



PEER REVIEWED JOURNAL

ACCESS TO JUSTICE IN EASTERN EUROPE

EDITOR-IN-CHIEF 'S NOTE

Iryna Izarova

From Editor:

**A Call for Unity and Proactive Legal Scholarship
in a Turbulent World**

RESEARCH ARTICLES

Dovilė Pūraitė-Andrikienė

**Legal Capacity and Electoral Rights in Lithuania:
The Issue of Compatibility between
the Constitution and the UN Convention
on the Rights of Persons with Disabilities**

Diana Repiščáková

**Ecological Extremism in the Slovak Republic:
Conceptual and Legal Foundations**

ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by the East European Law Research Center

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

Editor-in-Chief	Prof. Iryna Izarova, Dr. Sc. (Law), Kyiv, Ukraine
Deputy	Prof. Elisabetta Silvestri, JD, LL.M. (Cornell) (Law), Pavia, Italy
Editor-in-Chief	
Editorial Board	Prof. Dr. Cornelis Hendrik (Remco) Van Rhee , Professor of European Legal History and Comparative Civil Procedure, Department of Foundations and Methods of Law, Faculty of Law, Maastricht University, the Netherlands; Prof. Dr. Vytautas Nekrosius , Head of the Private Law Department, Faculty of Law, Vilnius University, Lithuania; Dr. Vigita Vebrate , PhD (Law), Deputy Dean of Faculty of Law, Vilnius University, Lithuania; Prof. habil. Dr. Radosław Flejszar , Head of the Civil Procedure Department, Jagiellonian University, Poland; Prof. habil. Dr. Tadeusz Wiesław Zembrzusi , Prof. of the Civil Procedure Department, Warsaw University, Poland; Dr. Bartosz Szolc-Nartowski , PhD (Law), Assoc. Prof., University of Gdańsk, Poland; Dr. Henriette-Cristine Boscheinen-Duursma , Priv.-Doz., Dr. LL.M. (Passau), MAS (European Law), Law Faculty, Paris Lodron University of Salzburg, Austria; Dr. Fernando Gascón-Inchausti , Prof. of the Department of Procedural and Criminal Law, Universidad Complutense de Madrid, Law School, Spain; Prof. habil. Dr. Joanna Mucha , Professor at the Civil Proceedings Department of the Law Faculty and Administration of the University of Adam Mickiewicz in Poznań, Poland; Dr. Eduard Stoica , Lucian Blaga University of Sibiu, Faculty of Economic Sciences, Romania; Prof. Enrique Vallines , Professor of Procedural Law at the Complutense University of Madrid in Spain, Spain; Dr. Archil Chochia , Senior Researcher, TalTech Law School, Tallinn University of Technology, Estonia; Prof. Qerim Qerimi , Professor of International Law, International Law of Human Rights, and International Organizations, Faculty of Law of the University of Pristina, Republic of Kosovo; Dr. Oleh Ilnytskyi , Cand. of Science of Law, Associate Professor, Disciplinary Inspector of the High Council of Justice, Ukraine; Prof. Dr.Sc. (Law) Roman Melnyk , Director of the Scientific School of Administrative and German Law at Maqсут Narikbayev University, Kazakhstan; Prof. Agne Tvaronavičienė , Professor of the Law School and Head of Mediation and Sustainable conflict resolution Laboratory of Mykolas Romeris University, Lithuania; Dr. Silviu Nate , Director of the Global Studies Center, Lucian Blaga University of Sibiu, Romania; Dr. Libor Klimek , Doc. JUDr., Associate Professor at the Faculty of Law of the Matej Bel University in Banská Bystrica, Slovak Republic
Advisory Board	Prof. Dr.Sc. (Law) Yurii Prytyka , Head of the Civil Procedure Department, Taras Shevchenko National University of Kyiv, Ukraine; Prof. Dr.Sc. (Law) Oksana Kaplina , Head of the Department of Criminal Procedure, Yaroslav Mudryi National Law University, Ukraine; Prof. Dr.Sc. (Law) Serhij Venediktov , Prof. of the Labour Law Department, Taras Shevchenko National University of Kyiv, Ukraine; Prof. Dr.Sc. (Law) Oksana Khotynska-Nor , Head of the Department of Justice, Taras Shevchenko National University of Kyiv, Ukraine; Dr. Oksana Uhrynovska , Associate Professor, Department of Civil Law and Procedure, Ivan Franko National University of Lviv, Ukraine
Section Editors	Civil Procedure Prof. Tetiana Tsuvina , Dr.Sc. (Law), Head of the Department, Yaroslav Mudryi National Law University, Ukraine
	ADR and Arbitration Dr. Serhii Kravtsov , Cand. of Science of Law, Assoc. Prof. at the Civil Procedure Department, Yaroslav Mudryi National Law University, Ukraine; University of Luxembourg, Luxembourg
	Constitutional Law and Constitutional Justice Dr. Hryhorii Berchenko , Cand. of Science of Law, Assoc. Prof. of the Department of Constitutional law of Ukraine of Yaroslav Mudryi National Law University, Kharkiv, Ukraine
	Criminal Law and Procedure Dr. Mykola Rubashchenko , Cand. of Science of Law, Assoc. Prof. of Criminal Law Department, Yaroslav Mudryi National Law University, Kharkiv, Ukraine
	Balkan Region Dr. Harun Halilovic , Assistant Professor, Faculty of Law, International University of Sarajevo, Bosnia and Herzegovina; Dr. Eniana Qarri , Lecturer at the Faculty of Law, University of Tirana, Tirana, Albania
Managing Editors	Dr. Olena Terekh , PhD in Law, Assoc. Prof. of the Department of Civil Procedure, Law School, Taras Shevchenko National University of Kyiv, Ukraine; Dr. Lyazzat Nurlumbayeva , LL.M., KAZGUU University, Head of Department, the "Institute of Legislation and Legal Information of the Republic of Kazakhstan", Kazakhstan; Mag. Yuliia Hartman , Master in law, PhD Student, Taras Shevchenko National University of Kyiv, Ukraine; Mag. Bogdana Zagrebela , Master in law, Academic Insights Press, Austria
Language Editors	Dr. Yuliia Baklazhenko , PhD in Pedagogy, MA in Translation, Assoc. Prof. at National Technical University of Ukraine "Igor Sikorsky Kyiv Polytechnic Institute", Ukraine; Julie Bold , Academic Insights Press, Austria; Olha Samofal , Academic Insights Press, Austria
Ukrainian Language Editor	Mag. Liliia Hartman , East European Law Research Center
Assistant Editor	Assistant Editors Ms Maria Andronic , Bachelor of Laws (LL.B.) student, University of Lausanne (Switzerland/Romania); Mag. Viktoria Ivanova , Master in law, Taras Shevchenko National University of Kyiv, Ukraine

