approved the plan if creditors holding 75% of the value of claims within that class vote in favour without a numerical majority.[47]

In the United Arab Emirates, a group of creditors is considered to have accepted a restructuring plan if most of them vote in favour and their claims make up at least two-thirds of the total debt in that group.[48]

In the EU,[49] Article 9 of the Directive requires creditors and shareholders to vote on the restructuring plan. The plan requires placing stakeholders of interest in the same class at the same level (Art. 9(4)). The class voting shall not exceed 75% of the claims or interests in each class, and the number of affected parties (Art. 9(6)). A restructuring plan is accepted if the required voting is met (Art. 9(6)). If the plan does not receive the required vote from all the classes, Art. 11 can be invoked, allowing a judicial or administrative authority to confirm the plan upon dissenting classes, provided certain conditions are met. This is referred to as cross-class cramdown (Art. 11(1)). The claimants can be invited to freeride on others' expenses if the restructuring plan is reasonable. The Directive provides Member States with flexibility to choose between the EU Relative Priority Rule (RPR) (Art. 11(1)(c)) and the Absolute Priority Rule (APR) (Art. 11(2)). To invoke cramdown, it is necessary to show that the structuring plan followed the assigned procedure, met the best interest of the dissenting affected parties, the plan is approved by at least one of the affected parties, the dissenting parties are treated fairly like any others in the class and better than the junior class and no class of affected parties receive more than the full amount of its claim.

45 Saudi Arabia Royal Decree no M/50 (n 2) art 31 (2).

46 UK Companies Act 2006, c 46, s 899 <https://www.legislation.gov.uk/ukpga/2006/46/enacted/data.xht?view=snippet&wrap=true> accessed 25 May 2026.

47 ibid, s 901F.

48 UAE Federal Decree-Law no 9 of 2016 'On Bankruptcy' (adopted 20 September 2016) art 102 <https://uaelegislation.gov.ae/en/legislations/1475/download> accessed 25 May 2026.

49 Directive (EU) 2019/1023 (n 14).

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The classification of affected parties under the Directive applies to all creditors; member countries may create exceptions for Small and Medium-sized Enterprises, as stated in Article 9, as they have a simple capital structure. The classes of creditors can ensure fairness among creditors and help control undue influence when the plan is adopted. The affected parties, according to Article 2(1), are creditors whose interests are affected by the restructuring plan. The Directive, however, allows national law to include employees and shareholders as affected parties under Article 11. Nonetheless, some parties can be excluded from voting rights under Article 9(3) (a) to (c) of the Directive. The problem is that the affected parties with voting rights may not participate in the process. For instance, in the *Purdue Pharma* case in the US, the restructuring plan was approved, though the majority of the affected parties did not vote.[50] However, the plan is binding under Recital 64; member countries can address the non-voting issue.

The classification of affected parties is based on common interest; though the Directive does not define common interest, Member States can introduce their own definitions. The common interests must be sufficiently present, and they should be treated equally in proportion (Articles 9 and 10). The judicial or administrative authority will not approve the restructuring plan if common interest criteria are not met. According to Article 9, there must be at least two classes, such as secured and unsecured, though more classes are possible with subordinated claims. The Directive is also unclear about the criteria for inclusion in the secured creditor category. Member States should draft the detailed criteria. The secured creditors are those with security, and if their claims are reduced or curtailed, they could be disadvantaged.

All unsecured claims for which separate classes are not established can, in principle, be included in this class. The Directive dispenses with a further subdivision of unsecured creditors according to their respective interests. It leaves the division of unsecured creditors into one or more classes to the implementation of the Member States. An unsecured class may be created in accordance with Article 8. Among the affected parties, employees and shareholders may be included under Article 2, Paragraph 1(2), of the Directive. If employees are not included among the affected parties, their claims should be settled before the restructuring process (Recital 43). As for shareholders, Member States may decide whether they can be included among the affected parties. They should also ensure that the shareholders do not unduly affect the restructuring plan (Article 12).

Under US law, the APR applies only to dissenting classes of unsecured creditors and shareholders. However, Germany's APR covers all ranks of claimants. In addition, the Directive also allows the adoption of a strict or a flexible APR. The APR is said to act as a waterfall, with creditors of the highest priority receiving their share, followed by those in the hierarchy. However, many are sceptical about APR due to its complex and costly

50 Melissa B Jacoby, 'Sorting Bugs and Features of Mass Tort Bankruptcy' (2022) 101(7) Texas Law Review 1745.

valuation. It only addresses the distribution of values to all stakeholders, but it fails to address the amount to be distributed. A dispute could arise over the values each class could receive from the surplus. A strict application of APR may result in an unfair distribution to older equity holders, such as founders, leading to a holdout. Therefore, it may be critical to provide equity interests to certain individuals as part of a mitigated APR. The mitigated APR can be adopted if there are reasonable grounds for doing so and the dissenting creditors or shareholders will not be affected.[51]

This comparison shows how countries use different voting rules and approval thresholds to protect creditors and make the insolvency process more efficient. Though Saudi Arabia and the EU followed certain voting rules, the EU provided an elaborate architecture based on class-based voting, cramdown, and control of minority obstruction. It also provides predictability.[52]

5 ACCESS TO DEBTOR FINANCING

Under the Bankruptcy Law, the competent court may authorise new financing during restructuring or preventive settlement proceedings. Such a request can only be approved if the court is convinced that new financing is necessary.[53] The new financing may be granted as a priority over unsecured debts. This financing may be secured by unencumbered assets or by a junior lien on encumbered assets.[54]

The UK partially allows creditors to provide new financing secured by the company's assets to meet the capital requirement of restructuring. The UAE resembles Saudi Arabia's approach in allowing the court to approve financing in preventive settlement or financial restructuring. The new financing may be granted priority over the current unsecured debts and secured by the available pledged assets, subject to being second in line after the current ongoing pledges. The EU Directive states that new financing obtained during restructuring will be protected if the restructuring fails (Article 17). EU courts could review the financial arrangement to assess the need, reasonableness, and creditor interest. This could reduce risks and create creditor confidence. It could also promote market-based financing rather than liquidation.[55] The law also allows new financing during restructuring proceedings, subject to court approval that considers creditor interests. The courts may assign priority status on a case-by-case basis. Thus, the Saudi approach is more cautious and court-driven. This may affect market confidence.

51 Axel Krohn, 'Rethinking Priority: The Dawn of the Relative Priority Rule and the New 'Best Interests of Creditors' Test in the European Union' (2021) 30(1) International Insolvency Review 75, doi:10.1002/iir.1398.

52 Fagetan (n 22).

53 Saudi Arabia Royal Decree no M/50 (n 2) s 10.

54 Center for Legal Studies and Research (n 8).

55 Schmidt (n 18).

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6 DEBT DISCHARGE AND FRESH-START MECHANISMS

UK insolvency systems allow a complete debt discharge following a restructuring plan, subject to certain conditions.[56] In Saudi Arabia, the Bankruptcy Law provides a procedure that may allow debts to be discharged after liquidation. This discharge is under 'certain circumstances', meaning that a full 'fresh start' is not guaranteed to all debtors.[57] In Saudi Arabia, a discharge may be possible following a restructuring plan or a court-supervised liquidation. The discharge is also subject to the good conduct of the debtor and the interest of the creditor. Certain debts may be excluded, depending on the court's assessment. Hence, the Saudi Arabian legal framework is cautious regarding debtor rehabilitation, considering economic and creditor interests.[58]

The UAE allows for clear discharge and a fresh start after all payments specified in the restructuring report are cleared.[59] However, there are specific exceptions where discharge is not permitted.[60] The EU allows a full discharge under Part III of the Directive. While debt discharge systems help businesses recover, the economic impact of insolvency laws significantly affects investor confidence, business stability, and foreign direct investment (FDI).

The EU Directive discharges debts within the maximum period **specified under** Article 20. The discharge is allowed at the end of repayment plans or liquidation if the debtor has, in good faith, followed the procedures, and there is no misconduct or fraud on the part of the debtor. This serves as a form of debt rehabilitation, enabling debtors to be reintegrated into economic activities.[61] The discussion on laws and regulations highlighted the availability of restructuring laws, including key issues such as moratorium, voting mechanisms, access to debt financing, and debt discharge. The results of this discussion reflect the theoretical differences that led to legal and procedural differences.

The comparative analysis of UK, UAE, and EU laws on restructuring reveals several strengths of Saudi Law. The comparison shows that Saudi Arabia has improved its insolvency system to outperform other jurisdictions in areas such as specialised sector courts, judicial authorities, and specialised training for judges and court personnel. The Saudi Bankruptcy Law was introduced in 2018, enabling progress toward establishing

56 Insolvency Service, 'What You Need to Know About Bankruptcy' (*GOV.UK*, 5 April 2023) <https://insolvencyservice.blog.gov.uk/2023/04/05/what-you-need-to-know-about-bankruptcy/> accessed 25 May 2026.

57 Fahad Abuhimed, 'The New Saudi Insolvency Law and Its Implementing Regulations' (*AS&H Clifford Chance*, 26 July 2018) <https://www.ashcliffordchance.com/en/publications/the-new-saudi-insolvency-law-and-its-implementing-regulations.html> accessed 25 May 2026.

58 Alfawzan, 'Moratorium (n 5).

59 UAE Federal Decree-Law no 51 of 2023 'Promulgating the Financial and Bankruptcy Law' (adopted 2 October 2023) art 248 <https://uaelegislation.gov.ae/en/legislations/2190/download> accessed 25 May 2026.

60 ibid, art 250.

61 Schmidt (n 18).

special business courts, forming a bankruptcy commission, improving judges' training, and providing clear, stable laws. These changes show that the system is moving closer to international standards. The law also seeks to balance the rights of debtors and creditors, enabling insolvency procedures to be initiated early or voluntarily. One important feature is the automatic moratorium, which helps protect asset value and creates a controlled environment for companies to try restructuring. The automatic stay in financial restructuring and the conditional moratorium in preventive settlement show that the law mainly aims to help companies survive, not shut them down. These parts of the law support the economy, build creditors' trust in the system, and help businesses keep running.

The analysis of the laws further showed that balancing the various parties' interests creates a business-friendly legal environment. In a debtor-friendly regulatory environment, creditors will be less likely to pursue debt discovery, as all income obtained through bankruptcy is used to give the business a second chance. A creditor-friendly legislative environment will enable successful restructuring by ensuring access to bank and other creditor resources and allowing the debt to be restructured on terms favourable to the debtor.[62]

In a debtor-friendly environment, businesses can run and benefit from a moratorium; in a creditor-friendly environment, a special administrator runs the business, and creditors are shielded from actions. Additionally, 'cross-class cramdown' forces a dissenting class of creditors to accept, and to give creditors the right to appoint or remove the examiner and to decide on assets and their handling.[63]

Overall, the inclusion of preventive settlements, financial restructuring, and liquidation, along with the use of automatic and short moratoriums, protects their economic value. This shows a significant change from the old system, which focused more on liquidation, similar to the EU. The UAE improved its bankruptcy law with Federal Decree-Law No. 9 of 2016. The system now includes tools such as restructuring and preventive composition. As in Saudi Arabia, courts play a significant role. The law also allows for a pause (moratorium) before a restructuring plan is accepted. The government is trying to improve the process by training judges and creating special courts, but there are still some issues with applications.

The UK has a strong insolvency system, with the Insolvency Act of 1986 and the Corporate Insolvency and Governance Act of 2020. The laws provide companies with a few ways to restructure, including CVAs and restructuring similar to Chapter 11 in the US. The law also provides automatic moratoriums, rules for creditor voting, and restructuring by creditor

62 Przemysław Banasik and others, 'The Pro-Debtor and Pro-Creditor Models: Comparison of the Effectiveness of Bankruptcy Law' (2022) 66(4) Kwartalnik Nauk o Przedsiębiorstwie17, doi:10.33119/KNoP.2022.66.4.2.

63 Aurelio Gurrea-Martínez, *The Myth of Debtor-Friendly or Creditor-Friendly Insolvency Systems: Evidence from a New Global Insolvency Index* (Research Paper 4, Singapore Management University Yong Pung How School of Law 2023) doi:10.2139/ssrn.4557414.

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groups, which clarify the process and make it more flexible. In the EU, the Directive imposes an obligation on directors to consider the interests of creditors, shareholders, and other stakeholders and to avoid insolvency. It also requires the directors to avoid reckless activities that will affect business interests (Article 19). In terms of stakeholder protection, the Directive ensures that quality information is provided to the stakeholders. It also provides automatic moratoriums, rules on creditor voting, and restructuring by creditor groups. A court is empowered to overrule all groups that refuse the plan. This is known as 'cross-class cramdown'. The restructuring court must confirm the plan, though voting need not take place there. Once the plan is confirmed, new financings can be obtained, and they are protected from insolvency claims and lender liability.

Although the systems in Saudi Arabia and the UAE are still developing, especially in how courts apply the law and how confident creditors are about the process, both countries have made significant progress and are working to meet international standards. Compared to them, the UK is more advanced in legal and practical areas, and the EU is still developing, like Saudi Arabia and the UAE. The EU Preventive Restructuring Directive was tested in courts across various Member States.[64] For example, Germany adopted the Directive in the StaRUG (Unternehmensstabilisierungs- und Restrukturierungs-Gesetz), and it has been tested in court and continues to develop. It was suggested that, to avoid restricting outcomes, it is necessary to work in parallel with the UK restructuring plan if the restructuring involves UK creditors, given the UK 'rule in Gibbs'. The English court will not recognise a foreign restructuring process that compromises the English-law debt of a creditor who has not participated. Similarly, in Spain, the Madrid courts in the *Single Home* case ruled that if more than one restructuring plan is submitted to the court, the restructuring plan approved by the majority and filed first with the court may be considered the approved plan.[65] The analysis shows that laws and directives now support the idea of business rescue, reflecting a global trend of helping companies before they collapse.

Regarding the automatic suspension of claims during financial restructuring, the suspension lasts 180 days and can be extended once. In a preventive settlement, the moratorium only begins after the court approves it and the trustee files a report. It also requires approval from all creditors, which is difficult to obtain, making it challenging to use. Even though the law tries to help the debtor, this rule may limit the real benefit. Nonetheless, the law protects businesses by giving them some time to reorganise. In the UAE, the law also provides an automatic moratorium, but creditors still have more freedom. If the court allows it, secured creditors can start enforcement actions. This shows that the law seeks to balance the interests of both debtors and creditors, but it can also create problems for debtors seeking complete protection from legal claims.

64 McMaster and others (n 17).
65 ibid

In the UK, the rules for moratoriums are more advanced and flexible. Under the Corporate Insolvency and Governance Act 2020, the court can stop a creditor's action if it might harm the restructuring process, even if legal steps have already started.[66] This shows that the UK takes a more practical approach, where courts and professionals work together to help companies recover earlier. In the EU, the Directive also allows a moratorium and facilitates cooperation between debtors and creditors to achieve better business outcomes.[67]

In short, the UAE uses a mixed system with court involvement; the UK and EU follow a more business-focused, flexible approach; and Saudi Arabia sticks to a more formal process that requires complete agreement. These differences show that each country has its own legal framework for helping businesses in financial trouble. Some systems focus on rules, and others give more control to judges or experts.

7 CONCLUSION AND RECOMMENDATIONS

This study highlights the transformation of Saudi Arabia's insolvency framework through the 2018 Bankruptcy Law. By adopting mechanisms such as the Preventive Settlement and Financial Restructuring procedures, Saudi Arabia demonstrates a deliberate shift from a liquidation-oriented regime to one prioritising business rescue and economic continuity. Similar to the UK, the EU, and the UAE, Saudi law exhibits a nuanced and structured approach that blends international best practices with local legal culture, especially in its treatment of moratoriums, the creditor-debtor balance, and access to debtor financing. The law provides an opportunity to manage complex, high-value restructurings transparently and effectively.

The study found that one of the significant developments in Saudi Arabia and the EU is the availability of a moratorium to support successful restructuring. However, they differ in terms of philosophy and application. In Saudi Arabia, the moratorium on preventive settlement procedures is discretionary and highly court-centric, whereas in the EU, it is structured with less court intervention. It was also found that there were differences in voting rules and approval thresholds to protect creditors. However, the EU introduced class-based voting and control over minority obstruction; such advanced provisions are absent in Saudi Arabian law.

The case study further revealed that if new financing is necessary during the restructuring process, both Saudi Arabia and the EU grant priority status to such financing. However,

66 UK Insolvency Act (n 11) pt A1, s A4(4).

67 Tibor Tajti, 'The Restructuring-Bankruptcy Stigma Nexus: In Light of the 2019 Preventive Restructuring Directive of the EU' in Oleksiy Kononov and Thomas Mastrullo (eds), *La transposition de la Directive (UE) 2019/1023 dite 'restructuration et insolvabilité': La place du débiteur et du créancier* (Larcier-Intersentia 2025) 29.

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the priority considerations differ between jurisdictions. There are also provisions on debt discharge in both jurisdictions. However, in the EU, debt discharge is certain after the maximum period, provided certain conditions are met, while in Saudi Arabia, debts can be excluded from discharge.

Though Saudi Arabia's 2018 Bankruptcy Law can help creditors recover funds, it cannot handle complex, significant cases involving international creditors in an organised manner. There is a need for further improvement to standardise the law to implement the restructuring successfully:

1. The provisions regarding the moratorium in preventive settlement should be made non-discretionary, and the courts' involvement should be reduced.
2. The voting procedures should be modified to include class-based voting and control minority obstruction. There should also be amendments to reduce reliance on the courts.
3. It is also necessary to examine the provisions regarding new financing and the allocation of priority status to such financing. Rather than assessing on a case-by-case basis, it can be given as a general rule if certain conditions are met.
4. Discharge of the debt also requires an amendment. The provisions may be amended to allow all debts to be discharged rather than only selected debts.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РЕСТРУКТУРИЗАЦІЯ КОМПАНІЙ: АНАЛІЗ ЗАКОНОДАВСТВА САУДІВСЬКОЇ АРАВІЇ ПРО БАНКРУТСТВО

Хайфа Альхенайфер та Джавахіта Сарабдін*

АНОТАЦІЯ

Передумови. *У 2018 році Саудівська Аравія ухвалила новий Закон про банкрутство, змінивши правовий режим неплатоспроможності з ліквідаційно орієнтованого на такий, що надає пріоритет реорганізації та відновленню діяльності підприємств. Закон має на меті забезпечити баланс між безперервністю господарської діяльності та захистом прав кредиторів завдяки запровадженню процедур превентивного врегулювання і фінансової реструктуризації, а також таких механізмів, як автоматичні та умовні мораторії. Незважаючи на ці нововведення, досліджень, які б оцінювали відповідність цих механізмів міжнародним стандартам, є недостатньо. Для заповнення цієї прогалини у дослідженні проаналізовано, як процедури реструктуризації в Саудівській Аравії забезпечують баланс інтересів зацікавлених сторін та сприяють економічній стабільності.*

Методи: *У цьому дослідженні застосовано доктринальний, порівняльно-правовий методи та метод аналізу тематичних досліджень. Доктринальний підхід передбачає аналіз первинних і вторинних правових джерел, тоді як порівняльний аналіз зіставляє правове регулювання корпоративної реструктуризації в Саудівській Аравії з відповідними нормами Великої Британії, ОАЕ та ЄС. Теоретичним підґрунтям слугує інституційна теорія, яка пояснює адаптацію національних правових систем до глобальних стандартів, а також теорія агентських відносин між кредиторами і боржниками, що використовується для оцінки забезпечення балансу інтересів зацікавлених сторін у процедурах неплатоспроможності.*

Результати та висновки: *Результати свідчать, що хоча Саудівська Аравія загалом узгоджує своє регулювання реструктуризації з міжнародною практикою, її система залишається надмірно орієнтованою на судовий контроль, а суди мають ширші дискреційні повноваження порівняно з відповідними правовими режимами ЄС. Для*

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юристів-практиків та суб'єктів господарювання суворий підхід суду вимагає чіткого дотримання процедурних вимог, але зрештою сприяє підвищенню довіри інвесторів. Для ефективного управління складними процедурами реструктуризації дослідження рекомендує обмежити втручання суду, забезпечивши обов'язкове, а не дискреційне застосування мораторіїв. Крім того, законодавство Саудівської Аравії має запровадити систему голосування за класами кредиторів для запобігання блокуванню рішень меншістю, встановити уніфіковані правила визначення пріоритетності нового фінансування та розширити положення щодо звільнення боржників від боргових зобов'язань.

Ключові слова: *Закон Саудівської Аравії про банкрутство 2018 року, корпоративна реструктуризація, превентивне врегулювання, фінансова реструктуризація, права кредиторів і боржників.*

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Research Article

REGULATING THE ENVIRONMENTAL IMPACTS OF FAST FASHION IN EGYPT: COMPARATIVE LESSONS FROM EUROPEAN, POST-SOCIALIST AND GLOBAL SOUTH MODELS

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ABSTRACT

Background: *The fast fashion industry has become a defining feature of modern consumer culture, yet it is one of the most environmentally harmful sectors worldwide, contributing to water pollution, textile waste, and greenhouse gas emissions. As one of the largest textile and garment producers in the Middle East and Africa, Egypt faces serious challenges in reconciling the industry's economic importance with the urgent need for environmental protection and sustainable development. This article examines the environmental risks associated with fast fashion production and consumption in Egypt and evaluates whether the existing legal regime adequately addresses these challenges.*

Method: *The article adopts a doctrinal and comparative legal methodology. It analyses Egypt's Environmental Law No. 4 of 1994 and Waste Management Law No. 202 of 2020, alongside relevant executive regulations, national strategies, and policy instruments. It addresses these laws within broader sustainability frameworks, including the Sustainable*

Development Strategy: Egypt Vision 2030 and the United Nations Sustainable Development Goals (SDGs). It draws comparative insights from the European Union, Poland, and Bangladesh. The analysis focuses on regulatory mechanisms such as extended producer responsibility (EPR), circular economy policies, and environmental transparency requirements.