For further information on our activities and services, please visit our website <http://ajee-journal.com>

To submit your manuscript, please follow the instructions in our Guide and use our Scholastica submission platform. For any queries, or if you need further assistance, feel free to contact us at info@ajee-journal.com or editor@ajee-journal.com.

© AJEE, 2025

ISSN 2663-0575

Publishing House 'Academic Insights Press'

<https://academicinsightspress.com>

info@academicinsightspress.com

Access to Justice in Eastern Europe

Issue 8 (4) November 2025

TABLE OF CONTENTS

EDITOR-IN-CHIEF'S NOTE	
<i>Iryna Izarova</i> FROM EDITOR: A CALL FOR UNITY AND PROACTIVE LEGAL SCHOLARSHIP IN A TURBULENT WORLD	6
RESEARCH ARTICLES	
<i>Dovilė Pūraitė-Andrikienė</i> LEGAL CAPACITY AND ELECTORAL RIGHTS IN LITHUANIA: THE ISSUE OF COMPATIBILITY BETWEEN THE CONSTITUTION AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES	16
<i>Maya Khater, Yasser Alhowaish, Yassine Chami, Mohamed El Arbi Aoka and Hayssam Hammad</i> LEGAL RESPONSIBILITY OF IRAN FOR COMPENSATING VICTIMS OF THE SYRIAN WAR	43
<i>Iryna Bondar, Liubov Maliarchuk and Oleksandr Snidevych</i> FEATURES AND STATUS OF EXECUTION OF THE ECTHR JUDGEMENTS IN UKRAINE IN TERMS OF THE EUROPEAN EXPERIENCE	69
<i>Diana Repiščáková</i> ECOLOGICAL EXTREMISM IN THE SLOVAK REPUBLIC: CONCEPTUAL AND LEGAL FOUNDATIONS	91
<i>Shejnaze Gagica, Berat Dërmaku and Dukagjin Leka</i> MARRIAGE BETWEEN THE SAME SEXES IN THE REPUBLIC OF KOSOVO: COMPARATIVE OVERVIEW	114

<i>Van Hoi Nguyen, Toan Thang Nguyen, Thi Hoai Thuong Mac and Thi Hong Yen Nguyen</i> TRANSGENDER RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS LAW AND THE INCORPORATION PROCESS IN VIETNAM: BARRIERS, CHALLENGES AND PATHS FORWARD	140
<i>Albina Kiyazova and Maygul Abilova</i> THE MODEL OF REGULATION OF THE LEGAL PROFESSION IN KAZAKHSTAN AND FOREIGN JURISDICTIONS: THE SEARCH FOR A BALANCE BETWEEN STATE MONOPOLY AND SELF-REGULATION	170
<i>Nam Phan Phuong</i> REGULATIONS ON EMISSIONS TRADING SYSTEM AND CARBON TAX: EXPERIENCES FROM CHINESE LAW AND LESSONS FOR VIETNAM	197
<i>Dalia Kubiliūtė</i> LEGAL LIABILITY FOR GREENWASHING ACTIVITIES IN THE FINANCIAL SECTOR	222
<i>Enas Alqodsi, Mohammed Abdelsalam, Alaa Abouahmed, Abdallah Shatat and Adham Hashish</i> BLOCKCHAIN AND SMART PUBLIC PROCUREMENT CONTRACTS: A COMPARATIVE LEGAL ANALYSIS OF DIGITAL TRANSFORMATION IN THE PUBLIC SECTOR	242
<i>Karem Aboelazm, Mohammed Nour Eldeen Sayed, Saleh Al Shraideh and Khalid Mohamed Dganni</i> FORCED SEXUAL STERILISATION OF PERSONS WITH DISABILITIES: BETWEEN INTERNATIONAL OBLIGATIONS AND NATIONAL IMPLEMENTATION: A COMPARATIVE STUDY	275
<i>Dinh The Hung</i> THE LEGAL FRAMEWORK OF ELECTRONIC EVIDENCE IN VIETNAMESE CRIMINAL PROCEDURE: FROM THE BUDAPEST CONVENTION TO DOMESTIC LEGISLATION	301

REVIEW ARTICLES

*Madina Yessirkepova, Nurbek Isabay, Mereke Zhurunova
and Leila Amandykova*

DECENT PAY AND ACCESS TO JUSTICE
FOR LABOUR MIGRANTS IN THE EAEU:
COMPARATIVE LEGAL PERSPECTIVES

340

Ilda Muçmataj and Anjeza Liçenji

COPYRIGHT AND RELATED RIGHTS LEGISLATION IN ALBANIA:
FROM TRADITIONAL TO DIGITAL PROTECTION

359

Sumaya Aljahoori

FROM FLEXIBILITY TO REGULATION: REMOTE WORK
IN THE UAE PUBLIC SECTOR AND COMPARATIVE EU INSIGHTS

382

OPINION ARTICLES

Galym Zhussipbek

PRIMACY OF CARE AND HUMAN DIGNITY:
DECOLONIAL TURN VERSUS ANTI-SOCIAL
NEOLIBERAL CAPITALISM AND POSITIVIST
AND POSTMODERN EPISTEMOLOGIES

407

CASE STUDIES

Besard Belegu and Lavdim Terziu

PERCEPTIONS OF EMPLOYEE MOTIVATION AND ITS ROLE
IN WORK EFFICIENCY: A QUALITATIVE CASE STUDY
IN THE BASIC COURT OF PRISTINA

436

Viktor Tymoshchuk

REGARDING THE IMPLEMENTATION
OF THE EU'S PRIORITY RECOMMENDATIONS
ON THE IMPLEMENTATION OF THE LAW OF UKRAINE
"ON ADMINISTRATIVE PROCEDURE"

459

Bogdan Karnaukh

CAN TORT LAW HANDLE WAR? REFLECTIONS
ON PRIVATE LITIGATION FOR WAR-RELATED DAMAGES
IN UKRAINE

476

Editorial

FROM EDITOR:
A CALL FOR UNITY
AND PROACTIVE LEGAL SCHOLARSHIP
IN A TURBULENT WORLD

Iryna Izarova

ABSTRACT

This editorial of AJEE Issue 4/2025 addresses the profound challenges of a turbulent world where the illusion of stability has shattered. We face simultaneous, compounding crises — geopolitical conflicts, climate threats and rapid digitalization — that demand a proactive vision, not just reflection, from scholarship. The text highlights the devastating, real-world consequences of authoritarian aggression, citing the catastrophic impact on education and cultural heritage in Syria, and the systematic destruction of Ukraine's scientific ecosystem, which represents a profound loss for global science. In response to these existential threats, the editorial underscores the imperative for a unified global response, exemplified by the new International Coalition for Science, Research and Innovation in Ukraine. It frames legal science as bearing a unique responsibility to provide the foundational framework for reconstruction, accountability and justice, reminding us that law and fundamental rights must be respected by all. This issue vividly reflects this dynamic. The first section of articles confronts the complex legal issues arising from war and its

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-ed000401>

Disclaimer:

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

Copyright:

© 2025 Iryna Izarova

consequences, examining tort law for war-related damages, the execution of ECtHR judgments, philosophical questions of dignity and international responsibility. The second, no less substantial, block analyzes the adaptation of law, exploring institutional reforms, the evolution of fundamental rights and responses to novel societal and technological challenges like digitalization, greenwashing and new forms of work.

DEAR READERS,

We live in a time when the illusion of stability has definitively shattered and the path to the sustainable future serves as a challenging mission. The world is confronted not merely with individual crises, but with their simultaneous, interconnected compounding, resolving which has become a monumental task. Geopolitical conflicts, climate threats, rapid digitalization and fundamental shifts in the societal understanding of justice demand not just a reflection from scholarship, but a proactive vision and actions.

Societies everywhere in the world are facing the pressure of authoritarian aggression and human rights violations, leading to extremely negative consequences. In Syria, for example, the protracted conflict has had a catastrophic impact on the cornerstones of its society. UNESCO and its partners have reported that one in three schools is unusable due to damage or destruction, leaving over two million children out of the education system¹. Furthermore, the conflict has inflicted devastating damage on the country's cultural heritage, with all six of Syria's UNESCO World Heritage sites suffering significant harm and being placed on the List of World Heritage in Danger². This destruction is not just a loss for today; it is an erasure of the valuable heritage of thousands of years. This shared historical and cultural legacy, belonging to all humanity, must be protected and saved for our next generations.

In Ukraine, as another stark example, the aggression has devastated the nation's scientific and research landscape. A 2024 UNESCO analysis highlighted that over 30% of scientific infrastructure is "completely gone", 54% of scientists cannot operate as they did before and the estimated cost to restore public research infrastructure exceeds \$1.26 billion³.

- 1 UNICEF, 'Education: Every Child has the Right to Learn' (UNICEF Syrian Arab Republic, 2025) <<https://www.unicef.org/syria/education>> accessed 15 November 2025; UNESCO, 'Country Plan for Syria: Context & Data' (UNICEF Syrian Arab Republic, 29 January 2020) <<https://syria.un.org/en/32793-unesco%E2%80%99s-country-plan-syria>> accessed 15 November 2025.
- 2 UN, 'As War Continues, UN Agency Maps Extensive Destruction to Syria's Cultural Heritage' (United Nations News, 23 December 2014) <<https://news.un.org/en/story/2014/12/487072>> accessed 15 November 2025; UNITAR, *Satellite-based Damage Assessment to Cultural Heritage Sites in Syria* (UNITAR 2014) <<https://unitar.org/sustainable-development-goals/satellite-analysis-and-applied-research/chs-syria>> accessed 15 November 2025.
- 3 UNESCO, 'Ukraine: International Coalition for Science, Research and Innovation Launched' (UNESCO, 11 July 2025) <<https://www.unesco.org/en/articles/ukraine-international-coalition-science-research-and-innovation-launched>> accessed 15 November 2025.

It is worth adding here that Ukrainian science has given the world exceptional scientists who laid the foundations for entire fields: *Serhiy Korolyov*, the founder of practical cosmonautics; *Igor Sikorsky*, the inventor of the helicopter; and *Ilya Mechnikov*, the Nobel laureate for research on immunity and *Volodymyr Vernadsky*, founder of geochemistry and the biosphere theory. This legacy continues with world-renowned figures like *Maryna Viazovska*, a Fields Medal laureate. The damage to Ukraine's scientific ecosystem, therefore, is not just a national tragedy but a profound loss for the future of world science for generations to come.

It is precisely this challenge that demands a unified global response. A powerful example of such unity is the recent launch of the International Coalition for Science, Research and Innovation in Ukraine, announced during the 2025 Ukraine Recovery Conference in Rome⁴. This vital initiative, jointly led by the Ukrainian Ministry of Education and Science, the European Commission, UNESCO and the Italian Ministry of University and Research, aims to coordinate international efforts and place research and innovation at the heart of the nation's sustainable and long-term recovery.