Results and Conclusions: *The analysis reveals that although Egypt has established a comprehensive environmental legal regime, significant gaps persist in enforcement, industrial compliance, corporate accountability, and consumer awareness. Existing laws do not sufficiently address the environmental impacts of the fast fashion industry, nor do they impose effective obligations on manufacturers regarding waste reduction or sustainable practices. The comparative analysis informs several reform proposals for Egypt's environmental regulation of the fashion sector. This includes strengthening sector-specific environmental regulation for textile production, enhancing institutional enforcement capacity, introducing extended producer responsibility mechanisms, and expanding international cooperation in sustainable textile production. These measures could significantly reduce the environmental footprint of Egypt's fashion industry while improving compliance with international environmental sustainability standards.*

1 INTRODUCTION

To keep pace with rapidly changing fashion trends and provide affordable apparel for all consumer categories, fast fashion companies rely on extremely low cost production methods and materials. This results in the production of modest-quality products. These companies know such garments will be worn only a limited number of times, which directly influences their decisions about quality standards at every stage of production.[1]

This approach by fast fashion companies has caused severe environmental damage on multiple levels. One of the biggest problems is the use of harmful synthetic textiles, especially polyester, because of its low cost; it is a major source of microplastic pollution, harms oceans and marine life, and contaminates drinking water. These companies also dispose of unsold surplus products by incineration, leading to massive air pollution that contributes to climate change. Furthermore, thousands of tonnes of fabrics are wasted during the design and production phases before the clothes ever reach consumers.[2]

As a result, the fashion industry is one of the largest contributors to environmental degradation, and its harmful impact is further exacerbated by the rise of fast fashion companies that rely on accelerated production methods and encourage excessive

1 Alexandra L Bernard, 'The Hidden Costs Behind Cheap Clothing: Addressing Fast Fashion's Environmental and Humanitarian Impact' (2023) 25(3) Vanderbilt Journal of Entertainment and Technology Law 542.

2 ibid 544-5. See also Katrina L Wilkinson, 'A Legal Solution to the Fast Fashion Problem' (2021) 11(2) Arizona Journal of Environmental Law and Policy 186-7.

consumption. Consequently, this industry plays a pivotal role in climate change, crop endangerment, and the increasing frequency of natural disasters.[3]

Because the textile and garment industry is one of Egypt's most prominent industrial sectors, it faces considerable challenges in balancing industrial growth, environmental preservation, and sustainable development. This study examines the legal framework governing environmental protection in Egypt and assesses its effectiveness in achieving this balance. It also explores mechanisms to align Egypt's fashion sector with national and international environmental sustainability standards.

This article aims to evaluate the effectiveness of Egypt's environmental legislative framework in regulating the environmental impacts of the fast fashion industry, to identify the main gaps in law and enforcement, and to develop reform proposals informed by comparative experience and sustainability standards. It addresses the following questions:

1. Which comparative international models and legal mechanisms, such as extended producer responsibility (EPR), circular economy measures and transparency obligations, can guide Egyptian legal reform in this sector?
2. To what extent does Egypt's current legal framework adequately regulate the environmental impacts of the fast fashion and textile industry? Adequacy shall be assessed by four criteria: the existence of sector-specific pollution control rules, the effectiveness of enforcement institutions, the presence of producer responsibility mechanisms, and the availability of transparency and access-to-information guarantees.
3. What gaps exist in enforcement, institutional capacity, and regulatory tools, and what legal and policy reforms can address these gaps?

This article argues that although Egypt has developed a relatively broad environmental legal regime, its ability to regulate the environmental impacts of fast fashion remains limited by weak enforcement capacity, the absence of producer responsibility mechanisms, and insufficient transparency obligations. The comparative analysis suggests that Egypt should adopt a more sector-specific regulatory approach combining pollution control, EPR, stronger monitoring, and transparency-based accountability.

Existing scholarship has examined the environmental impacts of fast fashion, greenwashing, circular economy regulation, and sustainable textile governance. However, these debates intersect less with Egyptian environmental law and the regulatory challenges facing textile-producing economies. This article contributes to the literature by connecting fast fashion regulation, comparative environmental governance, and Egyptian

3 Emma Sammons, '"Green" is the New Black: Enforcing Consumer Protection Laws Against Greenwashing in the Fashion Industry' (2024) 38(1) Emory International Law Review 200.

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environmental law, and by demonstrating how comparative regulatory analysis can inform national reform strategies in textile-producing economies.

Methodologically, this article relies primarily on doctrinal legal analysis supported by a comparative approach. The doctrinal component examines Egyptian environmental protection legislation, including statutory provisions, regulatory instruments, and the institutional structures responsible for environmental protection.

The comparative analysis focuses on three jurisdictions with distinct regulatory approaches in the global textile and fashion industry: the European Union, Poland as a post-socialist EU Member State, and Bangladesh as a major Global South textile manufacturing hub. The European Union was selected because it has developed one of the most advanced regulatory frameworks addressing the environmental impacts of textile production, particularly through circular economy legislation and EPR schemes. Poland illustrates how EU environmental law operates in a post-socialist governance context, where implementation capacity and institutional structures may differ from those of older Member States. Bangladesh was selected as a comparator because it is one of the world's largest textile manufacturing countries and faces significant environmental challenges related to industrial wastewater and pollution control in textile production. The article also refers to France, India, Turkey, Sweden, China, and South Korea as illustrative examples relevant to specific reform proposals for Egypt. These jurisdictions are not treated as full comparators but as policy illustrations supporting several proposed reforms. Examining these jurisdictions alongside Egypt allows the study to compare regulatory approaches across advanced regulatory systems, transitional legal environments, and manufacturing-oriented developing economies.

The comparative analysis focuses in particular on four analytical dimensions: regulatory frameworks governing textile-related environmental impacts, institutional enforcement capacity, mechanisms of corporate environmental accountability, and transparency and access to environmental information. In addition, the study includes a normative component that evaluates the effectiveness of existing legal frameworks and proposes regulatory reforms to strengthen environmental sustainability in Egypt's fashion industry.

In this article, "fast fashion" refers to an accelerated production and consumption model characterised by low-cost garments, short product lifecycles, and rapid turnover. The terms "textile industry" and "garment industry" are used when discussing production processes, industrial pollution, and statutory regulation, since most environmental laws regulate textile production generally rather than fast fashion. The term "fashion sector" is used more broadly to capture the commercial and regulatory context in which fast fashion operates.

The remainder of this article is structured as follows. Section 2 examines the global rise of fast fashion and its environmental impacts. Section 3 provides a comparative analysis of regulatory approaches in the European Union, Poland, and Bangladesh, focusing on regulatory frameworks, enforcement capacity, corporate accountability, and transparency

mechanisms. Section 4 then analyses Egypt's textile sector, evaluates the existing legal and institutional framework governing environmental protection, and proposes reform strategies to strengthen environmental sustainability within Egypt's fashion industry. Section 5 concludes by summarising the key findings and discussing their implications for environmental governance of Egypt's fast fashion industry.

2 FAST FASHION AND ENVIRONMENTAL SUSTAINABILITY FROM A GLOBAL PERSPECTIVE

The growing and accelerating demand for fast fashion is a global phenomenon that has negatively affected several important legal aspects, most notably environmental protection and sustainability. In this section, we introduce this modern phenomenon and the environmental harm it causes.

2.1. Background of fast fashion as a global industry

The term fast fashion industry refers to a modern trend in clothing production that relies on imitating the latest fashion styles launched by famous brands and manufacturing them in massive quantities at a rapid pace and at low cost to meet the needs of consumers across all categories. Social media plays a pivotal role in driving this industry, as it intensifies consumers' desire to adopt new trends immediately upon release to emulate their favourite influencers. From another perspective, this trend provides producers with an enormous opportunity to achieve quick profits.[4]

Demand in this industry continues to grow, with global clothing consumption expected to increase by 63% by 2030,[5] especially as the latest fashion lines become more accessible to middle-class populations. This drives fast fashion companies to double production efforts. To do so, these companies relocate most manufacturing to less-developed countries, where goods are produced at maximum speed. At the same time, workers are paid low wages and work in unsafe, unhealthy, and hazardous conditions. Statistics show that the clothing and textile industry employs about 300 million people worldwide, most of whom are women.[6] These jobs are often at the lowest levels of the production chain, exposing female workers to dangerous conditions and near-negligible wages.

4 Colson Montgomery, 'International Fast Fashion: How China, Bangladesh and Brazil Can Be Held Accountable for Allowing Slave-Like Labour Conditions' (2024) 32 Michigan State International Law Review 366.

5 Alexa Maratos, 'The Fast Fashion Industry: Formulating the Future of Environmental Change' (2023) 40(2) Pace Environmental Law Review 395, doi:10.58948/0738-6206.1873.

6 ibid 394.

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As a result of this vast expansion and complexity of fast fashion supply chains, the original producing company often lacks knowledge of the true sources of its products. It typically has no visibility beyond its first-tier suppliers, which renders the manufacturing system more vulnerable to fraud and error.[7]

This approach relies on lower-quality raw materials, and the manufactured garments are not designed for long-term use or reuse. They are often disposed of in harmful ways.[8] This trend has undoubtedly led to many environmentally damaging practices.

Accordingly, there have been strong calls to encourage a shift toward "sustainable fashion". This term refers to a system of clothing production and consumption that seeks to mitigate negative environmental impacts at every stage, from fibre production to final disposal. This approach aims to reduce resource consumption at all stages by limiting excessive use and promoting recycling, without compromising these resources for future generations.[9]

As consumers become more aware of the environmental consequences of their clothing choices, and as demand for eco-friendly products rises, fast fashion companies face increasing pressure to adopt sustainable supply chain practices. These pressures have prompted many actors in the field to adopt sustainable supply chain practices, comply with international environmental regulations, and develop strategies that enhance the industry's long-term economic viability and competitiveness.[10]

2.2. Key environmental impacts of fast fashion and textile production

This subsection focuses on the environmental impacts of fast fashion, while referring to the broader textile and fashion industry where the relevant harms arise from production processes such as dyeing, finishing, washing, manufacturing, and waste disposal. This is because fast fashion is not usually regulated as a separate industrial category; instead, its environmental harms stem from textile production and are intensified by rapid production cycles, short product lifecycles, and high disposal rates.

Fast fashion has become one of the most environmentally harmful industries. The most prominent environmental damage from this industry includes water pollution, air pollution, wasteful resource use, and unsafe waste disposal.

7 ibid 396.

8 Montgomery (n 4) 3-4.

9 'Fashion', *Merriam-Webster.com Dictionary* (2026) <https://www.merriam-webster.com/dictionary/fashion> accessed 10 March 2026.

10 Muhammad Mamoon Shaikh and others, 'Sustainable Transformation in Pakistan's Textile Industry: A Holistic Approach to Supply Chain Management' (2023) 17(2) Journal of Business Strategies 2-3, doi:10.29270/JBS.17.2(23).01.

2.2.1. The Impact of Textile Production on Water Pollution

Studies indicate that the textile industry is responsible for nearly 20% of global industrial water pollution,[11] largely because chemical dyes used in fabric colouring leak into rivers and groundwater. However, one of the most dangerous pollutants in this context is microplastic. Synthetic fibres such as polyester, nylon, and acrylic account for about 69% of total clothing production, and they release microplastic particles into water each time they are washed, ultimately reaching the oceans. These particles have been detected in salt, seafood, and even drinking water, with proven harmful effects on the human body.[12]

2.2.2. Greenhouse Gas Emissions from the Clothing Industry

Fast fashion practices release vast amounts of harmful gases that pollute the air, alter the climate, and accelerate global warming. Foremost among these is the "carbon footprint", which refers to the total amount of gases emitted throughout all stages of clothing production, from cultivating raw materials such as cotton through manufacturing, transportation, and distribution to consumption and disposal.[13] Studies show that the fast fashion industry accounts for about 10% of total global greenhouse gas emissions and, if left unregulated, will account for over a quarter of global carbon pollution by 2050.[14]

2.2.3. Resource Depletion and Poor Waste Management in the Industry

The fast fashion industry encourages consumers to shop continuously to keep up with weekly changing trends, treating clothing as rapidly consumable goods. This approach leads to the excessive use of resources such as water, oil, and others. It also creates massive surpluses of unsold garments, and even purchased clothes are often discarded after a short period, especially when they cannot be recycled. In both cases, these clothes typically end up in landfills, posing additional health risks, particularly in developing countries that lack effective waste management systems.[15]

Between 4% and 9% of all textile products placed on the European market are destroyed without ever being used, while approximately 87% of used textiles are either burned or

11 Directorate General for Communication, 'Fast Fashion: EU Laws for Sustainable Textile Consumption' (*European Parliament*, 12 September 2025) <https://www.europarl.europa.eu/topics/en/article/20201208STO93327> accessed 10 March 2026.

12 Zoe Tsicalos, 'The Fashion Industry, the Environment & Sustainability: A Call for an International Treaty and What This Means for the Future of the Fashion Industry' (2024) 23(1) Journal of International Business and Law 137.

13 Directorate General for Communication (n 11) 4-5.

14 Maratos (n 5) 4.

15 Sammons (n 3) 8.

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buried.[16] In contrast, recycling rates remain extremely low, as the technologies capable of recycling clothes back into original fibres are still insufficiently advanced.[17]

These environmental impacts matter for legal regulation because they involve different regulatory tools. Water pollution and chemical discharge require sector-specific effluent standards, wastewater treatment obligations, and effective inspection systems. Greenhouse gas emissions require monitoring, reporting, and cleaner production measures. Resource depletion and textile waste require lifecycle regulation, including circular economy measures and extended producer responsibility. Accordingly, these environmental impacts of fast fashion are not merely descriptive background. They provide the basis for assessing whether Egypt's legal regime is adequate and for identifying the reforms proposed later in this article.

3 COMPARATIVE REGULATORY APPROACHES TO ADDRESSING THE ENVIRONMENTAL IMPACTS OF THE FASHION INDUSTRY

The environmental impacts of the fast fashion industry outlined in the previous section have prompted increasing legislative attention across different jurisdictions. Because fast fashion relies heavily on accelerated textile production, short product lifecycles, and large volumes of textile waste, most legislation focuses on the broader environmental governance of the textile industry rather than on fast fashion as a distinct legal category. Legislators and decision makers have begun to develop legal regimes aimed at reducing the environmental footprint of textile production, improving waste management, and strengthening corporate responsibility. However, the design and effectiveness of these regimes vary substantially depending on institutional capacity, regulatory traditions, and economic structures. The following comparative analysis examines regulatory responses in three jurisdictions: the European Union, Poland as a post-socialist EU Member State, and Bangladesh as a major Global South textile manufacturing hub.

The comparison uses four criteria: the regulatory design used to address textile-related environmental impacts, institutional enforcement capacity, corporate accountability through producer responsibility, and transparency and access to environmental information. These criteria evaluate not only the formal content of legal instruments, but also their capacity to support effective environmental governance in practice.

16 Directorate General for Communication (n 11) 3-4.
17 ibid 4.

3.1. The European Union: Circular Economy and Regulatory Leadership

In the European Union, circular economy principles dominate regulation of the textile industry's environmental impacts. This is evident in the European Green Deal and the Circular Economy Action Plan (CEAP), which promotes a lifecycle approach to products, meaning that environmental regulation should address not only waste disposal, but also product design, production, consumption, reuse, recycling, and resource recovery.[18] The CEAP provides the broader policy foundation for regulating the environmental impacts of textile production and consumption.

The EU Strategy for Sustainable and Circular Textiles applies these broader circular economy principles into a textile-specific policy framework.[19] It reinforces this approach by calling for mandatory durability and recyclability standards for textile products placed on the EU market.[20] The Strategy seeks to ensure that textile products placed on the EU market become more durable, repairable, reusable, and recyclable, while also addressing fast fashion, textile waste, greenwashing, hazardous substances, and weak transparency across textile supply chains. It serves as a critical policy instrument that informs subsequent regulatory developments on sustainable product design, producer responsibility, waste management, transparency, and disclosure of environmental information.[21]

This policy direction is reflected in the Waste Framework Directive. Article 8 of the Waste Framework Directive requires Member States to establish EPR schemes under which producers bear financial and organisational responsibility for collecting, recycling, and treating waste generated by their products.[22] These obligations aim to ensure that producers bear responsibility for the environmental impacts associated with manufacturing their

18 European Commission, 'The European Green Deal' (COM(2019) 640 final, 11 December 2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019DC0640> accessed 10 March 2026; European Commission, 'A New Circular Economy Action Plan: For a Cleaner and More Competitive Europe' (COM(2020) 98 final, 11 March 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020DC0098> accessed 10 March 2026.

19 European Commission, 'EU Strategy for Sustainable and Circular Textiles' (COM(2022) 141 final, 30 March 2022) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022DC0141> accessed 10 March 2026.

20 Mayra Lucía Montoya Flores and Stefan Salhofer, 'Environmental Assessment of Cotton Textile Production in Peru: A Case Study for a Cotton T-Shirt' (2025) 970 Science of the Total Environment 10**,** doi:10.1016/j.scitotenv.2025.179031.

21 Liene Siliņa, Inga Dāboliņa and Eva Lapkovska, 'Sustainable Textile Industry – Wishful Thinking or the New Norm: A Review' (2024) 19 Journal of Engineered Fibers and Fabrics 4-7, doi:10.1177/15589250231220359.

22 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L 312/3; Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste [2018] OJ L 150/109.

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products and create incentives for more sustainable products.[23] The Waste Framework Directive was further amended in 2025 to introduce common EU rules on extended producer responsibility for textiles, reinforcing the shift from general waste-management obligations toward sector-specific responsibility for textile waste.[24]

These regulatory instruments also strengthen corporate accountability by requiring producers to assume financial and organisational responsibility for the environmental impacts of textile products throughout their lifecycle. Several EU Member States have also adopted national circular economy legislation reinforcing these principles. For example, France's law on the Fight Against Waste and the Circular Economy (2020) prohibits destroying unsold goods and promotes reusing and recycling textile products.

Concerns about misleading environmental marketing practices, often referred to as *greenwashing*,[25] have further strengthened the importance of transparency and access to environmental information regulating the fashion industry.[26] Therefore, EU environmental governance adopts strong transparency mechanisms.[27] This includes legally guaranteed public access to environmental information under Articles 3 and 7 of Directive 2003/4/EC, which require public authorities to provide environmental information upon request and actively disseminate key environmental data. These transparency guarantees are supported by broader rights stipulated in Articles 4-6 of the Aarhus Convention, which establish rights of access to environmental information and public participation in environmental decision-making.

Monitoring and enforcement mechanisms at both the EU and national levels support these obligations, including administrative oversight and compliance systems, as well as judicial review and access-to-justice mechanisms under EU environmental directives and the Aarhus Convention.[28]

23 Thomas Lindhqvist, 'Extended Producer Responsibility in Cleaner Production: Policy Principle to Promote Environmental Improvements of Product Systems' (PhD thesis, International Institute for Industrial Environmental Economics, Lund University 2000) 144.

24 Directive (EU) 2025/1892 of the European Parliament and of the Council of 10 September 2025 amending Directive 2008/98/EC on Waste [2025] OJ L 2025/1892.

25 Abo El-Wafa Mohammad Abo El-Wafa, 'Climate Change Within the Halls of Justice: An Analytical Study of Climate Litigation to Ensure Climate Action and Promote Climate Justice' (2025) 39(3) UAEU Law Journal 129, doi:10.65088/2025.39.3.3 [in Arabic].

26 Siliņa (n 21) 7.

27 Marjan Peeters, 'Judicial Enforcement of Environmental Democracy: A Critical Analysis of Case Law on Access to Environmental Information in the European Union' (2020) 4(1) Chinese Journal of Environmental Law 13, doi:10.1163/24686042-12340048.

28 Directive (EU) 2018/851 (n 22); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention, 25 June 1998) [2003] UNTS 2161/447, art 9.

3.2. Poland: Implementation Challenges in a Post-Socialist Jurisdiction

In contrast, post-socialist legal systems such as Poland apply the relevant EU legal regime but still face implementation and enforcement challenges. As a Member State, Poland must transpose EU environmental directives into national law, including obligations on EPR and environmental transparency.[29] However, the implementation of these requirements varies in practice. Poland has delayed implementing the EPR obligations, although the legislative deadline expired on 5 January 2023. Poland is introducing a comprehensive EPR system through a draft law on packaging and packaging waste published in 2025.[30] As a result, municipal waste management costs fall largely on residents rather than producers until now,[31] indicating limited application of producer responsibility mechanisms.

Moreover, administrative capacity constraints, fragmented institutional responsibilities, and limited monitoring resources weaken the effectiveness of regulatory oversight and environmental inspection systems. Poland enforces EU waste directives through administrative, civil, and criminal mechanisms, including inspections, permitting requirements, and administrative sanctions.[32] However, despite these measures, the practical management of textile waste remains limited, with most textile waste still disposed of through municipal systems and only a small proportion is recycled.[33]

The European Commission plays an important monitoring role through instruments such as the Environmental Implementation Review, which assesses Member States' implementation of EU environmental law. As noted in the 2019 Environmental Implementation Review, Poland continues to face difficulties ensuring full compliance with EU environmental legislation, particularly in areas requiring complex monitoring and enforcement mechanisms.[34] Consequently, although the formal regulatory framework governing producer responsibility and environmental transparency largely mirrors EU standards, enforcement capacity and institutional coordination remain challenging in practice.

29 Wojciech Piontek, 'Implementacja Rozszerzonej Odpowiedzialności Producenta do Systemu Gospodarowania Odpadami w Polsce' (2018) 20(2) Rocznik Ochrona Środowiska 1597.

30 'EPR in Poland: Draft Law on Packaging and Packaging Waste – A New Model of Extended Producer Responsibility' (*Andersen*, 27 August 2025) <https://pl.andersen.com/en/newsletter/epr-in-poland-draft-law-on-packaging-and-packaging-waste-a-new-model-of-extended-producer-responsibility/> accessed 10 March 2026.

31 Ewa Woźniak-Gientka, 'Integration of Bioeconomy within Regional Policy Frameworks: a Case Study of the Wielkopolska Voivodeship' (2025) 106(2) BioTechnologia 195, doi:10.5114/bta/205149.

32 Marcin Wielec, 'Legal Regulations and Sanctions Related to the Illegal Dumping of Waste in Polish Environmental Law' (2024) 19(36) Journal of Agricultural and Environmental Law 308-14, doi:10.21029/jael.2024.36.30.

33 Irena Wojnowska-Baryła and others, 'The Growing Problem of Textile Waste Generation—The Current State of Textile Waste Management' (2024) 17 Energies 1528, doi:10.3390/en17071528.

34 European Commission, 'Environmental Implementation Review 2019 Country Report – Poland' (SWD(2019) 128 final, 4 April 2019) <https://op.europa.eu/hu/publication-detail/-/publication/5cf0cf1f-0ac2-11ea-8c1f-01aa75ed71a1/> accessed 10 March 2026.

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3.3. Bangladesh: Environmental Regulation in a Global Manufacturing Hub

A different regulatory context emerges in Global South manufacturing hubs such as Bangladesh. Bangladesh's textile sector is governed by the Environmental Conservation Act 1995 and the Environmental Conservation Rules 1997. Section 12 of the Act requires industrial facilities to obtain an Environmental Clearance Certificate from the Department of Environment before establishment or operation. The Environmental Conservation Rules implement this requirement through Rule 7, which establishes the procedure for issuing environmental clearance certificates. Under Rule 7 and Schedule 1, the Rules classify industries by environmental risk into Green, Orange-A, Orange-B, and Red categories. Schedule 1 lists textile dyeing and finishing operations as Red category industries, requiring the highest level of environmental scrutiny before approval. This classification reflects the significant environmental risks of textile processing, as dyeing and finishing plants are a major source of industrial water pollution.[35]

This permit-based structure shows that Bangladesh regulates textile-related environmental risks primarily through ex ante administrative clearance and facility-level risk classification. Its strength lies in identifying high-risk industrial activities before establishment or operation, but its limitation is that it does not establish lifecycle regulation, producer responsibility, or transparency-based accountability mechanisms comparable to those found in the EU model.

Studies of the Bangladeshi textile sector confirm that dyeing industries generate large volumes of wastewater containing dyes, salts and other chemical pollutants that pose serious risks to aquatic ecosystems.[36] In addition, Schedule 10 of the Rules establishes effluent discharge standards that regulate pollutants commonly generated in textile production processes. However, enforcement capacity is a problem,[37] as many textile factories either lack effluent treatment plants or fail to operate them effectively, contributing to ongoing industrial water pollution.[38]

To conclude, approaches across jurisdictions show how regulation of the fashion industry's environmental impacts varies with regulatory design, enforcement capacity, corporate accountability, and transparency mechanisms. The European Union represents the most developed model, combining lifecycle regulation, producer responsibility, circular economy

35 Rita Kant, 'Textile Dyeing Industry an Environmental Hazard' (2012) 4(1) Natural Science 22-3, doi:10.4236/NS.2012.41004.

36 Laila Hossain, Sumit Kanti Sarker, and Mohidus Samad Khan, 'Evaluation of Present and Future Wastewater Impacts of Textile Dyeing Industries in Bangladesh' (2018) 26 Environmental Development 23, doi:10.1016/j.envdev.2018.03.005.

37 Siliņa, Dāboliņa and Lapkovska (n 21) 13.

38 Sayeda Ummeh Masrura and Kazi Shafayet Haider, 'Case Study on Effluent Treatment Plant of ACS Textiles (Bangladesh) Limited' (2017) 6(1) UITS Journal of Science & Engineering 95.

policies, and transparency guarantees. Poland illustrates that formal alignment with EU standards does not necessarily ensure effective implementation where institutional coordination and enforcement capacity remain limited. Bangladesh demonstrates the limits of a permit-based model that relies primarily on environmental clearance and effluent discharge standards, particularly where enforcement remains uneven, and lifecycle accountability mechanisms are weak. These comparative insights provide a useful basis for evaluating the effectiveness of environmental regulation in Egypt's fashion sector and identifying potential pathways for legal and institutional reform.

4 THE FASHION INDUSTRY IN EGYPT: BETWEEN ENVIRONMENTAL REALITY AND LEGAL REFORM

The Arab Republic of Egypt is renowned for cultivating some of the world's finest cotton. As a result, the textile and clothing industry is considered a central pillar of the national economy. However, the industry also contributes significantly to environmental pollution from textile production. This section explores the economic importance of Egypt's textile industry. It then examines the industry's environmental impacts. Finally, it also provides policy recommendations regarding how Egypt can balance industrial development with environmental sustainability in the fashion sector.

4.1. Economic Significance and Environmental Impacts of Egypt's Textile Industry

Egypt is one of the world's leading producers of high-quality cotton, renowned for its exceptional quality. Because cotton is the most widely used raw material, Egypt has been known for its textile industry since the Pharaonic era thousands of years ago. This sector's prominence grew further with the invention of the cotton gin in the 18th century.[39]

The textile and clothing industry has long played a pivotal role in Egypt's national economy because of the country's fully integrated production system, from cultivating premium-quality raw cotton to spinning, weaving, dyeing, and manufacturing ready-made garments and fabrics. The textile industry is Egypt's second-largest industrial sector after the food industry and continues to grow steadily. The fashion and apparel sector accounted for 56.7% of total industry revenues in 2024.[40] It is also one of Egypt's most important export sectors. Raw cotton exports reached approximately USD 156 million during the 2021–2022 fiscal

39 'Textile Sector in Egypt: Case Study' (*ElSewedy Industrial Development*, May 2025) <https://elsewedydevelopment.com/textile-sector-in-egypt-case-study-may-2025> accessed 10 March 2026.

40 'Egypt Textile Manufacturing Market Size & Share Analysis – Growth Trends and Forecast (2025–2030)' (*Mordor Intelligence*, 11 January 2026) <https://www.mordorintelligence.com/industry-reports/egypt-textile-manufacturing-industry-study-market> accessed 10 March 2026.

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year, while ready-made garment exports increased by 42% in the same period.[41] In 2024, the value of Egypt's textile exports rose to USD 1.11 billion, with Turkey, Algeria, Italy, and China ranking among the top importing countries.[42]

The Egyptian government is making tremendous efforts to maintain the country's leading position in textile production and exports. It aims to strengthen the textile industry's competitiveness by using national resources optimally. To achieve this, the government follows a strategy focused on enhancing cotton crop quality, providing favourable conditions for farmers to boost productivity, developing cotton ginning facilities, improving all stages of production, and integrating modern technologies to meet global standards.

Despite the textile industry's significance in Egypt, it has negative environmental effects at every stage of production. The Egyptian environment suffers from the emissions, industrial wastewater, and solid waste generated by textile activities.[43] The main sources of pollution in the textile sector include cotton dust and fibres, chemical vapours and gases, and sulphur and nitrogen oxides emitted from steam boilers, as well as the discharge of contaminated effluents into surface waters or sewage systems.[44] These Egypt-specific impacts provide the factual basis for assessing whether the existing legal and institutional framework can regulate the environmental consequences of textile and fashion production.

4.2. Analysis of the Legal and Institutional Framework for Environmental Protection in Egypt

4.2.1. Egyptian Environmental Law No. 4 of 1994

The principal legislation governing environmental protection in Egypt is Law No. 4 of 1994.[45] At the outset, the law provides fundamental definitions in environmental protection, clarifying sources and factors of pollution such as hazardous waste, water pollutants, and oil mixtures, as well as different areas of environmental pollution, including air and water pollution, among other basic concepts.

One key aspect of the second chapter of the Egyptian Environmental Law concerns the institutional body responsible for environmental protection: the Egyptian Environmental Affairs Agency (EEAA), a public legal entity affiliated with the Ministry of Environment. The law details the Agency's structure, powers, and functions, as well as the authorities

41 'Textile Sector in Egypt (n 39).

42 Egypt's Exports of Textiles Exceeded One Billion Dollars in Eleven Months' (*AlArabiya*, 30 December 2024) [in Arabic] <https://www.alarabiya.net/aswaq/exclusive/2024/12/30> accessed 10 March 2026.

43 Ministry of State for Environmental Affairs, *Self-Monitoring Manual: Textile Industry* (Egyptian Environmental Affairs Agency, Egyptian Pollution Abatement Project 2003) 9 [in Arabic].

44 ibid 45-6.

45 Law of the Arab Republic of Egypt no 4 of 1994 'On Environmental' [1994] Official Gazette 5 [in Arabic].

vested in it to enable it to perform its duties effectively.[46] The law also establishes the Environmental Protection Fund, affiliated with the EEAA, into which financial allocations are deposited from several sources detailed in Article 14 of the Law.

Most provisions of the law set out rules to protect the terrestrial, aquatic, and atmospheric environments from all types of pollutants that may cause harm,[47] the administrative and judicial measures that follow in the event of violations,[48] and the penalties applicable to offenders.[49] While the law provides a comprehensive framework for environmental regulation, its effectiveness depends largely on the institutional capacity of enforcement authorities, a challenge that remains significant in practice.

4.2.2. Law No. 202 of 2020 on Waste Management Regulation50

This law is among the most significant pieces of legislation enacted to protect the Egyptian environment from the adverse impacts of various types of waste by organising their management and establishing sound disposal mechanisms. A key feature of this law is the establishment of a specialised public authority responsible for regulating, monitoring, evaluating, and developing all aspects of integrated waste management to achieve sustainable environmental development: the Waste Management Regulatory Authority.

The Authority oversees the implementation of waste management plans in coordination with state institutions, local administrations, the private sector, civil society, and international organisations.[51] The law also sets out in detail the Authority's structure, mandates, the powers conferred on it to fulfil its duties, and its financial resources.[52]

Furthermore, the law regulates general policies, obligations, and prohibitions that licensed entities engaged in waste management activities must observe.[53] It distinguishes between various categories of waste: non-hazardous waste, municipal waste, construction and demolition waste, agricultural waste, industrial waste, and hazardous waste. It specifies the mechanisms and rules governing each type.[54] The final chapter sets out the penalties for violating the obligations imposed by its provisions.[55] However, the law does not yet incorporate EPR mechanisms comparable to those adopted in EU circular economy legislation, which limits its effectiveness in addressing textile waste generated by the fashion industry.

46 ibid, arts 2–13.
47 ibid, arts 19–77.
48 ibid, arts 78–83.
49 ibid, arts 84–104.
50 Law of the Arab Republic of Egypt no 202 of 2020 'On Waste Management' [2020] Official Gazette 41 [in Arabic].
51 ibid, arts 3–4.
52 ibid, arts 5–14.
53 ibid, arts 15–28.
54 ibid, arts 29–64.
55 ibid, arts 65–80.

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4.2.3. Other Relevant Legislation and Policies

In addition to the principal laws regulating environmental protection and waste management, Egypt has adopted several laws and policies that strengthen the legal and institutional framework for environmental protection and promote the transition toward sustainable production and consumption patterns.

The new Labor Law No. 14 of 2025, which entered into force in September 2025, introduced several provisions that reinforce sustainable production in workplaces. Book Four of the Law, titled "Occupational Safety, Health, and Work Environment Protection", mandates industrial establishments to adopt all necessary preventive measures to protect workers from environmental hazards resulting from production processes, including gaseous emissions, industrial pollutants, noise, and hazardous chemicals. It also requires employers to provide a safe work environment in line with international safety standards and to train workers in pollution prevention and waste management arising from production activities.[56] Through these provisions, the law clearly aligns with environmental sustainability goals and supports the national transition toward a greener economy.

At the strategic level, Egypt Vision 2030 serves as the overarching framework guiding state policies toward sustainable development. The Vision's seventh pillar, "Environment", sets a strategic objective of "achieving world-class levels of environmental performance", focusing on three main areas: pollution reduction, ecosystem protection, and improved natural resource management. The Vision also establishes quantitative targets, such as increasing the recycling rate to 50% by 2030 and reducing carbon emissions by 10% of total national emissions during the same period.[57]

International commitments also influence Egypt's environmental policy. It is a party to the Paris Agreement on Climate Change (2015)[58] and has committed, through its Nationally Determined Contributions (NDCs), to reducing emissions in the energy, transport, and industrial sectors. Egypt is also pursuing the United Nations Sustainable Development Goals (SDGs), particularly Goal 13 (Climate Action) and Goal 12 (Responsible Consumption and Production).[59] These international commitments reflect Egypt's determination to align its national policies and legislation with global environmental standards, thereby ensuring comprehensive and sustainable development.

56 Law of the Arab Republic of Egypt No 14 of 2025 'On Labor' [2025] Official Gazette 18(supp), arts 255, 256 [in Arabic].

57 Government of the Arab Republic of Egypt, *Egypt Vision 2030: The National Agenda for Sustainable Development: Egypt's Updated Vision 2030* (Ministry of Planning and Economic Development 2023) 88; 'Environmental Axis' (*Egypt Vision 2030*, 2026) <http://sdsegypt2030.com/environmental-dimension/environment-axis/?lang=en> accessed 10 March 2026.

58 Paris Agreement 'Framework Convention on Climate Change' (adopted 12 December 2015) [2023] UNTS 3156/79.

59 Transforming Our World: The 2030 Agenda for Sustainable Development (adopted 25 September 2015 UNGA Res 70/1) <https://docs.un.org/en/A/res/70/1> accessed 10 March 2026.

Despite notable progress in Egypt's legal framework for environmental protection and waste management, several gaps continue to limit its effectiveness in achieving environmental sustainability in the fashion sector. Compared with the regulatory approaches discussed in the previous section, the most prominent challenges are limited enforcement and monitoring of existing laws, whether due to a lack of human and technical resources within the competent authorities or weak coordination among relevant entities.[60]

Moreover, Egypt lacks an EPR system that holds manufacturers accountable for the entire lifecycle of their products, even after they enter the market. This mechanism is considered a cornerstone of modern circular economies. Egyptian legislation also lacks clear provisions protecting consumers from greenwashing practices, the misleading claims made by some companies regarding the sustainability of their products.

In addition, the economic and legislative incentives designed to encourage circular economy practices, such as recycling and reuse, remain limited. This weakness undermines the sector's ability to transition to production processes more aligned with global environmental standards.[61]

In addition, the effectiveness of environmental regulation depends on access-to-justice mechanisms. Procedurally, this includes access to environmental information and transparency in decision-making. Institutionally, it requires well-established authorities that can monitor and enforce compliance. From a remedial perspective, effective environmental governance also depends on the availability of judicial review and legal remedies that allow individuals and civil society organisations to challenge violations and ensure the enforcement of environmental standards.[62]

4.3. Legal Reform Proposals for Regulating the Environmental Impacts of Egypt's Fashion Sector

As noted before, while the fast fashion industry plays a major role in Egypt's economy, it also has serious negative environmental impacts due to its high consumption of water and energy, its use of chemical substances, and the generation of large amounts of industrial waste. Addressing these challenges requires strengthening the legal and institutional framework governing the sector. Building on the comparative regulatory approaches

60 Roushdi Eid, Irene Shenouda and Maggy Atalla, 'Sustainable Development and its Relation to Environmental Policies in Ready-Made Garment Factories in the Arab Republic of Egypt' (2023) 33(1) Journal of Home Economics 170, doi:10.21608/mkas.2022.155802.1157 [in Arabic].

61 Medhat Abo Hashima and Sara Mahran, 'Sustainability in the Ready-Made Garment Industry Using Unconventional Eco-Friendly Materials' (2023) 33(1) Journal of Home Economics 218-9, doi:10.21608/mkas.2022.160379.1173 [in Arabic].

62 Gururaj Devarhubli and Alaukik Shrivastava, 'The Advancement of Environmental Procedural Rights in India: An Analysis of Issues, Problems and Prospects' (2024) 10(1) Cogent Social Sciences 3-5, doi:10.1080/23311886.2024.2312949.

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examined in the previous section, several reforms could enhance environmental sustainability within Egypt's fashion industry.

4.3.1. Strengthening Sector-Specific Environmental Regulation and Producer Responsibility

The existing environmental legislative framework should be expanded to include explicit provisions regulating the fashion industry's environmental impacts. Although Environmental Law No. 4 of 1994 is comprehensive, it lacks detailed provisions addressing pollutants specific to the textile and garment industries, such as synthetic dyes and wastewater. It is therefore recommended to add a specific section on the textile and ready-made garment industries, establishing maximum permissible emissions limits and setting standards for wastewater treatment before discharge.

Egypt can benefit from India's and Turkey's experience. Since 2016, India has classified the textile sector as a "Red Category" industry under the Central Pollution Control Board (CPCB) classification.[63] It has required factories to establish Common Effluent Treatment Plants (CETPs) in textile industrial zones[64]. Turkey also introduced a new regulation at the beginning of 2025 establishing an inspection and control system for certain textiles, clothing, and leather products to ensure safety and compliance with restrictions on hazardous chemicals.[65]

Additionally, introducing an EPR system is among the most critical reforms needed in Egyptian legislation. An EPR system obliges companies to take responsibility for their products throughout their entire lifecycle, even after consumption. Experiences from other jurisdictions show the potential effectiveness of these mechanisms. As shown in the comparative analysis of the European Union in Section 3, modern environmental governance increasingly relies on lifecycle regulation that assigns waste-management responsibility to producers rather than public authorities. The European Union has incorporated EPR into its waste governance framework through the Waste Framework Directive, which requires Member States to establish producer responsibility schemes to reduce waste generation and promote recycling across product lifecycles. Likewise, South Korea has implemented the EPR system since 2003 under the Act on the Promotion of Saving and Recycling of Resources, which led to a 46% increase in textile recycling rates within five years.[66] In Egypt, this could be implemented by requiring fashion brands and

63 Central Pollution Control Board (CPCB), *Classification of Industries – Red, Orange, Green, White* (Government of India 2016, updated 2025) 73.

64 ibid 77.

65 Communiqué Ministry of Trade of the Republic of Turkey no 18/2025 'On Inspection of Certain Textile, Apparel and Leather Products (Product Safety and Inspection)' [2025] Official Gazette 32769.

66 Republic of Korea, 'The Republic of Korea's EPR System for Packaging: An Asian Role Model' (*PREVENT Waste Alliance*, 2023) <https://prevent-waste.net/wp-content/uploads/2023/06/Republic-of-Korea.pdf> accessed 10 March 2026.

large manufacturers to establish systems to collect, sort, and recycle post-consumer textile products, or to donate and reuse them as raw materials.

Moreover, governments could introduce mandatory minimum quotas for using recycled materials in production. Similarly, tax incentives for companies that meet specific targets in waste reduction or emissions control can be useful in this regard. Such mechanisms would encourage the transition toward a circular economy model, which has become a cornerstone of modern environmental policies.

To implement these reforms in Egyptian law, Environmental Law No. 4 of 1994 and its executive regulations could be amended to introduce textile-specific pollution standards. Also, Waste Management Law No. 202 of 2020 could be amended to establish EPR obligations for textile products. Such amendments could require large fashion brands and manufacturers to register with the competent authority, so that the authority can identify which companies are subject to EPR, reporting, disclosure, and fee obligations. The amendments could also require manufacturers to finance or participate in post-consumer textile collection and recycling schemes, report on textile waste and recycling rates, and disclose key environmental impact data. The disclosure obligation would also help address greenwashing by requiring verifiable environmental claims and subjecting them to administrative oversight.

4.3.2. Enhancing Institutional Enforcement Capacity

Institutional and regulatory capacities must be strengthened to enforce environmental legislation effectively. As the comparative analysis in the previous section demonstrated, the effectiveness of environmental regulation depends not only on the existence of legislation but also on the institutional capacity of enforcement authorities. While the European Union has developed robust monitoring and transparency mechanisms for environmental governance, Poland and Bangladesh show how administrative capacity constraints and limited monitoring resources can weaken the implementation of environmental legislation in practice.

Similar challenges exist in Egypt, where the EEAA continues to face challenges due to shortages of technical staff and weak mechanisms for monitoring industrial pollution. To address this, it is recommended that specialised environmental monitoring units be established in major industrial zones such as Sadat City, 10th of Ramadan City, and the Suez Canal Economic Zone, equipped with advanced digital technologies to monitor industrial emissions and assess air and water quality.

Comparative experiences show how stronger monitoring systems and transparency mechanisms can significantly improve environmental enforcement. Several European countries have strengthened environmental accountability through transparency-based monitoring mechanisms. For instance, Sweden implemented an industrial environmental

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transparency policy that requires companies to publish annual reports on their emissions and energy consumption, thereby strengthening public accountability.[67] These policies are also linked to broader international initiatives such as the United Nations Environment Programme's Climate Transparency Initiative, which seeks to enhance global climate performance, help countries improve national systems for monitoring environmental violations, and modernise accountability mechanisms.[68]

In addition, China's experience shows how technological innovation can support environmental enforcement. In 2018, China's Ministry of Ecology and Environment launched an intelligent environmental monitoring system using satellites and sensors to track emissions in real time and impose immediate sanctions on polluting facilities.[69] These experiences demonstrate how improved monitoring systems and transparency mechanisms can significantly strengthen the enforcement of environmental legislation in industrial sectors such as textile manufacturing.

4.3.3. Strengthening Policy Coordination, International Cooperation, and Industry Partnerships

In addition to legislative amendments, Egypt could adopt a National Strategy for Sustainable and Circular Textiles. Such a policy initiative could provide a basis for future legal reforms. It could set targets to reduce textile waste, improve wastewater treatment, expand recycling, strengthen producer responsibility, and enhance environmental disclosure. It could also clarify the roles of the EEAA, the Waste Management Regulatory Authority, industrial zone authorities, manufacturers, and private-sector actors.

To align with environmental sustainability standards, Egypt must strengthen public-private partnerships and cooperate with international initiatives. This could include collaboration with the United Nations Environment Programme (UNEP) and the European Bank for Reconstruction and Development (EBRD) to provide technical assistance and green financing to upgrade production technologies in the textile and fashion industry.

The Bangladeshi experience, as discussed in section 3 above, stands out in this regard. In 2013, the government of Bangladesh, in cooperation with the World Bank and the United Nations Industrial Development Organization (UNIDO), launched the Green

67 Ministry of Climate and Enterprise, *Sweden's First Biennial Transparency Report under the Paris Agreement* (Government Offices of Sweden 2024) 71.

68 'What is Climate Transparency and Why is it Important' (*UN Environment Programme*, 29 August 2025) <https://www.unep.org/news-and-stories/story/what-climate-transparency-and-why-it-important> accessed 10 March 2026.

69 Ministry of Ecology and Environment of the People's Republic of China, *2018 Report on the State of the Ecology and Environment in China* (PRC 2019) 17.

Garment Factories Initiative, through which the country now hosts more than 150 LEED-certified garment factories.[70]

Moreover, integrating environmental sustainability into Egypt's industrial education curricula and vocational training programmes would help prepare a new generation of engineers and workers in the fashion industry with environmental awareness and the ability to innovate in sustainable design and resource management.