This spirit of international coordination underscores a fundamental truth: unity and proactive collaboration are our only viable paths forward. This is especially true for the field this journal serves. While the coalition focuses on R&I broadly, the legal science community bears a unique and critical responsibility. We provide the very framework for this reconstruction, for accountability and for justice. Legal science is the basis and ground upon which a stable, rules-based recovery is built, reminding us that the law and fundamental rights must be one for all and respected by all.

Taking this opportunity, we issue a call to our colleagues in the international legal and academic community. We urge you to engage with initiatives like the Coalition and to contribute expertise to the reconstruction and rebuilding of damaged infrastructures. This is a way to unify, to collaborate in defence of shared values and to strengthen the foundations of our global community against future threats.

This issue of our journal (4/2025), continuing its mission of open access to knowledge, is a vivid reflection of this global dynamic. The articles collected here are broadly divided into two powerful sections: research on law in the context of existential threats and an analysis of its evolution in response to novel societal and technological challenges.

4 *ibid*; Directorate-General for Research and Innovation, 'International Coalition Launched to Support Ukraine's Research and Innovation Ecosystem' (*European Commission*, 11 July 2025) <https://research-and-innovation.ec.europa.eu/news/all-research-and-innovation-news/international-coalition-launched-support-ukraines-research-and-innovation-ecosystem-2025-07-11_en> accessed 15 November 2025.

The first block of articles immerses us in the most complex issues related to war and its consequences. **Bogdan Karnaukh** poses a fundamental question in "Can Tort Law Handle War? Reflections on Private Litigation for War-Related Damages in Ukraine". This topic is continued by **Iryna Bondar, Liubov Maliarchuk and Oleksandr Snidevych**, who explore the "Features and Status of Execution of the ECtHR Judgements in Ukraine in Terms of the European Experience". The discussion is extended to a deeper, philosophical level by **Galym Zhussipbek** in his article, "Primacy of care and human dignity: decolonial turn versus anti-social neoliberal capitalism and positivist and postmodern epistemologies". This section concludes with a look at international responsibility from **Maya Khater** and her co-authors, who examine the "Legal Responsibility of Iran for Compensating Victims of the Syrian War".

The second, no less substantial block is dedicated to the adaptation of law. It opens with research focused on reforms and the effectiveness of legal institutions. **Viktor Tymoshchuk** provides a critically needed analysis in "Regarding The Implementation of the EU's Priority Recommendations on the Implementation of the Law Of Ukraine 'On Administrative Procedure'". In their qualitative study, "Perceptions of Employee Motivation and Its Role in Work Efficiency: a Qualitative Case Study in the Basic Court of Pristina", **Besard Belegu and Lavdim Terziu** demonstrate the direct link between motivation and judicial efficiency. Joining this theme of institutional design are **Albina Kiyazova and Maygul Abilova** with "The Model of Regulation of the Legal Profession in Kazakhstan and Foreign Jurisdictions: The Search for a Balance between State Monopoly and Self-Regulation".

Next, we observe how law is responding to the evolving societal demand for the protection of fundamental rights and dignity. This includes the study by **Dovilė Pūraitė-Andrikienė**, "Legal Capacity and Electoral Rights in Lithuania: The Issue of Compatibility between the Constitution and the UN Convention on the Rights of Persons with Disabilities", and the comparative study by **Karem Aboelazm** and co-authors, "Forced Sexual Sterilisation of Persons with Disabilities: Between International Obligations and National Implementation: A Comparative Study". Also in this area are the overview by **Shejnaze Gagica, Berat Dërmaku and Dukagjin Leka**, "Marriage Between the Same Sexes in the Republic of Kosovo: Comparative Overview", and the analysis by **Van Hoi Nguyen, Toan Thang Nguyen, Thi Hoai Thuong Mac, and Thi Hong Yen Nguyen**, "Transgender Rights under International Human Rights Law and the Incorporation Process in Vietnam: Barriers, Challenges and Paths Forward". This vital theme is further supplemented by the comparative research of **Madina Yessirkepova, Nurbek Isabay, Mereke Zhurunova and Leila Amandykova**, "Decent Pay and Access to Justice for Labour Migrants in the EAEU: Comparative Legal Perspectives".

Finally, a series of articles is dedicated to the novel challenges transforming society. This includes the "green" agenda: from the conceptualization of "Ecological Extremism in the Slovak Republic" by **Diana Repiščáková**, and lessons from "Regulations on Emissions Trading System and Carbon Tax: Experiences from Chinese Law and Lessons for Vietnam" by **Nam Phan Phuong**, to "Legal Liability for Greenwashing Activities in the Financial Sector" by

Dalia Kubiliūtė. It also covers digitalization, such as "Blockchain and Smart Public Procurement Contracts: A Comparative Legal Analysis" by **Mohammed Abdelsalam** et al., and "Copyright and Related Rights Legislation in Albania: From Traditional to Digital Protection" by **Ilda Muçmataj and Anjeza Liçenji**. And, of course, new forms of work organization, where **Sumaya Aljahoori** offers an analysis in "From Flexibility to Regulation: Remote Work in The UAE Public Sector and Comparative EU Insights".

We wish to particularly draw our readers' attention to the wide geography of our authors. The research from our colleagues in Vietnam, Kazakhstan, the UAE and other countries not only highlights the unique legal realities of their regions but also provides an invaluable foundation for comparative legal studies, an area to which our editorial team always pays special attention.

We sincerely thank all the authors for their meticulous work, as well as our tireless reviewers. We hope this collection will serve as a source of new ideas and a stimulus for further professional discussions.

Sincerely,
Iryna Izarova
AJEE Editor in Chief

ШАНОВНІ ЧИТАЧІ!

Ми живемо в час, коли ілюзія стабільності остаточно зруйнована, а шлях до сталого майбутнього є складним викликом. Світ стикається не просто з окремими кризами, а з їх одночасним, взаємопов'язаним нашаруванням, вирішення якого стало монументальним завданням. Геополітичні конфлікти, кліматичні загрози, стрімка цифровізація та фундаментальні зміни у суспільному розумінні справедливості вимагають від науковців не лише рефлексії, але й проактивного бачення та дій.

Суспільства в усьому світі стикаються з тиском авторитарної агресії та порушеннями прав людини, що призводить до надзвичайно негативних наслідків. Наприклад, у Сирії затяжний конфлікт має катастрофічний вплив на підвалини суспільства. ЮНЕСКО та партнери повідомляють, що кожна третя школа є непридатною для використання через пошкодження або руйнування, що залишають понад два мільйони дітей поза системою освіти. Більше того, конфлікт завдав нищівної шкоди культурній спадщині країни: усі шість сирійських об'єктів Світової спадщини ЮНЕСКО зазнали значних пошкоджень і були внесені до Списку всесвітньої спадщини, що перебуває під загрозою. Це руйнування — не просто втрата для сьогодення; це стирання безцінної спадщини тисячоліть. Ця спільна історико-

культурна спадщина, що належить усьому людству, має бути захищена та збережена для наших наступних поколінь.

В Україні, як ще один яскравий приклад, агресія спустошила науковий та дослідницький ландшафт країни. Аналіз ЮНЕСКО 2024 року показав, що понад 30% наукової інфраструктури «повністю знищено», 54% вчених не можуть працювати, як раніше, а орієнтовна вартість відновлення державної дослідницької системи перевищує 1,26 мільярда доларів США.

Варто додати, що українська наука дала світові видатних вчених, які заклали основи цілих галузей: Сергія Корольова, засновника практичної космонавтики; Ігоря Сікорського, винахідника гелікоптера; Іллю Мечникова, лауреата Нобелівської премії за дослідження імунітету, та Володимира Вернадського, засновника геохімії та теорії біосфери. Ця спадщина продовжується у всесвітньо відомих постатях, як-от Марина В'язовська, лауреатка медалі Філдса. Тому шкода, завдана науковій екосистемі України, — це не просто національна трагедія, а й глибока втрата для майбутнього світової науки на прийдешні покоління.

Саме цей виклик вимагає єдиної глобальної відповіді. Яскравим прикладом такої єдності є нещодавній запуск **Міжнародної коаліції з питань науки, досліджень та інновацій в Україні**, оголошений під час Конференції з відновлення України 2025 року в Римі. Ця життєво важлива ініціатива, очолювана спільно Міністерством освіти і науки України, Європейською Комісією, ЮНЕСКО та Міністерством університетів і досліджень Італії, має на меті скоординувати міжнародні зусилля та поставити дослідження й інновації в центр сталого та довгострокового відновлення країни.

Цей дух міжнародної координації підкреслює фундаментальну істину: єдність і проактивна співпраця — наші єдині життєздатні шляхи вперед. Особливо це стосується сфери, якій слугує наш журнал. Хоча коаліція зосереджена на дослідженнях та інноваціях у широкому сенсі, **спільнота правників-науковців** несе унікальну та вирішальну відповідальність. Ми забезпечуємо саму основу для цієї реконструкції, для підзвітності та для справедливості. Правова наука є ґрунтом, на якому будується стабільне, засноване на правилах відновлення, нагадуючи нам, що закон має бути один для всіх і фундаментальні права мають поважатися всіма.

Користуючись нагодою, ми звертаємося до наших колег у міжнародній правовій та академічній спільноті. Ми закликаємо вас долучатися до таких ініціатив, як Коаліція, та робити свій експертний внесок у реконструкцію та відбудову пошкоджених інфраструктур. Це спосіб об'єднатися, співпрацювати на захист спільних цінностей та зміцнити основи нашої глобальної спільноти проти майбутніх загроз.

Цей випуск нашого журналу (4/2025), продовжуючи свою місію відкритого доступу до знань, є яскравим відображенням цієї глобальної динаміки. Зібрані тут статті умовно поділені на два потужні розділи: дослідження права в контексті

екзистенційних загроз та аналіз його еволюції у відповідь на новітні суспільні й технологічні виклики.

Перший блок статей занурює нас у найскладніші питання, пов'язані з війною та її наслідками. **Богдан Карнаух** ставить фундаментальне питання у статті «Чи може деліктне право вирішити проблему війни? Роздуми про приватні судові позови щодо відшкодування збитків, пов'язаних з війною, в Україні». Цю тему продовжують **Ірина Бондар**, **Любов Малярчук** та **Олександр Снідевич**, які досліджують «Особливості та стан виконання рішень ЄСПЛ в Україні в умовах сьогодення через призму європейського досвіду». Дискусія поширюється на глибший, філософський рівень завдяки **Галиму Жуссіпбеку** в його статті «Пріоритет турботи та людської гідності: деколоніальний поворот проти антисоціального неоліберального капіталізму та позитивістських і постмодерністських епістемологій». Цей розділ завершується поглядом на міжнародну відповідальність від **Маї Хатер** та її співавторів, які аналізують «Юридичну відповідальність Ірану за відшкодування шкоди жертвам сирійської війни».

Другий, не менш змістовний блок, присвячений адаптації права. Він відкривається дослідженнями, зосередженими на реформах та ефективності правових інституцій. **Віктор Тимощук** надає критично необхідний аналіз у статті «Щодо виконання пріоритетних рекомендацій ЄС із впровадження Закону України «Про адміністративну процедуру». У своєму якісному дослідженні «Уявлення про мотивацію працівників та її роль в ефективності роботи: якісне тематичне дослідження практики місцевого суду Приштини» **Бесард Белегу** та **Лавдім Терзіу** демонструють прямий зв'язок між мотивацією та ефективністю судової влади. До цієї теми інституційного дизайну долучаються **Альбіна Киязова** та **Майгуль Абілова** зі своєю працею «Модель регулювання юридичної діяльності в Казахстані та іноземних юрисдикціях: пошук балансу між державною монополією та саморегулюванням».