However, implementing these reforms in Egypt may face practical challenges. Strengthening wastewater treatment obligations, establishing EPR schemes, introducing environmental disclosure duties, and developing monitoring systems would impose financial and technical burdens on both the government and industry actors. Smaller manufacturers may struggle to meet new compliance costs. Larger producers and fashion brands may also resist additional reporting, collection, recycling, or fee obligations. Therefore, reform should be introduced progressively, supported by tax incentives and stakeholder consultation.

In short, achieving environmental sustainability in Egypt's fashion sector thus requires a structural transformation of the legal and institutional system, one that extends beyond the mere enactment of laws to the cultivation of a societal culture grounded in environmental awareness and responsible production. Implementing these reforms progressively and strategically, while drawing upon successful international experiences, will strengthen Egypt's competitiveness in the global fashion market and position it as a leading model for sustainable fashion production in the Arab world and across Africa.

5 CONCLUSION

This article shows that the fast fashion industry, despite its growing economic importance, poses significant environmental challenges through intensive resource consumption, chemical pollution, and large volumes of textile waste. These impacts are particularly relevant for countries with expanding textile sectors such as Egypt, where industrial development must increasingly be reconciled with environmental sustainability objectives.

This article has examined whether Egypt's current environmental legal regime adequately regulates the environmental impacts of the fast fashion and textile industry. The analysis shows that Egypt's legal regime is only partially adequate. Although Egypt has enacted important environmental and waste-management legislation, including

70 THM Kaizer, 'Green Garment Factories in Bangladesh: Motivation and Challenges' (Master thesis, School of Business and Economics, University of Jyväskylä 2020) 56-7; 'Bangladesh: Circularity Opportunities in the Textile Value Chain' (*UNIDO United Nations Industrial Development Organization*, 28 February 2023) <https://www.unido.org/news/bangladesh-circularity-opportunities-textile-value-chain> accessed 10 March 2026.

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Environmental Law No. 4 of 1994 and Waste Management Law No. 202 of 2020, these laws are general and do not sufficiently address the specific environmental harms associated with textile production and fast fashion consumption, such as wastewater discharge and textile waste.

The study has also identified several key regulatory gaps. The most important gaps include weak enforcement capacity, limited institutional coordination, the absence of an extended producer responsibility system, insufficient transparency and access-to-information obligations, and a lack of sector-specific rules governing pollutants generated by textile and garment production. These gaps limit the effectiveness of existing legislation and reduce its capacity to support a transition toward circular and sustainable production models. They also show that environmental regulation cannot be assessed only by reference to the existence of legal rules. Instead, its adequacy depends also on implementation, monitoring, corporate accountability, and available procedural and remedial mechanisms.

The comparative analysis provides useful lessons for Egyptian legal reform. The European Union demonstrates the importance of circular economy policies, EPR mechanisms, product lifecycle regulation, transparency obligations, and stronger corporate accountability. Poland illustrates that formal transposition of environmental rules is not sufficient where implementation capacity and institutional coordination remain weak. Bangladesh shows the limitations of permit-based regulation and effluent standards when enforcement is uneven and industrial compliance remains inconsistent. This comparative analysis suggests that Egypt should adopt a more integrated regulatory approach.

In particular, strengthening sector-specific environmental regulation for textile production would help address pollutants such as synthetic dyes and industrial wastewater that existing legislation does not sufficiently regulate. Strengthening the institutional capacity of environmental authorities, particularly through improved monitoring systems and specialised inspection units, would significantly improve enforcement effectiveness. Introducing an EPR scheme could also encourage lifecycle management of textile waste and promote circular economy practices. Finally, expanding international cooperation and partnerships in sustainable textile production would support technological upgrading and strengthen environmental governance within the sector. These reforms could enable Egypt to reduce the environmental footprint of its fast fashion industry while maintaining its competitiveness in global textile markets.

At the same time, implementing these reforms will require careful attention to practical constraints, including regulatory authorities' financial capacity, manufacturers' compliance costs, and potential resistance from industry actors.

Future research could build on this analysis by examining how emerging legal and technological developments may affect textile-producing economies such as Egypt. These include digital product passports for garment traceability, legal approaches that treat

textile waste as a recoverable resource, regulation of ultra-fast production models, microplastic pollution from synthetic fabrics, and digital tools to verify environmental claims and prevent greenwashing.

By examining Egypt's regulation of fast fashion's environmental impacts from a comparative perspective, the article contributes to emerging legal scholarship on the environmental governance of the fast fashion industry by showing how comparative regulatory analysis can inform national reform strategies in textile-producing economies.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РЕГУЛЮВАННЯ ЕКОЛОГІЧНОГО ВПЛИВУ ІНДУСТРІЇ ШВИДКОЇ МОДИ В ЄГИПТІ: ПОРІВНЯЛЬНИЙ ДОСВІД ЄВРОПЕЙСЬКОЇ, ПОСТСОЦІАЛІСТИЧНОЇ МОДЕЛЕЙ ТА МОДЕЛІ ГЛОБАЛЬНОГО ПІВДНЯ

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АНОТАЦІЯ

Передумови. *Індустрія швидкої моди стала визначальною рисою сучасної споживчої культури, проте вона залишається одним із найбільш екологічно шкідливих секторів у світі, спричиняючи забруднення водних ресурсів, утворення текстильних відходів і викиди парникових газів. Як один із найбільших виробників текстилю та одягу на Близькому Сході та в Африці, Єгипет стикається із серйозними викликами, намагаючись узгодити економічне значення цієї галузі з нагальною потребою в охороні довкілля та сталому розвитку. У цій статті досліджуються екологічні ризики, пов'язані з виробництвом і споживанням продукції швидкої моди в Єгипті, а також оцінюється відповідність чинного правового режиму масштабам зазначених викликів.*

Методи. *У статті застосовано доктринальний і порівняльно-правовий методи дослідження. Проаналізовано Закон Єгипту про охорону навколишнього середовища № 4 від 1994 року та Закон про управління відходами № 202 від 2020 року разом із відповідними виконавчими регламентами, національними стратегіями та програмно-політичними документами. Ці акти розглядаються крізь призму ширших концепцій сталого розвитку, зокрема Стратегії сталого розвитку «Бачення Єгипту 2030» (Egypt Vision 2030) та Цілей сталого розвитку Організації Об'єднаних Націй (ЦСР ООН). У дослідженні використано порівняльний досвід Європейського Союзу, Польщі та Бангладеш. Основну увагу зосереджено на таких регуляторних механізмах, як розширена відповідальність виробника (РВВ), засади циркулярної економіки та вимоги щодо екологічної прозорості.*

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Результати та висновки. *Проведений аналіз засвідчує, що, попри сформований у Єгипті комплексний еколого-правовий режим, зберігаються значні прогалини у сферах правозастосування, дотримання регуляторних вимог суб'єктами промисловості, корпоративної підзвітності та правосвідомості споживачів. Чинне законодавство недостатньо охоплює екологічні наслідки функціонування індустрії швидкої моди, а також не покладає на виробників дієвих зобов'язань щодо зменшення обсягу відходів або запровадження сталих виробничих практик.*

На основі порівняльно-правового аналізу сформульовано низку пропозицій щодо реформування системи екологічного регулювання індустрії моди в Єгипті. Зокрема, йдеться про посилення секторального природоохоронного регулювання текстильного виробництва, нарощування інституційної спроможності органів правозастосування, запровадження інструментів розширеної відповідальності виробника та розширення міжнародного співробітництва у сфері сталого текстильного виробництва. Зазначені заходи сприятимуть відчутному зменшенню екологічного сліду модної індустрії Єгипту за одночасного покращення рівня її відповідності міжнародним стандартам екологічної сталості.

Ключові слова. *Швидка мода; екологічне право; сталий розвиток; текстильна промисловість; циркулярна економіка; розширена відповідальність виробника (РВВ); Бачення Єгипту 2030 (Egypt Vision 2030).*

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REVIEW ARTICLE

Review Article

CONFLICTS OF COMPETENCE BETWEEN THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND NATIONAL PROSECUTING AUTHORITIES

Mila Ivanova

ABSTRACT

Background: *The establishment of the European Public Prosecutor's Office (EPPO) under Article 86 TFEU introduced a new model of criminal law integration within the European Union (EU) based on the functional allocation of competence between the EPPO and national prosecuting authorities. Although Regulation (EU) 2017/1939 establishes the legal framework governing the EPPO's competence, determining the competent authority in complex cross-border cases continues to raise significant legal and practical challenges. The absence of a sufficiently structured approach to the application of competence criteria may give rise to conflicts of competence, which may affect legal certainty, procedural efficiency, and the effective protection of the EU's financial interests.*

Method: *The study employs doctrinal legal research based on a systematic analysis of EU primary and secondary legislation, including Article 86 TFEU, Regulation (EU) 2017/1939, and Directive (EU) 2017/1371. The research combines doctrinal, systematic, and case-law analysis of the legal framework*

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governing the EPPO's competence with an examination of the case law of the Court of Justice of the European Union (CJEU) and relevant Bulgarian judicial practice. Particular attention is paid to the interaction between EU and national legal rules and to the practical application of the criteria for determining the competent authority in cross-border criminal proceedings.

Results and Conclusions: *The analysis demonstrates that conflicts of competence constitute a structural consequence of the model of functionally distributed competence established by EU law rather than isolated procedural anomalies. Although Regulation (EU) 2017/1939 provides the legal framework governing the EPPO's competence, it does not ensure sufficiently clear and predictable criteria for determining the competent authority in all complex cross-border cases. The study makes an original contribution by proposing an author's classification of conflicts of competence, a structured system of competence criteria, and an author's conceptual analytical framework for determining the competent authority. This framework supports a more coherent and predictable application of Regulation (EU) 2017/1939 and contributes to greater legal certainty and effectiveness in determining the competent authority between the EPPO and national prosecuting authorities.*

1 INTRODUCTION

The establishment of the European Public Prosecutor's Office (EPPO) constitutes one of the most significant institutional changes in the development of European criminal law. The legal basis for its establishment is contained in Article 86 of the Treaty on the Functioning of the European Union (TFEU), which provides for the establishment of a body competent to investigate, prosecute and bring to judgment criminal offences affecting the financial interests of the Union.[1] This possibility was implemented by Regulation (EU) 2017/1939, by which the European Public Prosecutor's Office (EPPO) was established.[2]

The primary objective of the EPPO is to ensure the effective protection of the financial interests of the EU by overcoming the limitations of traditional inter-State cooperation.

The specific nature of the EPPO lies in the fact that it exercises its competence jointly with the national prosecution authorities within a model of functionally allocated competence, rather than through their institutional replacement. This hybrid structure creates the preconditions for conflicts of competence between the EPPO and the national prosecuting authorities.

The question of delimiting competence is further complicated by the lack of sufficiently clear, predictable, and hierarchically structured criteria in the current legal framework. The

1 Treaty on the Functioning of the European Union (TFEU) (consolidated version) [2012] OJ C326/47, art 86.

2 Council Regulation (EU) 2017/1939 of 12 October 2017 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office (EPPO) [2017] OJ L 283/1.

case law of the Court of Justice of the European Union (CJEU) gradually clarifies certain aspects of the interaction between the EPPO and the national authorities, but a number of practical issues remain unresolved. This normative uncertainty does not constitute merely a theoretical problem, but has a direct impact on legal certainty, the effectiveness of cross-border investigations, and the consistent allocation of competence between the EPPO and the national prosecuting authorities.

Despite the growing interest in the EPPO in European legal doctrine, research has focused primarily on the institutional and procedural aspects of the EPPO. There has been considerably less attention devoted to the systematic analysis of conflicts of competence, and there is also a lack of a comprehensive analytical framework for determining the competent authority where competing grounds of competence exist. This gap in the literature is precisely what the present study seeks to address.

The present study analyses the competence of the EPPO and proposes a conceptual analytical framework for determining the competent authority in the event of conflicts of competence. On the basis of the identified gap in the literature, the study raises questions regarding the causes and types of conflicts of competence, the adequacy of the existing criteria, and the possibilities for their more consistent application. In order to answer the research questions posed, the article sequentially examines the legal framework governing the competence of the EPPO, the causes and types of conflicts of competence, the criteria for determining the competent authority, and the relevant case law.

2 METHODOLOGY

The aim of the present study is to analyse the legal nature, manifestations, and mechanisms for resolving conflicts of competence between the EPPO and the national prosecuting authorities in the context of EU law and national criminal procedural law.

The object of the study is the social relations arising in the exercise and allocation of criminal jurisdiction between the EPPO and the national prosecuting authorities.

The subject matter of the study is the legal framework, case law, and institutional mechanisms for resolving conflicts of competence between the EPPO and the national prosecution authorities, as well as the criteria that determine the competent authority within the framework of cross-border criminal proceedings.

The study seeks to answer the following main research questions:

> *RQ1. What are the main causes of conflicts of competence between the EPPO and the national prosecuting authorities?*
>
> *RQ2. To what extent does the current EU legal framework contain clear, predictable, and sufficiently structured criteria for the delimitation of competence?*

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RQ3. How does the case law of the CJEU and the Bulgarian courts contribute to the interpretation and practical resolution of conflicts of competence?

RQ4. Is it possible, on the basis of the existing system, to develop a conceptual framework for determining the competent authority in cases of conflicts of competence?

The formulated research questions determine the logic and structure of the study, with each subsequent part being directed towards their sequential clarification.

To achieve the aim of the study, the doctrinal, systematic, comparative, and case law methods were used.

Doctrinal legal analysis has been applied to examine the current legal framework of the EU, including the provisions of the TFEU, Regulation (EU) 2017/1939 and Directive (EU) 2017/1371[3].

Systematic and comparative analyses have been applied to clarify the interaction between EU law and the applicable national criminal procedural law in the exercise of the competence of the EPPO.

The analysis of the case law of the CJEU and Bulgarian case law has been used to assess the practical application of the rules governing the competence of the EPPO.[4] These methods make it possible to examine simultaneously the normative, institutional, and practical aspects of conflicts of competence.

The scientific contribution of the present study is expressed in three interrelated directions.

- An original classification of conflicts of competence between the EPPO and the national prosecuting authorities has been developed.
- The principal criteria for determining the competent authority where competing grounds of competence exist have been formulated.
- An original conceptual analytical framework has been proposed, which systematizes and determines the logical sequence for the application of these criteria in conflicts of competence between the EPPO and the national prosecuting authorities.

The study is limited by the relatively short period of operation of the EPPO and the still-developing case law of the CJEU and the Bulgarian courts on the issues under consideration. For this reason, some of the conclusions reached are of an analytical and prognostic nature and are subject to further development with the accumulation of new case law and institutional experience. Nevertheless, the conclusions reached are based on the current legal framework and the available case law and may serve as a basis for future research on the competence of the EPPO.

3 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law [2017] OJ L 198/29.

4 Case no 6093/2024 Decision no 2077 (Sofia District Court, 30 April 2024).

3 DEVELOPMENT OF EUROPEAN CRIMINAL LAW AND THE ESTABLISHMENT OF THE EPPO

3.1. Evolution of European Criminal Law

Initially, criminal law was perceived as a sphere belonging entirely to national sovereignty; therefore, European integration was limited to intergovernmental cooperation between the Member States. The fight against cross-border crime was carried out through mutual legal assistance, extradition, and coordination between the national authorities, without the European Community possessing autonomous criminal law powers.[5]

The increase in cross-border crime, financial fraud against the EU budget, and organized crime called into question the effectiveness of the exclusively national model of criminal prosecution and necessitated closer coordination between the Member States.[6]

A significant turning point in the development of European criminal law occurred with the entry into force of the Treaty of Lisbon in 2009. For the first time, the primary law of the EU provided an explicit legal basis for the adoption of minimum rules concerning certain categories of criminal offences and sanctions, as well as for the establishment of institutional mechanisms for the protection of the financial interests of the Union.[7]

In European legal doctrine, the period following the Treaty of Lisbon is defined as a transition from intergovernmental cooperation to a model based on common standards, mutual recognition, and specialized supranational institutions, which exercise limited criminal law powers or coordinate the activities of the national authorities.[8] It is precisely this transformation that laid the foundations for the establishment of the EPPO.[9]

Consequently, the development of European criminal law represents not only an institutional expansion of the powers of the EU, but also a change in the manner in which criminal competence is allocated between the European and national levels. This transformation laid the foundations of the model of functionally allocated competence, which creates the preconditions for conflicts of competence between the EPPO and the national prosecuting authorities.

5 TFEU (n 1) arts 67, 82–86; Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2020) 19-38.

6 Mitsilegas (n 5).

7 TFEU (n 1) arts 82–86; Mitsilegas (n 5) 51-63.

8 Katalin Ligeti (ed), *Toward a Prosecutor for the European Union: A Comparative Analysis* (Hart Publishing 2013) vol 1.

9 Lorena Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer Nature 2018).

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3.2. Article 86 TFEU as the Constitutional Basis of the EPPO

Article 86 TFEU establishes the constitutional basis of the EPPO and outlines the principal limits of its competence.[10] The provision is intended to ensure more effective protection of the financial interests of the Union in the context of cross-border crime and differences in the national procedural systems.[11] Article 86 TFEU does not confer universal criminal competence upon the EPPO, but rather introduces a model of functionally allocated competence between the European and the national levels.[12] This model is further developed in Regulation (EU) 2017/1939.[13]

A particular feature of the model under Article 86 TFEU is that the EPPO was established through the mechanism of enhanced cooperation due to the lack of the necessary unanimity among the Member States for its establishment.[14] For this reason, the EPPO exercises its competence only in the participating Member States. This limitation acquires particular significance in the case of cross-border offences affecting the financial interests of the EU that involve both participating and non-participating Member States. In such cases, the interaction between the EPPO and the national authorities is carried out in accordance with the applicable rules of EU law, which may create the preconditions for competing grounds of competence and difficulties in determining the competent authority.[15]

Furthermore, Article 86 TFEU limits the competence of the EPPO to offences affecting the financial interests of the EU. Regulation (EU) 2017/1939 governs the organization and the exercise of that competence, while Directive (EU) 2017/1371 defines the offences falling within its material scope.[16] The thus-defined model of functionally allocated competence creates the preconditions for conflicts between the EPPO and the national prosecuting authorities. For this reason, conflicts of competence should be regarded as a structural consequence of the multi-level model of criminal law integration, rather than as incidental practical difficulties.

10 TFEU (n 1) art 86.
11 Council Regulation (EU) 2017/1939 (n 2) recs 12–15; Mitsilegas (n 5).
12 TFEU (n 1) art 86; Mitsilegas (n 5).
13 Council Regulation (EU) 2017/1939 (n 2).
14 Ligeti (n 8).
15 Mitsilegas (n 5).
16 Directive (EU) 2017/1371 (n 3).

4 LEGAL FRAMEWORK OF COMPETENCE

4.1. EU Legal Framework

The legal framework governing the competence of the EPPO is characterized by a multi-level normative structure, built upon the interaction of primary and secondary EU law, as well as the national legal systems of the participating Member States. On the one hand, Article 86 TFEU constitutes the constitutional basis for the establishment of the EPPO and outlines the limits of its competence. On the other hand, Regulation (EU) 2017/1939 specifies the content of that competence, while Directive (EU) 2017/1371 defines the substantive scope of the offences affecting the financial interests of the Union.[17] For this reason, the analysis of the current legal framework should sequentially examine the primary and secondary law of the EU.

4.1.1. Constitutional Framework of Competence: Article 86 TFEU

Article 86 TFEU constitutes the primary legal basis for the competence of the EPPO.[18] It defines its purpose, outlines the constitutional limits of its competence, and provides for its establishment through the mechanism of enhanced cooperation.

4.1.2. Secondary EU Law and the Normative Limits of Competence

The constitutional framework established by Article 86 TFEU finds its specific normative development in the secondary law of the EU, primarily in Regulation (EU) 2017/1939 and Directive (EU) 2017/1371. The two acts form a unified legal framework, in which the Regulation governs the institutional organization of the EPPO and the rules governing the exercise of its powers, while the Directive defines the substantive scope of the offences falling within the competence of the EPPO.[19] It is precisely within this normative framework that the criteria for determining the competence of the EPPO are specified.

Article 22 of Regulation (EU) 2017/1939 is of particular importance for determining competence, as it limits the material competence of the EPPO to offences affecting the financial interests of the EU, as defined in Directive (EU) 2017/1371. In this way, the competence of the EPPO is determined through the functional link between the specific offence and the financial interests of the Union, which requires an individual assessment in each particular case.

In that assessment, Directive (EU) 2017/1371 is of decisive importance. It introduces minimum rules concerning the constituent elements of offences affecting the budget of the

17 Council Regulation (EU) 2017/1939 (n 2) arts 22–25; Directive (EU) 2017/1371 (n 3).

18 TFEU (n 1) art 86.

19 Council Regulation (EU) 2017/1939 (n 2); Directive (EU) 2017/1371 (n 3).

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EU, including fraud, corruption, misappropriation of funds, money laundering, and serious cross-border VAT fraud. However, the Directive does not aim at the complete unification of national criminal law, but at minimum harmonization, which leaves the Member States discretion as to the manner of transposition of its provisions.[20]

Minimum harmonization creates practical difficulties in determining the competent authority. Although the material scope of the offences is harmonized at the level of the EU, the individual Member States retain differences both in the national constituent elements of offences and in the procedural rules governing their investigation. Consequently, the secondary law of the EU defines the normative limits of the competence of the EPPO and the mechanisms for its exercise, but their practical application requires an individual assessment in determining the competent authority.[21]

An additional element of the normative framework is constituted by the rules laid down in Articles 24 and 25 of Regulation (EU) 2017/1939, which govern the notification of the EPPO and the criteria for the exercise of its competence. These provisions are intended to prevent competition between European and national criminal prosecution by granting the EPPO the right to determine whether to exercise its competence in the specific case. Nevertheless, the normative criteria do not always allow for the unambiguous resolution of complex cross-border cases, especially where there are multiple interconnected offences or competing grounds of competence.[22] Consequently, these provisions reduce the risk of conflicts of competence, without excluding it completely.[23]

4.2. National Legal Framework

The national legal framework plays a key role in the practical exercise of the powers of the EPPO, as it is through it that European rules are integrated into the national criminal justice systems.

Although the competence of the EPPO derives directly from EU law, its exercise is inevitably carried out within the framework of the national institutions and in compliance with the national procedural rules, insofar as Regulation (EU) 2017/1939 does not provide otherwise.[24]

In the Republic of Bulgaria, this integration has been effected through amendments to the Judiciary Act, by which the European Delegated Prosecutors have been incorporated into the structure of the Prosecutor's Office, while, in the exercise of their functions, they act as organs of the EPPO in accordance with Regulation (EU) 2017/1939.[25]

20 Directive (EU) 2017/1371 (n 3); Ligeti (n 8).
21 Mitsilegas (n 5) 245-50.
22 Council Regulation (EU) 2017/1939 (n 2) arts 24, 25.
23 Mitsilegas (n 5).
24 Council Regulation (EU) 2017/1939 (n 2).
25 Law of the Republic of Bulgaria on Judicial System [2007] SG 24, art 136(8)-(9) <https://www.justice.government.bg/home/normdoc/2135560660> accessed 20 April 2026.

The dual institutional status of the European Delegated Prosecutors is one of the most characteristic features of the legal model of the EPPO. On the one hand, the European Delegated Prosecutors apply the national criminal procedural law and use the national investigating authorities. On the other hand, in the exercise of the powers of the EPPO, they are bound by the instructions and decisions of the Permanent Chambers, the European Chief Prosecutor, and the EPPO as an institution. Consequently, their procedural status combines elements of the national and the European legal regime.[26]

To guarantee the institutional independence of the European Delegated Prosecutors, the Bulgarian legislator has provided for special rules regarding their status. The Judiciary Act excludes the possibility of national administrative heads and the prosecutors of the higher-level prosecution offices from exercising hierarchical control over their activities when they act in their capacity as European Delegated Prosecutors. In this way, the institutional independence of the EPPO in the exercise of its powers is guaranteed.[27]

At the procedural level, the interaction between European and national law is implemented through the application of the provisions of the Criminal Procedure Code, insofar as Regulation (EU) 2017/1939 does not contain special rules. The investigation, gathering of evidence, judicial review, and the procedural rights of the participants are governed primarily by national procedural law.

At the same time, all procedural actions must comply with the requirements of the Regulation and the principles of EU law, which forms a complex model of the parallel application of the European and the national legal frameworks.[28]

The interaction between European competence and national procedural law creates the preconditions for conflicts of competence. Although material competence is determined by EU law, its practical exercise passes through national institutions and procedural mechanisms, as a result of which the national legal framework has a direct influence on the determination of the competent authority in particular proceedings.[29]

4.3. Interaction between EPPO and National Authorities

The interaction between the EPPO and the national authorities is carried out through the mechanisms for notification, coordination, and determination of competence provided for in Regulation (EU) 2017/1939. Through them, it is determined whether the particular

26 Ligeti (n 8); Mitsilegas (n 5).

27 Law of the Republic of Bulgaria on Judicial System (n 25) art 136 (11).

28 Council Regulation (EU) 2017/1939 (n 2); Law of the Republic of Bulgaria on Judicial System (n 25); Criminal Procedure Code of the Republic of Bulgaria [2005] SG 86 <https://justice.government.bg/home/normdoc/2135512224> accessed 20 April 2026.

29 Council Regulation (EU) 2017/1939 (n 2); Mitsilegas (n 5).

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case falls within the competence of the EPPO or should remain within the competence of the national authorities.[30]

The practical functioning of this model presupposes constant coordination between the EPPO and the national prosecution authorities through the exchange of information, joint conduct of the investigation, and exercise of powers in accordance with Regulation (EU) 2017/1939 and the applicable national law. In this process, difficulties may arise in the delimitation of competence, which are the subject of the following section.[31]

Consequently, it is precisely in the process of interaction between the EPPO and the national authorities that practical issues related to the delimitation of competence may arise. This necessitates an analysis of the factors that determine the competent authority in the individual situations.[32]

4.4. Structural Limitations of the Existing Legal Framework

Although the current legal framework establishes a stable basis for the functioning of the EPPO, it does not entirely eliminate the difficulties arising from the model of functionally allocated competence. These structural limitations account for a significant part of the conflicts between the EPPO and the national prosecution authorities.[33]

4.4.1. Uncertainty in the Delimitation of Competence

One of the main practical problems of the current system is the lack of sufficiently clear and comprehensive criteria for the delimitation of competence between the EPPO and the national prosecution authorities. Although Regulation (EU) 2017/1939 defines the material scope of the competence of the EPPO and contains rules regarding the exercise of its powers, it does not comprehensively regulate all possible situations in which competing grounds of competence may arise.[34]

The practical determination of the competent authority requires the combined application of Article 86 TFEU, Regulation (EU) 2017/1939, Directive (EU) 2017/1371, and the applicable national procedural law. As a result, competence is determined through an overall assessment of normative and factual circumstances, including the nature of the offence, its connection with the financial interests of the EU, and the cross-border elements of the case.[35]

30 Council Regulation (EU) 2017/1939 (n 2) arts 24, 25; Mila Ivanova, *International Cooperation in Criminal Matters* (Burgas Free University 2026) 253-82 [in Bulgarian].
31 Council Regulation (EU) 2017/1939 (n 2) art 25; Mitsilegas (n 5)
32 Ligeti (n 8); Mitsilegas (n 5).
33 Council Regulation (EU) 2017/1939 (n 2); Directive (EU) 2017/1371 (n 3); TFEU (n 1) art 86.
34 Council Regulation (EU) 2017/1939 (n 2) arts 22–25; Mitsilegas (n 5).
35 Council Regulation (EU) 2017/1939 (n 2); Directive (EU) 2017/1371 (n 3); TFEU (n 1) art 86; Law of the Republic of Bulgaria on Judicial System (n 25).

An additional difficulty arises from the fact that a significant part of the criteria provided for in Regulation (EU) 2017/1939 are of an evaluative nature. Concepts and criteria such as "offences affecting the financial interests of the Union," "inextricably linked offences," or the assessment of whether the EPPO is in a better position to investigate or to conduct criminal prosecution require a specific legal assessment in each individual case and cannot be applied mechanically. This inevitably leaves room for differing interpretations by both the EPPO and the national authorities.[36] This problem becomes particularly apparent in complex cross-border investigations, in which different grounds of competence may simultaneously be applicable. In such cases, normative uncertainty hinders the predictable determination of the competent authority.[37]

Consequently, the principal problem is not the lack of a legal framework, but the absence of a sufficiently clearly structured system of criteria for the predictable delimitation of competence. This normative uncertainty constitutes a significant factor in the emergence of conflicts of competence and confirms the need for a conceptual analytical framework for their resolution.

4.4.2. Divergences in National Implementation

One of the essential characteristics of the current regime is that the exercise of the powers of the EPPO takes place within the framework of multiple national criminal procedural systems. Although Regulation (EU) 2017/1939 is directly applicable in all participating Member States, the procedural autonomy of the Member States determines the application of national legislation to matters in respect of which the Regulation refers to it.[38] Consequently, the European Delegated Prosecutors exercise their powers in accordance with Regulation (EU) 2017/1939 and, in the absence of specific regulation, apply the national procedural law. In this way, a single proceeding is based simultaneously on European and national procedural rules, which gives rise to differences in the practical application of the regime of competence.[39]

An additional complication arises from the minimum harmonization introduced by Directive (EU) 2017/1371. Although the Directive harmonizes the minimum standards concerning offences affecting the financial interests of the EU, it does not lead to the complete unification of substantive criminal law. The Member States retain discretion with regard to the transposition and individual elements of criminal law regulation. As a result, the same factual conduct may be classified differently in the individual Member States, which affects the determination of the competent authority.[40]

36 Ligeti (n 8); Mitsilegas (n 5).
37 Council Regulation (EU) 2017/1939 (n 2) arts 24, 25; Mitsilegas (n 5).
38 Council Regulation (EU) 2017/1939 (n 2); Mitsilegas (n 5).
39 Council Regulation (EU) 2017/1939 (n 2) arts 5, 13 and 28.
40 Directive (EU) 2017/1371 (n 3); Ligeti (n 8).

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Differences in national procedural mechanisms are of no less importance. The conditions for carrying out individual investigative procedural actions, the judicial review of the acts of the European Delegated Prosecutors, the rules concerning the admissibility of evidence, and the time limits for carrying out procedural actions continue to be governed predominantly by national law. Consequently, the practical exercise of the powers of the EPPO is not entirely uniform in all participating Member States.[41]

These differences become apparent in cross-border investigations, where European Delegated Prosecutors from several Member States participate in a single proceeding. Although the central structure of the EPPO ensures coordination between them, the individual procedural actions continue to be carried out in accordance with the national legislation of the respective State. This creates conditions for differing interpretations of the procedural rules and difficulties in the delimitation of competence between the European and national levels.[42]

Consequently, the differences between national legal systems have a direct impact on the practical exercise of the competence of the EPPO and remain a significant factor in the emergence of conflicts of competence.

4.4.3. Limited Judicial Guidance

The limited case law concerning the competence of the EPPO constitutes the third significant structural limitation of the current legal framework. Due to the relatively short period of operation of the EPPO, the judicial interpretation of the key provisions of Regulation (EU) 2017/1939 is still in the process of being developed. This applies in particular to the provisions concerning the material competence, the right of the EPPO to exercise its right of evocation, cross-border investigations, and judicial review of the actions of the European Delegated Prosecutors.[43]

The judgment in Case C-281/22 is of particular importance, as it clarifies certain aspects of judicial review in the context of the cross-border investigations by the EPPO. However, the judgment does not provide a comprehensive answer regarding the delimitation of competence between the EPPO and the national authorities.[44]

The limited scope of the case law means that a number of practical issues remain unresolved, including the criteria for determining whether a particular offence falls within the

41 Council Regulation (EU) 2017/1939 (n 2); Criminal Procedure Code (n 28); Law of the Republic of Bulgaria on Judicial System (n 25).

42 Council Regulation (EU) 2017/1939 (n 2) arts 31, 32; Mila Ivanova, 'European Investigation Order' (2018) 25 BFU Journal of Legal Studies 129 [in Bulgarian].

43 Ligeti (n 8); Mitsilegas (n 5).

44 Council Regulation (EU) 2017/1939 (n 2); Case C-281/22 *GK and Others* (CJEU Grand Chamber, 21 December 2023) ECLI:EU:C:2023:1018.

competence of the EPPO, "inextricably linked offences," and the relationship between the competence of the EPPO and already instituted national proceedings.

At the national level, case law is also developing gradually. The Bulgarian courts are already considering issues related to the procedural actions of the European Delegated Prosecutors, but this case law has not yet established consistent criteria regarding conflicts of competence.

Consequently, at the present time, the case law performs predominantly a fragmented function. Although it clarifies certain procedural issues, it still does not provide sufficient criteria for the resolution of conflicts of competence. It is precisely this absence that underscores the importance of a consistent doctrinal analysis in the interpretation of the current legal framework. Until consistent case law of the CJEU and the national courts is established, the determination of the competent authority will depend to a significant extent on the systematic interpretation of Regulation (EU) 2017/1939.[45]

4.4.4. Interim Conclusions

The analysis carried out demonstrates that the current legal framework governing the competence of the EPPO establishes a stable normative basis but does not entirely overcome the practical difficulties in the delimitation of competence between the EPPO and the national prosecution authorities.[46]

On the basis of this conclusion, three main structural limitations of the current model may be identified. First, the legal framework does not contain sufficiently detailed criteria for the unambiguous delimitation of competence in all practical situations. Second, the differences in the transposition and application of EU law by the Member States lead to divergent procedural solutions in similar factual circumstances. Third, the still limited case law of the CJEU and the national courts does not provide sufficiently stable guidance for the consistent resolution of emerging conflicts of competence.[47]

These characteristics demonstrate that conflicts of competence cannot be explained solely through the analysis of individual legal provisions.[48] They constitute an inherent consequence of the model of functionally allocated competence adopted in EU law, rather than a result of the absence of a legal framework. Consequently, the resolution of such conflicts requires not only the interpretation of the applicable legal provisions but also a systematic approach based on clearly defined criteria for the delimitation of competence.

45 Council Regulation (EU) 2017/1939 (n 2).
46 TFEU (n 1) art 86; Council Regulation (EU) 2017/1939 (n 2); Directive (EU) 2017/1371 (n 3).
47 Council Regulation (EU) 2017/1939 (n 2) arts 22, 25, 31 and 42; Case C-281/22 (n 44).
48 Ligeti (n 8) 15-42; Mitsilegas (n 5) 231-46.

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The following section builds upon the normative analysis by presenting the author's conceptual analytical framework, including a classification of conflicts of competence and the principal criteria for determining the competent authority.

5 CONFLICTS OF COMPETENCE BETWEEN THE EPPO AND NATIONAL PROSECUTING AUTHORITIES

Conflicts of competence constitute one of the principal practical manifestations of the model of functionally allocated competence between the EPPO and the national prosecution authorities. The present section develops the author's classification of these conflicts and outlines the principal criteria for determining the competent authority.

5.1. Classification of Conflicts of Competence

Conflicts of competence between the EPPO and the national authorities do not arise due to the absence of a legal framework, but rather due to the interaction between the European and national levels in the exercise of criminal prosecution. Therefore, they should be regarded as structural elements of the current EPPO model, rather than isolated practical difficulties.[49]

Traditionally, conflicts of competence are classified as positive or negative. This distinction retains its significance within the framework of the EPPO, but it is not sufficient to encompass the complexity of the relationship between the EPPO and the national prosecution authorities. For this reason, the present study proposes a broader analytical classification based on the nature of the competing grounds of competence, the normative preconditions for their emergence, and their practical manifestation.

First, positive conflicts arise where the EPPO and the national prosecution authority simultaneously claim competence in respect of the same offence. This occurs most frequently in the case of offences of a mixed nature, which affect both the financial interests of the EU and national-protected interests. Such cases create a risk of parallel proceedings, duplication of procedural acts, and conflicting decisions.[50]

Second, negative conflicts arise where neither the EPPO nor the national authorities accept competence in a particular case. Although such situations are less frequent, they may lead to delays in the investigation, procedural uncertainty, and a risk of de facto impunity.[51]

Alongside the traditional distinction between positive and negative conflicts, the analysis of the practical functioning of the EPPO makes it possible to distinguish other types of conflicts of competence.

49 TFEU (n 1) art 86; Council Regulation (EU) 2017/1939 (n 2); Mitsilegas (n 5) 231-46.
50 Council Regulation (EU) 2017/1939 (n 2) arts 22, 25; Directive (EU) 2017/1371 (n 3); Ligeti (n 8) 303-25.
51 Council Regulation (EU) 2017/1939 (n 2) arts 22–25.

From the perspective of their territorial scope, a distinction may be drawn between domestic conflicts, arising within a single participating Member State, and cross-border conflicts, involving several jurisdictions. Cross-border conflicts are more complex, as they require compliance with both Regulation (EU) 2017/1939 and the national procedural legislation.

From a functional perspective, a distinction may also be drawn between conflicts arising in the determination of the competent authority and conflicts arising in the exercise of already established competence. The first group arises during the initial assessment of whether the particular offence falls within the material and territorial scope of the EPPO. The second group manifests itself during the course of the investigation, when disputes arise concerning the carrying out of procedural actions, the collection of evidence, or the coordination between European Delegated Prosecutors and the national authorities.

The proposed author's classification demonstrates that conflicts of competence are not limited to the distinction between positive and negative conflicts. They constitute a multi-layered phenomenon, determined by the normative structure of the EPPO, national differences, and the specific nature of cross-border proceedings. Therefore, their resolution requires the application of a clearly structured system of criteria for determining the competent authority.

5.2. Criteria for Determining the Competent Authority

Following the identification of the types of conflicts of competence, the criteria for determining the competent authority should be clarified. Regulation (EU) 2017/1939 does not contain a unified system of criteria for determining the competent authority in all types of conflicts of competence; therefore, competence is determined through a combined assessment of interrelated criteria.[52]

The first criterion is the material criterion, which requires it to be established whether the particular offence falls within the scope of offences affecting the financial interests of the EU, as defined in Directive (EU) 2017/1371 and the references thereto in Regulation (EU) 2017/1939. This criterion constitutes the first and mandatory condition for the competence of the EPPO to arise.[53]

The second criterion is the territorial criterion, which takes into account the place where the offence was committed, the Member State in whose territory the criminal prosecution is conducted, and the participation of the respective Member State in the enhanced cooperation mechanism. In the case of cross-border offences, this criterion acquires particular significance, as a single offence may be connected with several national jurisdictions.

52 ibid; TFEU (n 1) art 86.
53 ibid; Mitsilegas (n 5).

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The third criterion is the functional criterion. It requires an assessment of which authority is in a better position to conduct the investigation effectively, taking into account the location of the evidence, the connection between the offences, and the need for coordination.[54]

The fourth criterion is the procedural criterion, which manifests itself in the course of the criminal proceedings. In certain cases, the competence initially determined correctly may need to be reconsidered due to newly emerged factual circumstances, a change in the subject matter of the accusation, or the establishment of additional offences falling within the competence of the EPPO. Consequently, the determination of the competent authority constitutes a dynamic process that may change during the course of the investigation.

Alongside the aforementioned criteria, the principle of effectiveness has an integrating significance. It serves as a general guiding principle in their application by ensuring that the proceedings are conducted by the authority that can ensure the most effective criminal prosecution and prevent parallel proceedings, procedural delays, and conflicting decisions.[55]

The following subsection examines the practical difficulties in the application of these criteria.

5.3. Challenges in Applying the Criteria

Although the current legal framework contains rules relevant to the determination of the competent authority, their practical application continues to give rise to difficulties. They arise not only from the content of the individual provisions but also from the need for the criteria to be applied simultaneously in different national legal systems.[56]

One of the principal challenges is the risk of parallel criminal proceedings. In the case of complex cross-border offences, it is not always possible, already at the initial stage of the investigation, to determine unequivocally whether competence belongs to the EPPO or to the national authorities. This may lead to the duplication of procedural actions, delays in the proceedings, conflicting decisions, and the risk of violating the principle of *ne bis in idem*.[57]

Additional difficulties arise from the differences between the national procedural systems. Although the EPPO functions as a single institution of the EU, the investigation is conducted in accordance with the national procedural law of the participating Member

54 Council Regulation (EU) 2017/1939 (n 2) arts 25, 26 and 31; Mitsilegas (n 5).
55 Case C-281/22 (n 44); Council Regulation (EU) 2017/1939 (n 2); Ligeti (n 8).
56 Council Regulation (EU) 2017/1939 (n 2) arts 22–25.
57 Council Regulation (EU) 2017/1939 (n 2) arts 24, 25 and 31; Mitsilegas (n 5).

States. This leads to differences in procedural actions, judicial review, time limits, and the admissibility of evidence.[58]

The case law of the CJEU is gradually overcoming some of these difficulties. The judgment in Case C-281/22 *G.K. and Others* clarifies the allocation of judicial review in cross-border investigations, but it does not resolve all the practical issues related to the delimitation of competence.[59]

National case law is also gradually developing. The Bulgarian courts recognize the procedural powers of the European Delegated Prosecutors in accordance with Regulation (EU) 2017/1939 and national legislation; however, the case law still does not provide sufficiently consistent solutions to all issues related to conflicts of competence.[60]

The practical difficulties outlined above demonstrate that the normative criteria, in themselves, do not always ensure the predictable determination of the competent authority. This justifies the need for the consistent application of the proposed analytical framework.

5.4. Author's Conceptual Analytical Framework

The analysis conducted demonstrates that the current legal framework does not contain a sufficiently clearly structured system of criteria for determining the competent authority.[61] Therefore, the present study proposes the author's conceptual analytical framework, based on the step-by-step application of the systematized criteria for determining the competent authority.

The framework is based on the understanding that the determination of the competent authority constitutes a sequential process of legal assessment. Each subsequent criterion is applied after the preconditions for the preceding one have been established, which limits the risk of positive and negative conflicts of competence.

First, it must be established whether the particular offence falls within the material scope of the offences affecting the financial interests of the EU, in accordance with Directive (EU) 2017/1371 and Article 22 of Regulation (EU) 2017/1939. If the answer is negative, competence remains within the national prosecution authorities.[62]

58 Mila Ivanova, 'Admission, Execution and Sending of the Acts for Implying Measures for Procedural Compulsion that are Different from these Which Demand an Arrest' (Administrative Law - Contemporary Trends in Jurisprudence and Doctrine: National Scientific Roundtable, University of Economics, Varna, 20 April 2018) 172.

59 Case C-281/22 (n 44).

60 Case no 10950/2023 Decision no 3873 (Sofia District Court, 15 August 2023); Case no 6093/2024 (n 4).

61 TFEU (n 1) art 86; Council Regulation (EU) 2017/1939 (n 2); Mitsilegas (n 5).

62 TFEU (n 1) art 86; Council Regulation (EU) 2017/1939 (n 2).

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Next, the territorial criterion is taken into account, including the place where the offence was committed, the participating Member States, and the connection of the case with the enhanced cooperation mechanism.

Furthermore, a functional assessment should be carried out to establish which authority has the best capacity to conduct an effective investigation, having regard to the location of the evidence, the necessary coordination, and the possibility for the proceedings to be concentrated within a single jurisdiction.[63]

Where necessary, competence is subject to reassessment upon a change in the factual circumstances or the establishment of new offences, which takes into account the dynamic nature of the investigation.

Finally, the principle of effectiveness guides the overall assessment where several authorities possess potential competence, with preference to be given to the authority that can ensure the most effective criminal prosecution while guaranteeing procedural rights.[64]

The proposed conceptual analytical framework does not amend the existing legal framework but systematizes the existing criteria for determining the competent authority in their logical sequence. In this way, it contributes to a more consistent and predictable application of Regulation (EU) 2017/1939, while at the same time enhancing legal certainty and reducing the risk of conflicts of competence.

6 JUDICIAL PRACTICE ON CONFLICTS OF COMPETENCE

The case law specifies the application of the criteria for determining the competent authority established by Regulation (EU) 2017/1939 and contributes to the consistent delimitation of competence between the EPPO and the national prosecution authorities. Although it does not create new rules on competence, it clarifies the application of the existing legal framework.