Далі ми спостерігаємо, як право реагує на еволюцію суспільного запиту на захист фундаментальних прав і гідності. Сюди входить дослідження **Довіле Пурайте-Андрікене** «Правоздатність та виборчі права в Литві: питання сумісності Конституції та Конвенції ООН про права осіб з інвалідністю» та порівняльне дослідження **Карема Абоєлазма** зі співавторами «Примусова стерилізація осіб з інвалідністю між міжнародними зобов'язаннями та національним впровадженням - порівняльне дослідження». Також у цій царині — огляд **Шейназе Гагіци**, **Берата Дермаку** та **Дукаджина Леки** «Шлюб між особами однієї статі в Республіці Косово: порівняльний огляд» та аналіз **Ван Хой Нгуєна**, **Тоан Тханг Нгуєна**, **Тхі Хоай Тхуонг Мака** і **Тхі Хонг Єн Нгуєна** «Права трансгендерних осіб згідно з міжнародним законодавством у сфері прав людини та процес їх впровадження у В'єтнамі: перешкоди, виклики та шляхи розвитку». Цю важливу тему доповнює компаративне дослідження **Мадіни Єсіркепової**,

Нурбека Исабая, Мереке Журунової та Лейли Амандикової «Гідна оплата та доступ до правосуддя для трудових мігрантів в ЄАЕС: порівняльно-правовий огляд перспектив».

Нарешті, серія статей присвячена новітнім викликам, що трансформують суспільство. Це і «зелений» порядок денний: від «Екологічного екстремізму у Словацькій Республіці: концептуальні та правові засади» **Діани Репіщак** до «Правил регуляції системи торгівлі викидами та податку на вуглець: досвід китайського законодавства та уроки для В'єтнаму» **Нам Фан Фуонга** до «Юридичної відповідальності за грінвошинг у фінансовому секторі» **Далі Кубілюте**. Це також охоплює цифровізацію, як-от: «Блокчейн та смарт-договори про державні закупівлі: порівняльно-правовий аналіз цифрової трансформації в державному секторі» **Енас Аль-Кодсі** та ін., і «Закон Албанії "Про авторське право та суміжні права": від традиційного до цифрового захисту» **Ільди Мукматай та Анжези Ліценжи**. І, звичайно, нові форми організації праці, де **Сумая Аль Джагурі** пропонує аналіз у дослідженні «Від гнучкості до регулювання: порівняльний аналіз дистанційної роботи в державному секторі ОАЕ та досвіду ЄС».

Ми хочемо особливо звернути увагу наших читачів на широку географію авторів. Дослідження наших колег з В'єтнаму, Казахстану, ОАЕ та інших країн не лише висвітлюють унікальні правові реалії їхніх регіонів, але й забезпечують безцінну основу для порівняльних правових досліджень – сфери, якій наша редакція завжди приділяє особливу увагу.

Ми щиро дякуємо всім авторам за їхню кропітку роботу, а також нашим невтомним рецензентам. Сподіваємося, ця збірка стане джерелом нових ідей та стимулом для подальших фахових дискусій.

AUTHOR INFORMATION

Iryna Izarova

Full Professor, Dr. Sc., School of Law, Taras Shevchenko National University of Kyiv, Ukraine;
Guest Researcher at the University for Continuing Education Krems, Austria
irina.izarova@knu.ua

<https://orcid.org/0000-0002-1909-7020>

Editor-in-Chief of Access to Justice in Eastern Europe Journal

Chair of EASE Ukraine, Chair of the RCPC of the European Association of Science Editors

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

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

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Iryna Izarova. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

ABOUT THIS ARTICLE

Cite this article

Izarova I, 'From Editor: A Call for Unity and Proactive Legal Scholarship in a Turbulent World' (2025) 8(4) Access to Justice in Eastern Europe 1-10 <<https://doi.org/10.33327/AJEE-18-8.4-ed000401>>

DOI <https://doi.org/10.33327/AJEE-18-8.4-ed000401>

Keywords: *Legal Scholarship; Scientific Infrastructure; International Cooperation; War-related Damages; Human Rights; Editorial Excellence.*

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

СЛОВО РЕДАКТОРА:

ЗАКЛИК ДО ЄДНОСТІ ТА ПРОАКТИВНОЇ ПРАВОВОЇ НАУКИ В БУРЕМНОМУ СВІТІ

АНОТАЦІЯ

У своєму вступі редактора до 4 випуску 2025 AJEE висвітлено глибокі виклики турбулентного світу, де ілюзія стабільності зруйнована. Одночасні складні кризи – геополітичні конфлікти, кліматичні загрози та швидка цифровізація – вимагають від науковців проактивного бачення, а не лише рефлексій. У тексті висвітлюються руйнівні,

реальні наслідки авторитарної агресії і катастрофічний вплив на освіту та культурну спадщину в Сирії, а також систематичне руйнування наукової екосистеми України, що є величезною втратою для світової науки. У відповідь на ці екзистенційні загрози у публікації підкреслюється необхідність єдиної глобальної відповіді, прикладом якої є нова Міжнародна коаліція з питань науки, досліджень та інновацій в Україні. Юридична наука розглядається як така, що несе унікальну відповідальність за забезпечення фундаментальної основи для реконструкції, підзвітності та відновлення правосуддя, нагадуючи нам, що закон та фундаментальні права людини повинні поважатися всіма. Цей випуск яскраво відображає цю динаміку. Перший розділ статей розглядає складні правові питання, що виникають внаслідок війни та її наслідків, досліджуючи деліктне право щодо збитків, пов'язаних з війною, виконання рішень ЄСПЛ, філософські питання гідності та міжнародної відповідальності. Другий, не менш суттєвий, блок аналізує адаптацію права, досліджуючи інституційні реформи, еволюцію фундаментальних прав та реакції на нові суспільні та технологічні виклики, такі як цифровізація, грінвошинг та нові форми праці.

Ключові слова: правова наука; наукова інфраструктура; міжнародна співпраця; воєнні збитки; права людини; редакційна майстерність.

Research Article

LEGAL CAPACITY AND ELECTORAL RIGHTS IN LITHUANIA: THE ISSUE OF COMPATIBILITY BETWEEN THE CONSTITUTION AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Dovilė Pūraitė-Andrikiienė

ABSTRACT

Background. For decades, persons with disabilities in Lithuania, as well as in other CEE countries, faced significant barriers to exercising their political rights, including voting and standing for election, due to restrictive legal provisions and social attitudes. The adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2006 marked a paradigm shift from the medical and charity models of disability towards a human rights-based approach. Article 29 of the CRPD obliges State Parties to ensure the full political participation of persons with disabilities. However, the implementation of these provisions in Lithuania has been challenged by constitutional restrictions that exclude persons declared legally incapacitated by a court from participating in elections. This has created tensions between international human rights obligations and national constitutional provisions.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000136>

Date of submission: 10 Jul 2025

Date of acceptance: 11 Sep 2025

Last Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Dovilė Pūraitė-Andrikiienė

Methods. *This study employs a multi-method legal research approach to examine the compatibility of the Lithuanian Constitution with Article 29 of the CRPD in the context of electoral rights. Document content analysis was conducted on relevant Lithuanian legal provisions, Constitutional Court rulings, and international human rights instruments. A comparative analysis was conducted to assess reforms in EU Member States aimed at removing voting restrictions based on legal incapacity. Historical and teleological methods were used to trace the evolution of legal incapacity and uncover the intended meaning of constitutional provisions. Systematic and logical analysis supported the evaluation of potential constitutional amendments required for compliance with the CRPD.*

Results and conclusion. *The analysis revealed that while significant reforms were introduced in Lithuania in 2016 to replace full legal incapacity with partial incapacity in specific areas, the electoral rights of persons with disabilities may still be restricted by a court decision. Draft laws proposed in 2024 sought to abolish the institution of legal incapacity entirely and to implement Article 29 of the CRPD. However, these reforms were suspended following concerns about their compatibility with the Lithuanian Constitution, which explicitly prohibits persons declared legally incapacitated from exercising electoral rights. Comparative analysis showed that many EU Member States have successfully reformed their legal frameworks to align with the CRPD, including constitutional amendments in Luxembourg. The study demonstrates that the full implementation of Article 29 of the CRPD in Lithuania is obstructed by constitutional provisions that explicitly restrict electoral rights for persons declared legally incapacitated. While legislative reforms alone are insufficient to resolve this issue, constitutional amendments would be required to ensure compliance with international human rights standards. Given prevailing societal attitudes towards persons with mental and intellectual disabilities, such amendments are likely to encounter political and social resistance. Nevertheless, aligning national law with the CRPD remains essential to promote inclusive democracy and uphold the principle of equality enshrined in both international and national legal systems.*

1 INTRODUCTION

For a long time, active political participation was inaccessible to persons with disabilities due to exceptional legal provisions or inaccessible procedures and infrastructure. As a result, persons with disabilities were unable to participate in political life. To address this problem, Article 29 of the United Nations Convention on the Rights of Persons with Disabilities¹ (hereinafter – the Convention or CRPD) provides for important political rights for persons with disabilities. These include not only the right to vote, but also the right to be elected to political office.

1 UNGA Res 61/106 'Convention on the Rights of Persons with Disabilities' (13 December 2006) <<https://docs.un.org/A/Res/61/106>> accessed 8 July 2025.

Scholars emphasise that Article 29 of the CRPD is one of the most prominent examples of a provision granting a person the right to participate in decision-making when it concerns his or her interests.² It is also noted that, so far, the political rights of persons with disabilities have received little attention, with discussions mostly centred on the legitimacy and extent of exceptions. However, neither lawmakers nor courts have shown interest in the positive dimension of these developments—namely, how to ensure that persons with disabilities can effectively exercise their electoral rights.³

Nevertheless, emerging practices around the world demonstrate that persons with disabilities, including those with mental disabilities, can be successfully included in all stages of the electoral process.⁴

The Committee on the Rights of Persons with Disabilities (hereinafter – the CRPD Committee), a body of independent experts responsible for overseeing the implementation of the Convention by the States parties, has noted that the rights enshrined in Article 29 of the Convention should not be restricted on the basis of legal capacity. Despite the aforementioned interpretation by the CRPD Committee, the concept of legal capacity formulated in Roman law remains in one form or another in the legislation of many European countries. It is understandable why many countries find it difficult to abolish it, as it is deeply rooted in the legal thinking of legal professionals.⁵

Nevertheless, taking into account the aforementioned provisions of the Convention and the explanations of the CRPD Committee, European countries are gradually abolishing restrictions in the field of electoral rights based on declared incapacity.⁶ In Lithuania, significant reforms in the area of legal incapacity were implemented in 2016 with the entry into force of amendments to the Civil Code and other laws, according to which a person may be declared legally incapacitated by a court only in certain areas. With regard to electoral rights, this right may also be restricted by a court decision.

To implement the requirements of the CRPD, in 2024, the Lithuanian Ministry of Justice attempted to take further steps in the area of legal protection for persons with mental or intellectual disabilities by preparing draft laws aimed at completely abolishing both the institutions of incapacity and limited capacity.⁷ Among other things, these projects sought

2 Rachele Cera, 'Article 29 [Participation in Political and Public Life]' in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham 2017) 525. doi:10.1007/978-3-319-43790-3_33

3 Janet E Lord, Michael Ashley Stein and János Fiala-Butora, 'Facilitating an Equal Right to Vote for Persons with Disabilities' (2014) 6(1) *Journal of Human Rights Practice* 115. doi:10.1093/jhuman/hut034.