6.1. Case Law of the Court of Justice of the European Union

The case law of the CJEU gradually clarifies the parameters of the interaction between the EPPO and national prosecution authorities.[65]

Of particular importance is the judgment in Case C-281/22, in which the Court held that the assessment of the necessity and justification of cross-border investigative measures is carried out in accordance with the law of the Member State of the handling European

63 Council Regulation (EU) 2017/1939 (n 2) arts 25, 26 and 31.
64 Case C-281/22 (n 44); Council Regulation (EU) 2017/1939 (n 2).
65 Mitsilegas (n 5).

Delegated Prosecutor, whereas judicial review in the assisting Member State is limited to issues relating to the execution of those measures.[66]

The judgment is based on the understanding that Regulation (EU) 2017/1939 allocates responsibility between the handling European Delegated Prosecutor and the assisting European Delegated Prosecutor in accordance with the principles of mutual trust and mutual recognition. Therefore, judicial review in the assisting Member State should be limited to the execution of the assigned measure, whereas the assessment of its justification and necessity belongs to the Member State of the handling European Delegated Prosecutor. In this way, the Court limits the risk of duplication of judicial review and contributes to the more consistent application of Regulation (EU) 2017/1939 in cross-border investigations.

6.2. National Judicial Practice

Alongside the case law of the CJEU, Bulgarian case law also contributes to clarifying the interaction between the EPPO and national prosecution authorities.

Illustrative in this regard is Decision No. 3873 of 15 Aug 2023 of the Sofia District Court, in which it is held that the European Delegated Prosecutor is the competent authority under national law when requesting the disclosure of banking secrecy in connection with the investigation of offences affecting the financial interests of the EU. The Court reaches this conclusion after holding that the European Delegated Prosecutor has procedural competence pursuant to Article 13(1) of Regulation (EU) 2017/1939, and therefore the request was made by a competent authority within the meaning of Regulation (EU) 2017/1939 and the national legislation.

Only after this assessment does the Court carry out an independent review of the necessity and proportionality of the requested measure, allowing the disclosure of banking secrecy only to the extent justified.[67]

Decision No. 2077 of 30 April 2024 of the Sofia District Court further develops this approach by holding that judicial authorization is required only for information constituting banking secrecy within the meaning of Article 62(2) of the Credit Institutions Act. The Court bases this conclusion on the distinction between the special regime for the disclosure of banking secrecy under the Credit Institutions Act and the general procedural order under Article 159(1) of the Criminal Procedure Code, which applies to information not falling within the scope of banking secrecy.[68]

Although Bulgarian case law is still limited, it is gradually establishing standards for the application of Regulation (EU) 2017/1939 and specifying the criteria for determining the competent authority in national proceedings.

66 Case C-281/22 (n 44).
67 Case no 10950/2023 (n 60).
68 Case no 6093/2024 (n 4).

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6.3. Contribution of Judicial Practice to Determining Competence

The analysis of the case law of the CJEU and the national courts demonstrates that judicial practice is gradually specifying the criteria for determining the competent authority and supporting the consistent application of Regulation (EU) 2017/1939. Although the case law is still limited, its further development will be of substantial importance for the more predictable determination of the competent authority and for the consistent delimitation of competence between the EPPO and the national prosecution authorities.

7 CRITICAL EVALUATION AND FUTURE DEVELOPMENT

The analysis conducted allows for a comprehensive assessment of the current legal framework of the EPPO's competence and for outlining the main directions for its future development.

The analysis conducted demonstrates that the current EPPO system provides the necessary legal basis for the protection of the financial interests of the EU, but the practical determination of the competent authority in complex cross-border proceedings continues to present difficulties. Although the case law of the CJEU and the national courts gradually specifies the application of individual criteria, it does not establish sufficiently consistent standards for resolving conflicts of competence.

The current EPPO framework creates the necessary institutional conditions for the protection of the financial interests of the EU, but it does not provide a fully clear and predictable system for determining the competent authority in complex cross-border proceedings.[69]

An additional difficulty arises from the hybrid institutional model of the EPPO, which combines centralized strategic management with the application of national procedural regimes. Although this model facilitates cross-border criminal prosecution, it simultaneously preserves the differences between the national procedural systems.[70]

The case law of the CJEU gradually contributes to clarifying certain aspects of competence; however, it still does not provide comprehensive standards for resolving all practical scenarios.[71]

However, the main problem is not the lack of normative regulation, but the absence of a sufficiently consistent mechanism for applying the competence criteria in complex cross-border proceedings. This precisely justifies the need for a more consistent application of the criteria for determining the competent authority.

69 Mitsilegas (n 5).

70 Michele Simonato and Katalin Ligeti, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?' (2013) 4(1-2) New Journal of European Criminal Law 7.

71 Mitsilegas (n 5).

Based on the analysis conducted, the main directions for the more consistent determination of the competent authority can be outlined.

First, the determination of the competent authority should be based on the consistent application of the material, territorial, functional, and procedural criteria.[72]

Second, early coordination between the EPPO and the national authorities is essential for limiting the risk of parallel proceedings and procedural delays.[73]

Finally, this study proposes that, in the practical determination of the competent authority, the author's conceptual analytical framework should be applied, as it systematizes the applicable criteria in a logical sequence and contributes to limiting the risk of conflicts of competence, as well as enhancing legal certainty and the effectiveness of criminal prosecution.

The analysis conducted demonstrates that the effective resolution of conflicts of competence requires not only normative rules but also a consistent analytical approach to their application.[74]

In this regard, the present study proposes an author's conceptual analytical framework based on the consistent application of the material, territorial, functional, and procedural criteria in determining the competent authority. The framework systematizes these criteria in a logical sequence that supports their practical application. The proposed approach contributes to a more predictable delimitation of competence, limitation of conflicts between the EPPO and the national authorities, and strengthening of legal certainty in cross-border criminal proceedings.[75]

In this sense, the author's conceptual analytical framework represents the main scientific contribution of the present study, as it proposes a systematized approach for determining the competent authority in the application of the existing legal framework.

8 CONCLUSIONS

The present study analyses the competence framework of the EPPO in the context of the interaction between the European and national levels in the prosecution of offences affecting the financial interests of the EU. The study demonstrated that the competence of the EPPO is based on a model of functionally distributed competence between the European and national levels.

72 Council Regulation (EU) 2017/1939 (n 2).
73 Mitsilegas (n 5).
74 ibid
75 Council Regulation (EU) 2017/1939 (n 2).

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The current legal framework provides the necessary conditions for the functioning of the EPPO, but it does not always allow for a sufficiently clear and predictable delimitation of competence. This creates conditions for positive and negative conflicts of competence, particularly in complex cross-border proceedings.

The scientific contribution of the present study consists in the development of a conceptual analytical framework for conflicts of competence between the EPPO and the national prosecution authorities. In this regard, the study proposes an author's classification of conflicts, a system of criteria for determining the competent authority, and their sequential application. The proposed framework does not amend the existing legal framework but rather supports its more consistent and predictable application.

Conflicts of competence represent a structural consequence of the model of functionally distributed competence, rather than an incidental practical problem. Therefore, their effective resolution requires the combination of a clear legal framework, consistent case law, and the systematic application of the author's conceptual analytical framework in determining the competent authority.

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Summary: 1. Introduction. – 2. Methodology. – 3. Development of European Criminal Law and the Establishment of the EPPO. – *3.1. Evolution of European Criminal Law. – 3.2. Article 86 TFEU as the Constitutional Basis of the EPPO.* – 4. Legal Framework of Competence. – *4.1. EU Legal Framework. – 4.2. National Legal Framework. – 4.3. Interaction between EPPO and National Authorities. – 4.4. Structural Limitations of the Existing Legal Framework.* – 5. Conflicts of Competence between the EPPO and National Prosecuting Authorities. – *5.1. Classification of Conflicts of Competence. – 5.2. Criteria for Determining the Competent Authority. – 5.3. Challenges in Applying the Criteria. – 5.4. Author's Conceptual Analytical Framework.* – 6. Judicial Practice on Conflicts of Competence. – *6.1. Case Law of the Court of Justice of the European Union. – 6.2. National Judicial Practice. – 6.3. Contribution of Judicial Practice to Determining Competence.* – 7. Critical Evaluation and Future Development. – 8. Conclusions.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

КОНФЛІКТИ КОМПЕТЕНЦІЇ МІЖ ЄВРОПЕЙСЬКОЮ ПРОКУРАТУРОЮ ТА НАЦІОНАЛЬНИМИ ОРГАНАМИ ПРОКУРАТУРИ

Міла Іванова

АНОТАЦІЯ

Передумови. *Створення Європейської прокуратури (ЄП) відповідно до статті 86 Договору про функціонування Європейського Союзу (ДФЄС) започаткувало нову модель кримінально-правової інтеграції в межах Європейського Союзу (ЄС), засновану на функціональному розподілі компетенції між ЄП та національними органами прокуратури. Хоча Регламент (ЄС) 2017/1939 встановлює правові засади, що регулюють компетенцію ЕРРО, визначення компетентного органу в складних транскордонних справах залишається джерелом суттєвих правових та практичних викликів. Відсутність достатньо структурованого підходу до застосування критеріїв визначення компетенції може призвести до конфліктів компетенції, що негативно впливає на правову визначеність, процесуальну ефективність і дієвий захист фінансових інтересів ЄС.*

Методи. *У статті застосовано доктринальний метод правового дослідження на основі системного аналізу первинного та вторинного права ЄС, зокрема статті 86 ДФЄС, Регламенту (ЄС) 2017/1939 та Директиви (ЄС) 2017/1371. Робота поєднує доктринальний та системний аналіз правової бази, яка регулює компетенцію ЄП, із дослідженням судової практики Суду справедливості Європейського Союзу та відповідної судової практики Болгарії. Особливу увагу приділено взаємодії між нормами законодавства ЄС і національного законодавства, а також практичному застосуванню критеріїв визначення компетентного органу у транскордонних кримінальних провадженнях.*

Результати та висновки. *Проведений аналіз свідчить про те, що конфлікти компетенції є структурним наслідком передбаченої законодавством ЄС моделі функціонального розподілу повноважень, а не поодинокими процесуальними аномаліями. Незважаючи на те, що Регламент (ЄС) 2017/1939 визначає правові межі компетенції ЄП, він не забезпечує достатньо чітких і передбачуваних критеріїв для встановлення компетентного органу в усіх складних транскордонних справах. Науковий внесок дослідження полягає у запропонованій автором класифікації конфліктів компетенції, структурованій системі критеріїв визначення компетенції та авторській концептуальній аналітичній моделі визначення компетентного органу. Ця модель сприяє більш послідовному й передбачуваному застосуванню Регламенту (ЄС) 2017/1939 і забезпечує вищий рівень правової визначеності та ефективності під час визначення компетентного органу — ЄП чи національного органу прокуратури.*

Ключові слова: *Європейська прокуратура (ЕРРО), конфлікти компетенції, компетентний орган, критерії визначення компетенції, Регламент (ЄС) 2017/1939, європейське кримінальне право, співробітництво судових органів.*

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CASE STUDY

Case Study

THE IMPACT OF SOCIAL MEDIA ON THE REALIZATION OF THE RIGHT TO A FAIR TRIAL IN THE REPUBLIC OF KOSOVO

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ABSTRACT

Background: *Social media may create conditions that influence public perceptions and potentially exert pressure on judicial actors. Using statistics obtained directly from citizens of the Republic of Kosovo, this paper examines how social media has influenced the realization of judicial impartiality. However, this paper particularly emphasises the negative role of social media in the realization of judicial impartiality. Another challenge is that public opinion is shaped by how information is distributed through social media and how convictions are formed in society. The impact of social media is inevitable, as we are witnessing enough cases in practice; the prejudices transmitted on social media are reaching their peak and are being perceived by society.*

Method: *This study employed a quantitative survey-based research design complemented by an analysis of selected judicial cases. The study collected empirical data through a structured questionnaire administered to 492 respondents in the Republic of Kosovo. The questionnaire included five-point Likert scale*

items designed to test three research hypotheses concerning public opinion formation, the presumption of innocence, and perceived pressure on judicial actors. The data were analysed using descriptive statistics and interpreted alongside selected high-profile criminal cases and the applicable legal framework.

Results and Conclusions: *The results indicate that social media influences public opinion about judicial processes in the Republic of Kosovo, clearly shaping how the public perceives them. Furthermore, exposing judicial cases on social media jeopardises the presumption of innocence, as public information and commentary can create bias before the judicial process concludes. At the same time, social media can compromise judicial impartiality through public pressure and the influence of social perceptions on judicial decision-making.*

1 INTRODUCTION

The rapid expansion of social media has significantly transformed various sectors of society, including the criminal justice system. Its widespread use has created new opportunities for communication and information sharing while also raising important legal and ethical concerns about its influence on criminal proceedings. Social media platforms increasingly serve as sources of digital evidence, including photographs, videos, location data, and information obtained from users' accounts.[1] At the same time, the extensive dissemination of information through these platforms has intensified public engagement with ongoing judicial proceedings, thereby influencing public perceptions of justice and confidence in judicial institutions.

In the Republic of Kosovo, the growing influence of social media presents significant challenges to the administration of criminal justice. Information circulated on social media platforms can shape public opinion before judicial proceedings conclude, creating risks to fundamental procedural guarantees. Of particular concern is the potential impact of online discussions and media exposure on the presumption of innocence, a cornerstone of criminal justice and fair trial standards. Moreover, widespread public commentary and social media discourse may pressure judicial actors, raising concerns about judicial independence, impartiality, and public confidence in the justice system.

Against this background, this study examines the influence of social media on judicial impartiality and criminal proceedings in the Republic of Kosovo. Specifically, the study investigates whether social media contributes to the formation of public opinion about criminal proceedings, affects respect for the presumption of innocence, and creates public pressure that can influence judicial decision-making.

1 Justin P Murphy and Adrian Fontecilla, 'Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues' (2013) 19(3) Richmond Journal of Law and Technology 4 <https://scholarship.richmond.edu/jolt/vol19/iss3/4> accessed 5 July 2026.

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To address these issues, the study tests the following hypotheses:

> *H1: Social media use significantly influences the formation of public opinion about criminal proceedings in the Republic of Kosovo.*
>
> *H2: Public exposure of criminal proceedings on social media undermines the presumption of innocence of accused persons.*
>
> *H3: Social media influence may compromise judicial impartiality by increasing public pressure and shaping public perceptions of ongoing criminal proceedings.*

These hypotheses were tested through an empirical research methodology, the details of which are presented in the following section.

2 METHODOLOGY

This study employed a quantitative research design based on a structured survey to test the proposed research hypotheses. Four hundred and ninety-two respondents from the Republic of Kosovo participated in the study. Of the participants, 59.76% were female and 40.24% were male. In terms of age distribution, 40.85% were between 18 and 25 years, 39.63% were between 26 and 35 years, 11.18% were between 36 and 55 years, and 8.33% were aged over 56 years.

Data were collected through a structured questionnaire specifically developed for this research. The questionnaire consisted of two sections. The first section gathered demographic information, including respondents' gender and age. The second section contained closed-ended questions measured on a five-point Likert scale, designed to assess perceptions regarding the influence of social media on criminal proceedings, the presumption of innocence, and judicial impartiality in the Republic of Kosovo. The collected data were analysed using descriptive statistics to evaluate patterns in respondents' perceptions and test the proposed hypotheses.

The research followed established ethical standards for social science research. Before participating, all respondents were informed of the study's purpose and provided informed consent. Participation was voluntary, and respondents could withdraw from the survey at any stage without consequence. To ensure anonymity and confidentiality, the study collected no personally identifiable information. All data were securely stored and processed exclusively for academic and research purposes.

To complement the empirical findings, the study employed a qualitative analytical approach based on selected judicial cases and the applicable legal framework. This analysis provided additional context for interpreting the survey results by examining how social media may influence judicial decision-making, public perceptions of criminal proceedings, and the protection of the presumption of innocence. Where appropriate, the analysis included comparative references to relevant foreign judicial practice to support it.

3 THE IMPACT OF SOCIAL MEDIA ON PUBLIC OPINION

The formation of public opinion derives from human nature, which is that man is social by nature,[2] because he expects relationships which influence or affect him. One of the jurists explained that he likened successive human civilisations to "layers of the earth", explaining that the earth is just like a layer upon a layer, so the path of civilisation consists of a civilisation followed by a civilisation, building on and benefiting from it.[3] This analogy illustrates that societal and intellectual development is a continuous process, where each stage of civilisation contributes to and benefits from the one that precedes it.

Criminal cases have a prominent role in the citizen's interest, writing notes and comments, and agitating and shaping public opinion around them.[4] For example, the case of the former Director of Intelligence in Jordan shows that the widespread publicity of corruption cases in the media influenced public opinion, putting pressure on the judiciary, but also helped to unravel the case and achieve justice.[5] Citizens have gradually become accustomed to the presence of corruption in society, partly as a result of its continuous and extensive coverage in the media, particularly the frequent reporting and emphasis on corruption-related and criminal cases.[6]

Trust and security are essential for a democratic state's justice system, and that indicators that strengthen or weaken credibility in delivering justice come from multiple dimensions. However, the elaborations show that social media strongly influences the perception and formation of public opinion, both through how this is distributed and how social information is transmitted.

The influence of social media on the formation of public opinion regarding criminal proceedings in the Republic of Kosovo: the following survey findings are presented.[7]

2 Tayil Mahmoud Shiyab, 'The Impact of Social Media on the Rights of the Accused in Jordan: Does Public Opinion Matter?' (2021) 8(1) Cogent Arts & Humanities 1994112 <https://doi.org/10.1080/23311983.2021.1994112> accessed 5 July 2026.

3 Husein Mounis, *Civilization: A Study in the Origins and Factors of its Rise and Development* (Alam Al Maarifa series, National Council for Culture, Arts and Letters 1978) 227 [in Arabic].

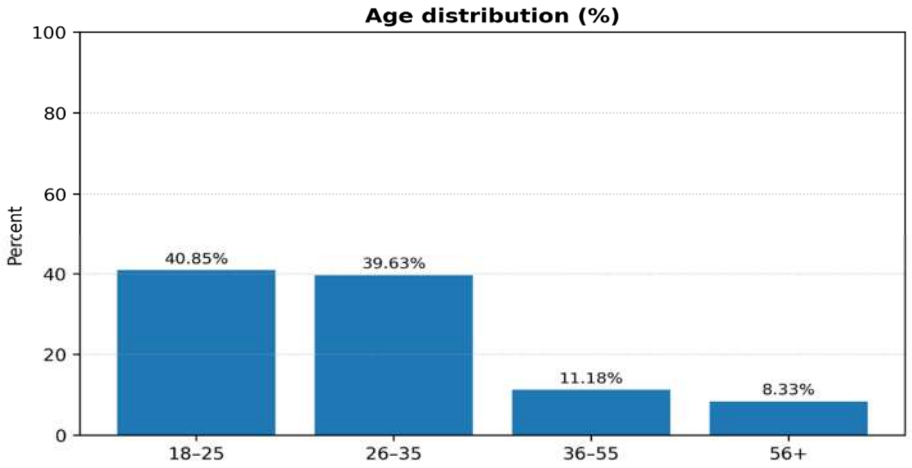
4 Osama Mohmmad and Boushra Awad, 'The Role of Social Communication Websites in Forming the Political Awareness' (2021) 43(1) Tishreen University Journal for Research and Scientific Studies - Arts and Humanities 529 [in Arabic].

5 Pete W Moore, 'A Political-Economic History of Jordan's General Intelligence Directorate: Authoritarian State-Building and Fiscal Crisis' (2019) 73(2) Middle East Journal 242 <https://www.jstor.org/stable/26933061> accessed 5 July 2026; 'Jordan's Ex-Spy Chief Jailed for Corruption' (*BBC News*, 11 November 2012) <https://www.bbc.com/news/world-middle-east-20286407> accessed 5 July 2026.

6 Shiyab (n 2).

7 Source: Author's elaboration.

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Note: n=492

Figure 1. Age Distribution of Survey Respondents

To understand how prevalent social media is, it helps to know how often people visit social networks. To measure social media use, we asked respondents how often they use social networks; the figure below shows that most respondents use social networks daily.

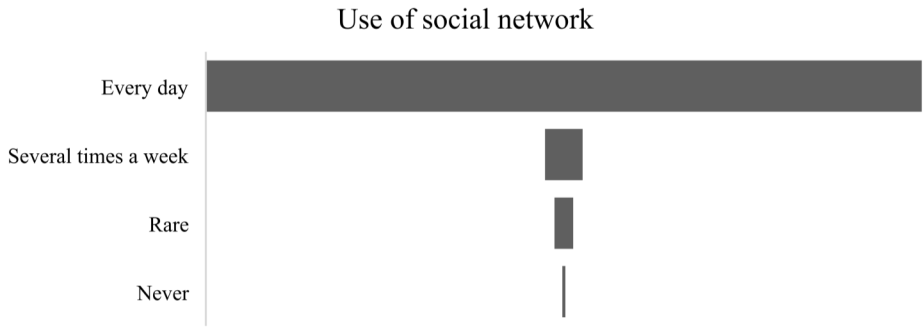


Figure 2. Frequency of Social Media Usage Among Respondents

Frequent social network use shows that they are "overpopulated", and users can obtain information from social media every day without knowing whether it is true or false.

The frequent use of social media reflects that respondents spend time on social networks.

When asked whether social media influences the formation of public opinion about judicial processes in the Republic of Kosovo, respondents said social media plays a considerable role in shaping public opinion about the development of court cases.

Based on the data, 65% of respondents (35% "Very" and 30% "Extremely") assess that social networks exert a great or extraordinary influence in this regard.

Meanwhile, 20% of participants consider the influence average, while only 15% (5% "Not at all" and 10% "A little") think social media plays little or no role in forming public opinion about judicial processes.

The results show that respondents affirm the influence of social media in shaping perceptions of judicial cases.

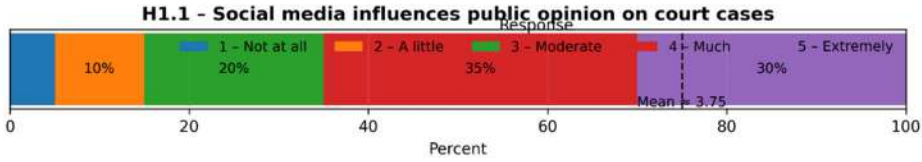


Figure 3. Public Assessment of Social Media's Influence on Court Cases

Regarding whether social media reporting influences perceptions of an accused person's guilt or innocence, the results show that most respondents believe it does. Specifically, 59% of respondents (33% "A lot" and 26% "Extremely") consider social media's influence to be great or extraordinary.

Of the remaining respondents, 22% assess the influence as average, while only 19% (7% "Not at all" and 12% "A little") think that social media reporting has a small or negligible influence.

These findings show that reporting on social media is often perceived as influencing public prejudice before judicial decisions are made. This indicates a real risk of violating the presumption of innocence, especially when information is disseminated in a biased, emotional manner or without verification. The danger of media outlets publishing news related to the accusation and the investigation gives the direct impression that this defendant is the real perpetrator of the crime.[8]

8 Al-Sayed Mohamed Hassan Sherif, *General Theory of Criminal Evidence* (Dar Al-Nahda Al-Arabiya 2002) 446 [in Arabic].

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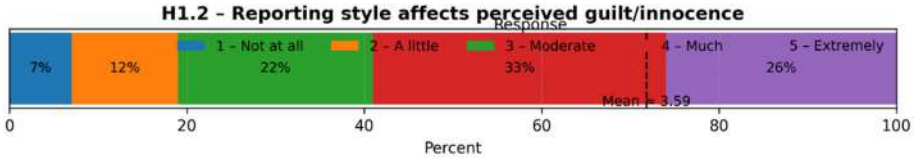


Figure 4. Impact of Media Reporting Style on the Perceived Guilt or Innocence of the Accused

Building on the previous analysis, in which most respondents acknowledged that how cases are reported on social media affects perceptions of the accused's guilt or innocence, the results of this question further reinforce this finding.

The data show that publicising court cases on social media is seen as a direct factor that jeopardises the principle of the presumption of innocence.

Specifically, 70% of respondents (40% "Very much" and 30% "Extremely") assess that exposing cases on social media significantly affects the public's prejudice against the accused before a judicial decision is made.

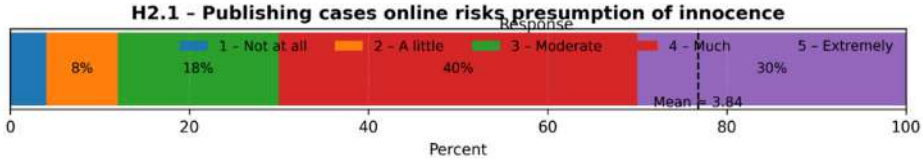


Figure 5. Perceived Risk to the Presumption of Innocence Due to Online Case Publication

This result shows a clear interdependence between reporting and its effect on public opinion. When court cases are publicised without balance and neutrality, social networks become a "parallel judicial system" that creates preliminary perceptions of the guilt or innocence of the individuals involved. The survey data reflect a serious challenge to implementing the principle of presumption of innocence as a core principle of criminal procedure and show that social media, without professional ethics, can exert direct pressure on judicial processes.

Meanwhile, on whether user comments influence opinions about the defendant's guilt, 67% of respondents believe user comments significantly shape perceptions of the accused's guilt. This shows that not only media reporting, but also user interactivity, through comments, reactions, and online discussions, can form preliminary opinions about the guilt or innocence of individuals involved in court cases.

This highlights a significant phenomenon: social networks are not only a source of information but also a space where public opinion is actively created and disseminated, often exerting indirect pressure on perceptions of justice.

The presumption of innocence is also protected under the constitutional and legal framework of the Republic of Kosovo. Kosovo's legal framework provides that criminal responsibility may be established only through a final court decision and guarantees the presumption of innocence throughout criminal proceedings. Accordingly, public statements should not prejudice ongoing judicial proceedings.[9]

Several high-profile criminal proceedings in Kosovo have generated extensive media coverage and public debate. Cases such as the murder of Oliver Ivanović,[10] the murder of Liridona Ademaj,[11] and other widely reported criminal proceedings attracted intense attention from both traditional and social media platforms. Public discussion often included speculation about suspects' guilt before judicial proceedings concluded, raising concerns about respect for the presumption of innocence. Social media platforms have increasingly become arenas for public discussion of ongoing criminal cases in Kosovo. Users frequently share opinions, allegations, and unofficial information regarding suspects and judicial proceedings. Such discussions may shape public perceptions before courts reach a final decision, creating a risk of prejudgment in the public sphere.

One of the most prominent criminal cases in Kosovo that generated extensive media and social media attention was the murder of Liridona Ademaj in November 2023. The case attracted widespread public discussion on online platforms and in traditional media even before the conclusion of judicial proceedings. The intensity of public reaction illustrates how social media can shape public perceptions regarding criminal responsibility and judicial outcomes before the decision of the court is made.[12] The public debate surrounding the Liridona Ademaj case became so intense that state institutions acknowledged the extraordinary public attention devoted to the proceedings. Public authorities noted the extensive media discussion and public interest surrounding the case. According to statements by Kosovo prison authorities, the suspects were placed in

9 Constitution of the Republic of Kosovo (2008) art 31 <https://old.kuvendikosoves.org/?cid=2,1058> accessed 5 July 2026; Criminal Procedure Code of the Republic of Kosovo no 04/L-123 (2012) art 3 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861&langid=2> accessed 5 July 2026.

10 Shyhrete Maliqi, 'Vrasja e Oliver Ivanoviqit, shtyhet seanca e planifikuar për nesër' (*Kallxo*, 10 December 2020) <https://kallxo.com/lajm/vrasja-e-oliver-ivanoviqit-shtyhet-seanca-e-planifikuar-per-neser/> accessed 5 July 2026.

11 'Liridona Ademaj' (*Kallxo*, March-April 2026) <https://kallxo.com/tag/liridona-ademaj/> accessed 5 July 2026.

12 The case was widely followed in Kosovo and received extensive media coverage throughout the investigation and trial proceedings. See: 'Verdict for the Murder of Ljiridona Ademaj: Two Life Sentences and 30 Years in Prison, Reactions from Institutions' (*KoSSev*, 21 April 2026) <https://kossev.info/en/presuda-za-ubistvo-ljiridone-ademaj-dve-dozivotne-kazne-i-30-godina-zatvora-reakcije-iz-institucija/> accessed 5 July 2026.

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separate institutions while authorities considered the exceptional public and media attention generated by the case.

Another example frequently discussed in the context of media influence and public opinion is the assassination of Oliver Ivanović. The case generated extensive domestic and international media coverage and substantial public debate regarding responsibility, accountability, and the administration of justice. The murder of Oliver Ivanović attracted prolonged public discussion and extensive media attention in Kosovo and beyond, with judicial proceedings and investigations being matters of considerable public interest.

Judicial and prosecutorial institutions in Kosovo have, on several occasions, issued public statements emphasising that criminal proceedings must be conducted independently of public opinion and media pressure. Such statements underscore the importance of safeguarding judicial impartiality and ensuring that decisions are based solely on evidence presented during the proceedings.

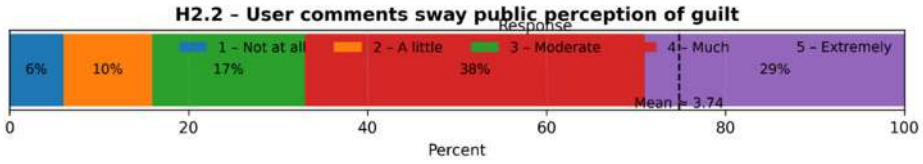


Figure 6. Influence of User Comments on the Public Perception of Guilt

In this way, the results further strengthen hypothesis H2, showing that social media's impact on perceptions of the accused's guilt is multidimensional: it comes from both case reporting and publicity, as well as from users' comments and discussions.

4 MEDIA REPORTING AND THE PERCEPTION OF GUILT OR INNOCENCE

Because most of the public has little direct experience with the justice system, public knowledge and view of law and the legal system are largely dependent on media representations.[13] Developments in the media also make it possible for criminal cases to be publicised and commented on through social networks. It is no coincidence that these comments and reactions are leading to a trial by the media, where guilt or innocence becomes a topic of discussion before a judicial epilogue. The way of

13 Valerie P Hans and Juliet L Dee, 'Media Coverage of Law: Its Impact on Juries and the Public' (1991) 35(2) American Behavioral Scientist 136 <https://doi.org/10.1177/0002764291035002005> accessed 5 July 2026.

commenting on social media can weaken the fundamental principle in criminal law, namely the presumption of innocence.[14]

The media tends to bias and manipulate how people think and make decisions.[15] An illustrative case of media influence on wrongful convictions is that of several well-known cases in Canada, such as the case of Guy Paul Morin, Robert Baltovich and James Driskell.[16] These errors can lead to the execution of innocent people,[17] because the writing and manner of reporting sentences and punishments can lead media users to support a punishment, depending on how the media reports on criminal cases.

Media coverage has the potential to impact not just the behaviour of juries but also judges and legal experts engaged in cases.[18] Courts' assessments of the likelihood that pretrial publicity has resulted in prejudice against a defendant and of jurors' ability to disregard any prejudice are often based on judicial common sense and often reflect a misappraisal or misunderstanding of the capabilities and weaknesses of human inference and decision-making.[19]

We can take, for example, the effect of dramatising crime and the increase in crime in the US. Violent crime rates in the US are escalating as law enforcement is de-policing,[20] and false narratives from the media about law enforcement against black men have led to protests. Not only that, increases in violence are negatively affecting law enforcement.[21] Incitement to hate is seen when Americans post or are likely to see racially charged

14 Gimson Rachel, 'Captured Red Handed: The Impact of Social Media on the Evolving Concepts of the Criminal Defendant and the Presumption of Innocence' (PhD thesis, University of Sussex 2017).

15 Allison Kozlowski, 'Perceptions of Guilt in Sensational Cases: The Influence of Media' (Master's thesis, Texas Tech University 2013).

16 Lauren Chancellor, 'Public Contempt and Compassion: Media Biases and Their Effect on Juror Impartiality and Wrongful Convictions' (2019) 42(3) Manitoba Law Journal 427 <https://doi.org/10.29173/mlj1121> accessed 5 July 2026.

17 David P Fan, Kathy A Keltner and Robert O Wyatt, 'A Matter of Guilt or Innocence: How News Reports Affect Support for the Death Penalty in the United States' (2002) 14(4) International Journal of Public Opinion Research 439 <https://doi.org/10.1093/ijpor/14.4.439> accessed 5 July 2026.

18 Ebenezer Kojo Gyesi Mensah, 'Assessing the Role of Media Influence and Public Perception in Legal Decision-Making' (*SSRN*, 29 April 2024) <https://dx.doi.org/10.2139/ssrn.4811277> accessed 5 July 2026.

19 Christina A Studebaker and Steven D Penrod, 'Pretrial Publicity: The Media, the Law, and Common Sense' (1997) 3(2-3) Psychology, Public Policy, and Law 428 <https://doi.org/10.1037/1076-8971.3.2-3.428> accessed 5 July 2026.

20 Justin Nix and Scott E Wolfe, 'Sensitivity to the Ferguson Effect: The Role of Managerial Organizational Justice' (2016) 47 Journal of Criminal Justice 12 <https://doi.org/10.1016/j.jcrimjus.2016.06.002> accessed 5 July 2026.

21 Shawn S Morrow, 'Social and New Media's Effects on Law Enforcement' (2019) 1(4) Global Journal of Forensic Science and Medicine 1 <https://doi.org/10.33552/GJFSM.2019.01.000516> accessed 5 July 2026.

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content.[22] The incitement of hatred can have the growth factor from dramatic media reports followed by public riots.

5 THE IMPACT OF SOCIAL MEDIA ON JUDICIAL IMPARTIALITY

The third hypothesis examines the impact of social media on judicial impartiality and whether public pressure can influence the decision-making of judges and prosecutors. The survey results indicate a clear public perception that social media can compromise judicial neutrality.

There is no doubt that the freer a judge is from suspicion and away from influences, the more their judgement is fair and equitable.[23] As for the judge, they rage and are affected by what is happening around him in society in terms of events, publications, and comments on a case.[24] While the use of social media by judges can enhance transparency and public engagement, it also raises concerns about the appropriateness of their communication, especially regarding impartiality.[25] Potentially, the influence of judges also comes from social networks.[26]



Figure 7. Public Perception Regarding the Compromise of Judicial Impartiality by Social Media

22 Lauren E Beausoleil, 'Free, Hateful and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World' (2019) 60(7) Boston College Law Review 2101 <https://lira.bc.edu/works/publication-article/hg2js-yd310> accessed 5 July 2026.

23 Shiyab (n 2).

24 Jeremy M Miller, 'Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)' (2012) 33(3) Pepperdine Law Review 575 <https://digitalcommons.pepperdine.edu/plr/vol33/iss3/3> accessed 5 July 2026.

25 Marina Matic Boskovic and Marko Novakovic, 'Freedom of Expression of Judges and the Influence of Social Media' (2025) 9(1) Bratislava Law Review 681 <https://doi.org/10.46282/blr.2025.9.1.886> accessed 5 July 2026.

26 Kristin R Brown, 'Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality' (2012) 19(3) Texas Wesleyan Law Review 809 <https://doi.org/10.37419/TWLR.V19.I3.6> accessed 5 July 2026.

The impact is presented through information or reporting of cases, but also through comments, reactions, and active discussions of users, creating both space for judgement and space for pressure on the persons involved in the incidents. Accordingly, the data emphasise that social media, in addition to being the main information tool today, is influencing citizens' perceptions and the environment in which judges and prosecutors must decide impartially.

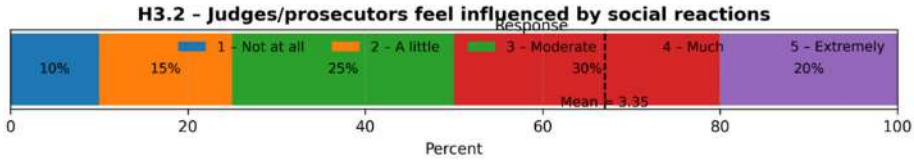


Figure 8. Perceived Influence of Social Media Reactions on Judicial Decision-Makers

Given the frequent use of social media, its role in the criminal justice process is inevitable.

Jurors' decisions may be influenced by a broad range of legally relevant information gleaned from media sources, including newspaper reports,[27] radio and television news, advertising, movies, and televised crime shows and courtroom scenes.[28] As a result, media portrayals may influence juries and the general public, distorting the course of justice.[29] Moreover, the widespread use of social media platforms has increased the media's impact on court procedures.[30]

In the survey results, we concluded that many respondents believe public pressure and social perception are reaching the judiciary, especially when social media is used to develop a trial or media justice; public pressure also takes place. At the same time, what is shared on social media can create a perception of a judicial case.

27 Rhoda Estep and Patrick T Macdonald, 'How Prime-Time Crime Evolved on TV, 1976–1983' in Ray Surette (ed), *Justice and the Media: Issues and Research* (Charles C Thomas 1984) 110.

28 Edith Greene, 'Media Effects on Jurors' (1990) 14 Law and Human Behavior 439 <https://doi.org/10.1007/BF01044221> accessed 5 July 2026.

29 Mensah (n 18).

30 Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton UP 2009).

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6 CONCLUSIONS

The impact of social media use and what is transmitted to us is inevitable. While we emphasise how much social media influences the formation of thoughts and opinions, the results show that what is served to us on social media is becoming part of mass opinion.

The survey results show that a significant share of participants affirmed that social media directly influences public opinion in judicial processes in the Republic of Kosovo. While respondents claim that social media plays an influential role in shaping their opinions, they also responded that media exposure of court cases affects the presumption of guilt or innocence in criminal proceedings. In this regard, the claim that social media also affects the presumption of guilt or innocence refers to where a criminal case is tried on social media. There are many cases that are treated as if they are a "media trial" that affects a suspect's presumption of innocence, but commenting and reacting on social media often also violates that presumption. The findings indicate that social media has become an important source of information that shapes public opinion about criminal proceedings in the Republic of Kosovo.

The survey results show that a substantial proportion of respondents perceive social media as significantly influencing public attitudes toward ongoing judicial processes, thereby supporting the first research hypothesis.

Furthermore, the findings suggest that respondents perceive media exposure of criminal proceedings as potentially influencing public perceptions of the guilt or innocence of accused persons before the conclusion of judicial proceedings. This perception is particularly evident in cases that receive extensive attention on social media, where public discussion and user-generated content may shape opinions about the case before a final judicial decision. These findings raise concerns about protecting the presumption of innocence and the potential impact of social media discourse on the fairness and impartiality of criminal proceedings.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

ВПЛИВ СОЦІАЛЬНИХ МЕРЕЖ НА РЕАЛІЗАЦІЮ ПРАВА НА СПРАВЕДЛИВИЙ СУД У РЕСПУБЛІЦІ КОСОВО

Бесар Краснікі, Букуріє Етемі-Адемі, Шабан Якупі та Валері Катані*

АНОТАЦІЯ

Передумови. *Соціальні мережі можуть створювати умови, що впливають на суспільне сприйняття судових процесів і потенційно чинять тиск на представників судової влади. На основі даних опитування громадян Республіки Косово, у цій статті досліджено вплив соціальних мереж на забезпечення неупередженості суду. Зокрема, особливу увагу приділено негативному впливу соціальних мереж на забезпечення судової неупередженості. Ще одним викликом є формування громадської думки під впливом способів поширення інформації через соціальні мережі та формування відповідних суспільних переконань. Вплив соціальних мереж є неминучим, про що свідчить численна судова практика: упередження, що транслюються в мережі, набувають дедалі більшого поширення та сприймаються суспільством як усталені уявлення.*

Методи. *У межах цього дослідження застосовано кількісний дизайн на основі анкетування, доповнений аналізом окремих судових справ. Емпіричні дані зібрано за допомогою структурованого опитувальника, охопивши вибірку з 492 респондентів у Республіці Косово. Анкета містила твердження, оцінювання яких здійснювалося за п'ятибальною шкалою Лайкерта, та була спрямована на перевірку трьох дослідницьких гіпотез щодо формування громадської думки, забезпечення презумпції невинуватості та сприйняття тиску на представників судової влади. Отримані результати було опрацьовано методами описової статистики та інтерпретовано у взаємозв'язку з матеріалами резонансних кримінальних проваджень і чинним нормативно-правовим регулюванням.*

Результати та висновки. *Результати дослідження свідчать про те, що соціальні мережі впливають на формування громадської думки щодо судових процесів у Республіці Косово, істотно визначаючи суспільне сприйняття таких процесів. Окрім того, висвітлення судових справ у соціальних мережах ставить під загрозу дотримання презумпції невинуватості, оскільки поширення інформації та коментарів у публічному просторі може спричиняти упереджене ставлення до особи ще до завершення судового розгляду. Водночас соціальні мережі можуть ставити під загрозу неупередженість суддів через суспільний тиск і вплив суспільних уявлень на процес ухвалення судових рішень.*

Ключові слова: *вплив медіа, громадська думка, захист прав людини, медійний суд, судова система Косова.*

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HOW CAN ACCESS TO JUSTICE IN CRIMINAL PROCEEDINGS BE IMPROVED IN LITHUANIA? REFORMING EFFECTIVE DEFENCE, LAY PARTICIPATION AND LANGUAGE RIGHTS

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ABSTRACT

Background: *Access to justice in criminal proceedings, understood here as the effective ability of victims, suspects, and defendants to assert their position and to be protected against wrongful conviction, is bound up with the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). Although the Republic of Lithuania ranks highly in international rule-of-law assessments and its Code of Criminal Procedure already secures numerous guarantees, practice reveals persistent gaps in the functional (procedural) dimension of that right, effective defence, equality of arms and effective participation. Against the background of the contested 2023 reform proposals, this article asks how these procedural guarantees can be strengthened.*

Method: *The study applies doctrinal (formal-legal), comparative-legal, historical, and functional methods. It analyses the Lithuanian Code of Criminal Procedure, Article 6 ECHR, and European Court of Human Rights case law. It conducts a functional comparison with selected jurisdictions (Germany, England and Wales, Denmark, the United States, Malta, Ireland, Argentina, and the Russian Federation), chosen and justified in the methodology based on comparability of fair-trial standards and transferability to the Lithuanian model.*

Results and Conclusions: *We advance four proposals: (1) an automated, randomised system for appointing state-funded defence counsel; (2) reintroducing the (non-advocate) public defender acting alongside a professional attorney, reframed by reference to modern analogues such as the English McKenzie friend and the German Beistand; (3) introducing trial by jury, at the defendant's request, for serious offences; and (4) strengthening the interpreter's role and the right to use one's native language, including electronic delivery and self-service translation of the case file. The distinctive contribution lies less in restating the well-known risks of prosecution-influenced defence than in combining these measures, in particular the automated assignment system and the digital handling of language rights, into an integrated and transferable reform package, tested against the principal counter-arguments, including the objection that lay participation is alien to the Lithuanian legal tradition.*

1 INTRODUCTION

The right of access to justice can be defined as the ability of persons in criminal proceedings, victims, and the accused (suspects, defendants), to exercise their rights effectively and to be protected from unfair conviction without undue obstacles. Under the Code of Criminal Procedure of the Republic of Lithuania, this is secured by several mechanisms: the right to a lawyer, including at the expense of the state; the right to be heard in court and during the investigation; the right to appeal decisions of the court and the investigator; the right to examine all case materials; the right to compensation for damage (for the victim through a civil claim, and for the accused for unfounded prosecution); and the right to take part in the proceedings in one's native language at the expense of the state. For the victim, the right to apply for the initiation of a case is also important; for the accused, the presumption of innocence is an essential guarantee.

A conceptual clarification is required at the outset. In the scholarly literature, the elements of the right to a fair trial are commonly grouped into an *institutional* (organisational) category, access to a court, an independent and impartial tribunal established by law, and a *functional* (procedural) category, effective defence, equality of arms, adversarial proceedings and a public hearing within a reasonable time. "Access to a court" in the strict sense is an implied but fundamental institutional element of Article 6 of the ECHR.[1] The present article,

1 See *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), which recognised access to a court as an inherent element of Article 6(1) ECHR.

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however, uses "access to justice" in a broader, functional sense: the effective ability of the parties to defend their position within proceedings. Its four proposals map onto the functional elements of the fair-trial guarantee: the automated appointment of counsel and the public defender concern *effective defence*; the jury concerns the composition of a *tribunal established by law* and public participation in justice; and the interpreter reforms concern *equality of arms and effective participation*. The title is to be read in this functional sense, and not as confined to access to a court *stricto sensu*.

In the World Justice Project's rule-of-law ranking, Lithuania ranks 18th out of 142, a relatively high position, ahead of France, the USA and Italy.[2] Even so, there is scope for improvement. The rule of law in the criminal justice sphere is especially important. Given the severity of criminal law, an unlawful decision can seriously violate the accused's rights. At the same time, a failure to prosecute a real offence leaves the offender unpunished and the victim uncompensated. These factors establish the problem's relevance for Lithuania and, as section 4 explains, for other jurisdictions facing the same structural tensions.

The Lithuanian Code of Criminal Procedure is a dynamic instrument. In 2021, it was amended to expand remote proceedings.[3] Reform proposals have recurred; as early as 2013, Mykolas Romeris University professor Petras Ancelis proposed measures, chiefly to widen the investigator's autonomy from the prosecutor, which also touched on victims' access to justice,[4] some of which were later enacted, including the victim's right to examine all case materials[5] even where the initiation of a case is refused.[6]

The proposals of the governmental working group established on 27 July 2023 (order No B-134), published on 18 April 2024, were extensive but attracted criticism.[7] They included lengthening the time limits for complaints, transferring much of the process to remote conduct, prohibiting the copying of case materials by defendants, and abolishing the possibility of appealing a refusal to initiate a case. According to Remigijus Merkevičius, such measures would make justice less accessible. They would expand the rights of state bodies, not of the prosecution (to which the victim belongs), making justice "more comfortable" for them. This article proceeds from the opposite premise, identifying four measures that would widen, rather than narrow, access to criminal justice.

2 World Justice Project, *Rule of Law Index* <https://worldjusticeproject.org/rule-of-law-index/> accessed 15 December 2025.

3 J Bieliavska, 'Įsigaliojo kodekso pataisos dėl baudžiamojo proceso vykdymo nuotoliniu būdu' (2021)

4 P Ancelis, 'Ten Years Since the Adoption of the Code of Criminal Procedure of the Republic of Lithuania: Theoretical and Practical Problems in the Pre-Trial Stage' (2013) 10 Public Security and Public Order 181.

5 Code of Criminal Procedure of the Republic of Lithuania (2002), art. 28.

6 Code of Criminal Procedure of the Republic of Lithuania (2002), art. 168.

7 R Merkevičius, 'Vyriausybės kanclerio sudarytos BPK tobulinimo darbo grupės pasiūlyta naujoji Lietuvos baudžiamojo proceso paradigma…' (Infolex.lt, 22 April 2024) <https://www.infolex.lt/portal/start.asp?act=news&Tema=39&str=129192> accessed 15 December 2025.

2 METHODOLOGY

The aim is to identify and formulate specific measures to improve access to justice in criminal proceedings in Lithuania. Four research questions follow: (i) which shortcomings in the current regulation limit the effective exercise of the functional fair-trial guarantees; (ii) which institutional reforms could address them; (iii) what benefits, costs and counter-arguments attach to each; and (iv) to what extent are the proposals transferable beyond Lithuania.

The study employs the formal-legal (doctrinal) method to analyse the applicable rules; the historical method to situate the proposed institutions within the Lithuanian and continental traditions; and the comparative-legal and functional methods to assess how analogous institutions operate elsewhere and whether they achieve their purpose. The comparator jurisdictions were not chosen at random. Germany and Denmark were selected as EU civil-law systems whose criminal procedure is structurally comparable to Lithuania's and which, like Lithuania, are bound by Article 6 of the ECHR; England and Wales and the United States serve as common-law reference points for the institutions of lay assistance and the jury; Malta and Ireland were chosen specifically to test the "small-state" objection to jury trials, being EU Member States smaller than or comparable to Lithuania in population yet operating juries for serious offences; Argentina illustrates a recent civil-law jury reform; and the Russian Federation is used, with due caution as a low-rule-of-law outlier, solely to isolate the acquittal function of the jury. Comparability rests on the shared fair-trial standard (Article 6 of the ECHR or functionally equivalent guarantees) and, for the civil-law comparators, a common continental procedural structure; the selection criterion for each institution is functional equivalence and the plausibility of transfer to Lithuania's adversarial-continental model.

The analysis relies on primary materials: the Lithuanian Code of Criminal Procedure, the German Strafprozeßordnung, Article 6 of the ECHR; ECtHR case law (*Golder v United Kingdom*; *Daud v Portugal*; *Jelcovas v Lithuania*); and scholarship, statistical reports, and official sources. To meet the requirement of scholarly balance, the analysis expressly engages the principal opposing positions, in particular the thesis that lay participation is alien to the Lithuanian legal tradition (section 3.3).

3 RESULTS AND DISCUSSION

3.1. An automated system for appointing state-funded defence counsel

Currently, when an accused is entitled to a state-funded lawyer but does not choose one, the state appoints one. In practice, investigators and court secretaries telephone lawyers they know and invite them to join. A comparable practice exists elsewhere.[8]

8 The Prosecution Service of Denmark, 'Appointment of a Defence Counsel' <https://anklagemyndigheden.dk/en/appointment-of-a-defence-counsel> accessed 15 December 2025.

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The drawback is that investigators and courts may choose lawyers convenient to work with or who will not take a firm line or file inconvenient motions,[9] and who may even persuade the accused to admit guilt, sometimes wrongly. This is especially dangerous at the earliest stages when the accused is under stress. Such a situation can engage the accused's right to qualified legal assistance, since the ineffective conduct of even a lawfully appointed lawyer may violate Article 6 of the ECHR.[10]

The solution is a state-automated system for appointing counsel. Where the accused is entitled to a state-funded lawyer, the investigator or court submits a request within the system; a randomly available lawyer accepts it and enters the case. Neither the investigator nor the court knows in advance which lawyer will join, so counsel is independent of the prosecution. To prevent the investigator from misleading the accused by calling a familiar lawyer and passing them off as system-assigned, the law should require that the accepted request be attached to the case file, on pain of the judgement being overturned. This measure, a randomised, technology-based allocation, is, to the authors' knowledge, not implemented in most European systems, and constitutes one of the article's more concrete contributions.

3.2. Reintroducing the institution of the public defender

The term "public defender" is used here differently from Anglo-Saxon usage, where it denotes a state-appointed lawyer for those who cannot afford one.[11] Here, it denotes a person without advocate status who performs defence functions *alongside* a professional attorney, a lawyer without advocate status, a human rights activist, or a relative or friend of the accused. This distinction is decisive for the objection, considered below, that the proposal reintroduces the very arbitrariness the automated system is meant to prevent.

The institution of the public defender (*visuomeninis gynėjas*) existed under the Soviet-era Code of Criminal Procedure, alongside its mirror image, the public accuser (*visuomeninis kaltintojas*),[12] but was not retained in the 2003 Code. The most plausible explanation is

9 See the German debate on the choice of Pflichtverteidiger: Anwalt.de, 'Pflichtverteidigung: Habe ich das Recht auf einen Pflichtverteidiger meiner Wahl?' <https://www.anwalt.de/rechtstipps/pflichtverteidigung-habe-ich-das-recht-auf-einen-pflichtverteidiger-meiner-wahl_159289.html> accessed 15 December 2025; Strafrecht Bundesweit, 'Strafverteidiger: Wahlverteidiger oder Pflichtverteidiger?' <https://www.strafrecht-bundesweit.de/strafrecht-blog/strafverteidiger-wahlverteidiger-oder-pflichtverteidiger/> accessed 15 December 2025.

10 *Jelcovas v Lithuania* App no 16913/04 (ECtHR, 20 September 2011); *Daud v Portugal* App no 22600/93 (ECtHR, 21 April 1998).

11 Cambridge Dictionary, 'Public Defender' <https://dictionary.cambridge.org/dictionary/english/public-defender> accessed 15 December 2025.

12 Code of Criminal Procedure of the Lithuanian SSR (1961), which provided for both the *visuomeninis gynėjas* and the *visuomeninis kaltintojas*. See the consolidated historical text at <https://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.20464/> accessed 15 December 2025.

systemic rather than incidental: tвhe 2003 reform reoriented Lithuanian criminal procedure towards an adversarial, advocate-centred model built on the constitutional guarantee of the right to counsel (Article 31(6) of the Constitution), and in doing so it discarded the Soviet apparatus of organised "public" participation on both sides. Recovering the *defence* half of that apparatus therefore requires a positive justification, to which we now turn.

The perception of the public defender as a Soviet vestige is understandable but incomplete, because functionally equivalent institutions operate in developed adversarial and continental systems today. In England and Wales, a litigant in person may be assisted by a *McKenzie friend,* a non-lawyer who provides support, takes notes, and gives quiet advice, a right recognised in *McKenzie v McKenzie* and extended, in exceptional circumstances, to a limited right of audience in criminal proceedings.[13] In Germany, a civil-law system structurally close to Lithuania's, Section 149 of the Code of Criminal Procedure expressly provides for the admission of an assistant (*Beistand*) to the accused.[14] The proposal is thus better presented as the modernisation of a widely recognised institution rather than the revival of a Soviet one.

The public defender would have the same rights as a professional attorney to attend hearings and investigative actions, file motions, meet the accused in custody, and examine the file, with one difference: whereas an advocate enters without permission, the admission of a public defender would be decided by the investigator or court by a reasoned decision assessing identity, the absence of a conflict of interest, and the person's suitability. Crucially, this admission decision is not the *selection* of counsel and does not reintroduce the arbitrariness targeted by section 3.1: the automated system assigns the professional advocate, and the public defender is an *additional* participant chosen by the defence, whom the authority may admit but not impose or hand-pick. A public defender cannot replace an attorney and must act only with one. These safeguards preserve the right to qualified legal assistance while widening the defence.

It may be objected, as the Soviet symmetry of *gynėjas* and *kaltintojas* suggests, that strengthening the defence alone upsets equality of arms, since an inert investigator or prosecutor may equally fail the victim, and the law should not equip the suspect more generously than the victim. We accept the force of this point in part. Two responses are offered. First, a degree of asymmetry in favour of the defence is justified by the coercive power of the State and the presumption of innocence, which are not mirrored on the prosecution side. Second, and to meet the objection directly, the reform could be made symmetrical by admitting a lay representative alongside the prosecutor or in support of the victim, a modern, rights-based counterpart to the former *visuomeninis kaltintojas,* so that the balance that the Soviet model achieved is preserved without its ideological content. The

13 *McKenzie v McKenzie* [1970] 3 WLR 472 (CA); on the grant of a right of audience to a non-lawyer in criminal matters, see *Clarkson v Gilbert* [2000] 2 FLR 839 (CA).

14 Strafprozeßordnung (StPO), s 149 (Zulassung von Beiständen).

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benefit of the defence-side institution is nonetheless real: a trusted person, sometimes more committed than appointed counsel, can strengthen the defence and, as a public defender, meet the accused in custody without separate authorisation.

3.3. Introducing trial by jury

This is the most far-reaching proposal. Analogues of the jury existed in antiquity, faded in medieval continental Europe, and were revived in England, whence they spread to the United States.[15] In the 19th century, juries emerged in continental Europe, including the Russian Empire, which then included Lithuania, and were discussed in interwar Lithuania in the 1930s,[16] but were not introduced; lay assessors existed until 1995.[17] On 25 June 1998, the Seimas resolved to analyse the feasibility of a jury; nothing came of it. This article proposes juries of at least six persons for especially serious (and preferably serious) offences, convened only at the defendant's request, with an unappealable acquittal, as in the USA.[18]

Professional judges, as civil servants, may lean towards state interests and treat the prosecution as colleagues, whereas jurors are independent and decide on common sense and life experience rather than law. Empirically, jurors acquit more readily than judges.[19] Russia is instructive: professional judges acquit in approximately 0.15 per cent of cases, but juries acquit in roughly 25 per cent.[20] If the jury is sufficiently impartial in Russia, it should be more effective in an EU democracy.

The most serious scholarly objection in the Lithuanian context is Dementavičienė's: based on a six-year study, she concludes that the participation of lay representatives is, historically, a "foreign body" (*svetimkūnis*) in the Lithuanian legal tradition, the Soviet period being the sole, imposed exception, so that Lithuanian justice has always been tied

15 R von Moschzisker, 'The Historic Origin of Trial by Jury' (1921) 70 University of Pennsylvania Law Review 1.

16 'Prisiekusiųjų teismas', *Visuotinė lietuvių enciklopedija* (2023) <https://www.vle.lt/straipsnis/prisiekusiujuteismas/> accessed 15 December 2025.

17 S Dementavičienė, *Visuomenės atstovų dalyvavimo vykdant teisingumą institutas Lietuvos Respublikoje ir kitose Europos Sąjungos valstybėse narėse: konstituciniai aspektai* (Mykolas Romeris University 2021).

18 Legal Information Institute (Cornell Law School), 'Reprosecution After Acquittal' <https://www.law.cornell.edu/wex/reprosecution_after_acquittal> accessed 15 December 2025. A negative counter-example is Russia, where a high proportion of jury acquittals are overturned: E Khodzhaeva, 'Sudy s uchastiem prisyazhnykh v 2018–2022 godakh' (Tochno.st, 2022) <https://tochno.st/materials/sudy-s-uchastiem-prisyazhnykh-v-2018-2022-godakh-statisticheskaya-spravka-po-itogam-chetyrekh-let-posle-reformy> accessed 15 December 2025.

19 See e.g. (USA) D Givelber and A Farrell, 'Judges and Juries: The Defense Case and Differences in Acquittal Rates' (2008) 33 *Law & Social Inquiry* 31; (Argentina) S Porterie and A Romano, *El poder del jurado* (INECIP 2018).

20 E Yurishina, 'Shansy poluchit' opravdatel'nyy prigovor v Rossii — 0,15%' (*Tochno.st*, 24 May 2023) <https://tochno.st/materials/shansy-poluchit-opravdatelnyy-prigovor-v-rossii-015-isklyucheniy-vsego-tri-dela-protiv-silovikov-sudy-prisyazhnykh-i-chastnoe-obvinenie> accessed 15 December 2025.

to professionalism rather than to "the voice of the people", and that foreign lay participation models are costly, slow and prone to decisions driven by preconception rather than legal argument. This objection must be met, not passed over. We offer three answers. First, the "alien tradition" thesis is historically contestable: juries did operate on Lithuanian territory under the 19th-century Russian Empire. They were seriously discussed in the interwar Republic, so the tradition is not uniformly professional. Second, even if lay participation is not indigenous, novelty calls for careful design and public debate, not exclusion; many now-entrenched institutions were once transplants. Third, and most importantly, the objection does not touch the core functional argument: the jury's markedly higher acquittal rate operates as a structural safeguard against wrongful conviction that a professional bench, however competent, does not provide. The cost and delay concerns are real but, for the narrow category of especially serious offences and only at the defendant's request, are outweighed by that safeguard.

A country's small size is no bar: Malta[21] and Ireland,[22] both EU states smaller than or comparable to Lithuania, operate juries for serious offences with a high level of rule of law. Legal awareness is a subjective criterion that juries tend to raise, and jurors need common sense and a sense of justice rather than legal expertise. Regarding cost, the social benefit of a fair trial for the gravest offences outweighs the cost; the high salaries of Lithuanian judges show how highly the State values justice.[23]

3.4. Strengthening the interpreter's role in criminal proceedings

Article 8 of the Lithuanian Code establishes the right to an interpreter for a person who does not speak Lithuanian; non-professional participants may address the court and file petitions in a language they speak and may examine the materials presented to them in that language, with the remaining materials translated only with the court's permission. In this respect, Lithuanian law is arguably more generous than, for example, German law, under which only the indictment, the detention decision, the judgement, and interim decisions are subject to mandatory written translation, with partial or oral translation otherwise permitted if it secures the accused's procedural rights.[24]

Nonetheless, the right should be expanded. First, communication with the investigator and the prosecutor, not only with the lawyer, should take place only through an interpreter, so that only interpreted oral instructions have legal force; many investigative actions (searches, identification parades, investigative experiments) turn on oral exchange, and misstatements

21 Courts of Justice of Malta, 'Criminal Court: Trials by Jury in Malta' (2025).

22 Ireland guarantees trial by jury for non-minor offences under art. 38.5 of the Constitution of Ireland (Bunreacht na hÉireann).

23 Vilniaus miesto apylinkės teismas, 'Darbo užmokestis' <https://vilniausmiesto.teismas.lt/administracine-informacija/darbo-uzmokestis/30> accessed 15 December 2025.

24 Strafprozeßordnung (StPO), s 187.

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can harm the participant's interests. Second, all documents presented to the accused should be translated into the participant's language and signed, not merely translated orally, so that a distorted "explanation" cannot later go unchallenged; absent a translated copy in the file, the evidence should be inadmissible. Third, consider translating not merely part but all materials available under Article 218(3), given the paradox that a participant cannot justify the need to translate a document whose content they do not understand.

A compromise, and a distinctly modern one, is to give participants, including those in custody, the means to translate documents themselves using information technology, which requires amending Article 218(3) to oblige the prosecutor to issue the file in electronic form. This measure is especially important given the growing number of Lithuanian residents who do not speak Lithuanian, many of them displaced by war or repression; strengthening native language guarantees would optimise their access to criminal justice whether they are victims or defendants.

4 CONCLUSIONS AND RECOMMENDATIONS

First, the Lithuanian Code already provides numerous guarantees of access to criminal justice, reinforced by Article 6 of the ECHR. Second, notwithstanding Lithuania's high rule-of-law ranking, the functional dimension of the fair-trial guarantee can be strengthened through four measures: an automated system for appointing state-funded counsel; the reintroduction, in modernised form, of the public defender; the introduction of trial by jury; and the strengthening of interpreters' role and native language rights.

Third, the obstacles to these reforms are either neutralised by accompanying safeguards or outweighed by the interests of justice, and the principal scholarly objections, the equality of arms concern, and the "alien tradition" thesis have been addressed on their merits rather than avoided.

The article's contribution lies not in restating the familiar danger of prosecution-influenced defence, which is well known in comparative practice, but in assembling a coherent and transferable package: a randomised, technology-based assignment of counsel; the digital delivery and self-service translation of the full case file for non-speakers; and a modernised, analogue-grounded reframing of lay assistance and jury participation, each tested against its strongest counter-argument. It is recommended that the corresponding amendments to the Code be put before the legislator. As neither the automated appointment system nor the public defender has been implemented in most European countries, and as jury trials have elsewhere been replaced by lay-assessor courts (Germany, Sweden, Norway) or by exclusively professional adjudication (the Netherlands, Estonia, Iceland), these proposals are of largely universal application.

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Artificial intelligence-based tools were used in this research solely for translation purposes. In particular, Google Translate and DeepL were used to translate source materials and individual passages from other languages into English. These tools were not used to generate, analyse, interpret, or formulate the research's substantive content. The authors are solely responsible for all arguments, analysis, conclusions, and academic judgements presented in the study.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Стаття-дискусія

ЯК ПОКРАЩИТИ ДОСТУП ДО ПРАВОСУДДЯ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ В ЛИТВІ? РЕФОРМУВАННЯ СИСТЕМИ ЕФЕКТИВНОГО ЗАХИСТУ, УЧАСТІ ГРОМАДСЬКОСТІ ТА МОВНИХ ПРАВ

Володимир Комарницький*, Нгва Мофоранж Мукумбанг та Тамерлан Тагієв

АНОТАЦІЯ

Передумови. *У цій статті доступ до правосуддя у кримінальному провадженні розглядається як реальна здатність потерпілих, а також підозрюваних і обвинувачених*

ефективно відстоювати власну позицію та бути належним чином захищеним від необґрунтованого засудження. Такий доступ тісно пов'язаний із правом на справедливий судовий розгляд, гарантованим статтею 6 Європейської конвенції з прав людини (ЄКПЛ). Хоча Литовська Республіка посідає високі позиції в міжнародних рейтингах верховенства права, а її Кримінальний процесуальний кодекс уже закріплює численні гарантії, практика виявляє системні проблеми у функціональному (процесуальному) вимірі цього права — ефективному захисті, рівності сторін та дієвій участі в кримінальному провадженні. На тлі суперечливих пропозицій щодо реформування, запропонованих у 2023 році, у статті досліджується, як саме можна зміцнити ці процесуальні гарантії.

Методи. *У дослідженні застосовано доктринальний (формально-юридичний), порівняльно-правовий, історичний та функціональний методи. Здійснено аналіз Кримінального процесуального кодексу Литви, статті 6 ЄКПЛ та практики Європейського суду з прав людини, а також проведено функціональне порівняння з окремими юрисдикціями (Німеччиною, Англією та Вельсом, Данією, Сполученими Штатами Америки, Мальтою, Ірландією, Аргентиною та Російською Федерацією). Вибір відповідних юрисдикцій обґрунтовано в методологічній частині дослідження з огляду на зіставність стандартів справедливого судового розгляду та можливість адаптації відповідних моделей до литовської правової системи.*

Результати та висновки. *У статті запропоновано чотири напрями реформування: (1) запровадження автоматизованої системи випадкового розподілу захисників для надання безоплатної правничої допомоги; (2) відновлення інституту громадського захисника (без статусу адвоката), який діятиме поряд із професійним адвокатом, із переосмисленням його ролі з огляду на сучасні аналоги, такі як англійський інститут «McKenzie friend» та німецький — «Beistand»; (3) запровадження суду присяжних за клопотанням обвинуваченого у справах про тяжкі злочини; та (4) посилення ролі перекладача й гарантій права користуватися рідною мовою, включно з наданням матеріалів справи в електронному вигляді та можливістю їх самостійного перекладу. Науковий внесок полягає не стільки в повторному описі загальновідомих ризиків впливу сторони обвинувачення на захист, скільки в об'єднанні цих заходів — зокрема системи автоматизованого призначення та цифрових механізмів забезпечення мовних прав — в інтегрований та придатний для рецепції пакет реформ. Запропоновані заходи оцінено з урахуванням основних контраргументів, зокрема аргументу про те, що участь представників громадськості не відповідає литовській правовій традиції.*

Ключові слова: *доступ до правосуддя; право на справедливий суд; ефективний захист; суд присяжних; громадський захисник; мовні права у кримінальному провадженні; Литва.*

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