4 *ibid* 116.

5 Cera (n 2).

6 For more on this in the third part of this article.

7 For more on this in the second part of this article.

to implement Article 29 of the Convention, under which the States Parties commit to guaranteeing the participation of persons with disabilities in political life, including their right and opportunity to vote and stand for election. However, this reform was halted in Lithuania due to questions raised about the compliance of the proposed legal regulation with the Lithuanian Constitution.⁸

Therefore, this article aims to analyse the compatibility between the Lithuanian Constitution and the UN CRPD in the field of electoral rights and to propose possible solutions. To achieve this, the following tasks are outlined and implemented:

- 1) To reveal the historical development of the concept of legal incapacity and its conceptual changes in recent decades;
- 2) To analyse the international and comparative context of EU countries regarding restrictions in the field of electoral rights based on established legal incapacity;
- 3) To discuss the provisions of the Lithuanian Constitution and the official constitutional doctrine of the Constitutional Court that are relevant to the issue under consideration, as well as doubts about the compatibility of these provisions with Article 29 of the Convention.

There are academic works by foreign authors devoted to reforms of the concept of legal incapacity aimed at implementing the provisions of the CRPD,⁹ but only a few address the challenges posed by Article 29 of the Convention.¹⁰ There are also a few academic works devoted to legal incapacity in the context of the implementation of the CRPD in Lithuania.¹¹ The issue of the compatibility of the Lithuanian Constitution and the UN CRPD in the field of electoral rights is planned to be addressed in the doctoral dissertation currently being prepared by Kornelija Krutulytė, a doctoral student at the Faculty of Law of Vilnius

8 For more on this in the fourth part of the article.

9 Antonio Martinez-Pujalte, 'Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms' (2019) 8(1) *Laws* 4. doi:10.3390/laws8010004; Marie Fallon-Kund and Jerome Bickenbach, 'Strengthening the Voice of Persons with Mental Health Problems in Legal Capacity Proceedings' (2016) 5(3) *Laws* 29. doi:10.3390/laws5030029; Robert D Dinerstein, 'Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making' (2012) 19(2) *Human Rights Brief* 8.

10 Cera (n 2); Lord, Stein and Fiala-Butora (n 3); Sanja Jovičić, 'ECHR v UNCRPD: Ending Restrictions on Voting Rights of Persons with Disabilities' (2021) 22 *ERA Forum* 699. doi:10.1007/s12027-021-00692-4.

11 Dovilė Juodkaitė, 'Teisinio veiksnio reforma Lietuvoje: nuo sovietinio konteksto iki šiuolaikinių žmogaus teisių standartų' (2015) 16(2) *Socialinis Darbas: Patirtis ir Metodai* 25. doi:10.7220/2029-5820.16.2.2; Dovilė Pūraitė-Andrikienė, 'Kai kurie Lietuvos teisės aktuose įtvirtinto neveiksnio instituto probleminiai aspektai' (2012) 3(77) *Teisės Problemos* 72; Kornelija Krutulytė and Rasa Genienė, 'Pilnamečio veiksniaus asmens rūpyba Lietuvoje: ar nacionalinė teisė atitinka tarptautinius Lietuvos įsipareigojimus?' (2025) 135 *Teisė* 71. doi:10.15388/Teise.2025.135.4.

University, who has also written on this topic in the popular press.¹² Nevertheless, this article is the first academic paper to examine, in a comparative context with other European countries, the issues related to ensuring the electoral rights of persons with disabilities in Lithuania. The issues analysed in this article are particularly important in both the international and Lithuanian national contexts.

This article employs a multi-method legal research approach to examine the compatibility of the Lithuanian Constitution with Article 29 of the CRPD in the context of electoral rights. Document content analysis was conducted on relevant Lithuanian legal provisions, Constitutional Court rulings, and international human rights instruments. A comparative analysis was conducted to assess reforms in EU Member States aimed at removing voting restrictions based on legal incapacity. Historical and teleological methods were used to trace the evolution of legal incapacity and uncover the intended meaning of constitutional provisions. Systematic and logical analysis supported the evaluation of potential constitutional amendments required for compliance with the CRPD.

2 HISTORICAL DEVELOPMENT OF LEGAL INCAPACITY AND ITS CONCEPTUAL CHANGES IN RECENT DECADES

The concept of incapacity has a long history. Ancient Jewish, Christian, and Arab laws prohibited minors, persons with mental disability, and the insane from entering into legal transactions. Even in ancient Athens, the court appointed guardians to protect the property interests of people with severe mental illnesses, thereby recognising their incapacity.¹³ In Rome, from the 5th century BC, according to the Law of the Twelve Tables—the legal code of the time—guardians were appointed for persons with mental disabilities after their condition was assessed, and they managed their property.¹⁴

In Lithuania, the first Lithuanian Statute (1529) declared that a will is valid only if it is made with “good memory and sound mind.” The fifth chapter, On Guardians, which specifies who has and who does not have the right to make a will for their real estate, states that “... the insane, heretics, slaves, and those who are losing their minds” do not have such a right.

12 Kornelija Krutulytė, ‘Jungtinių Tautų asmenų su negalia teisių konvencijos atitiktis Lietuvos Respublikos Konstitucijai ir Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijai dilema’ (*TeisePro*, 26 September 2025) <<https://www.teise.pro/index.php/2025/09/26/k-krutulyte-jungtiniu-tautu-asmenu-su-negalia-teisiu-konvencijos-atitiktis-lietuvos-respublikos-konstitucijai-ir-europos-zmogaus-teisiu-ir-pagrindiniu-laisviu-apsaugos-konvencijai-dilema/>> accessed 30 September 2025. The author of the article would like to thank Kornelija Krutulytė and Dovilė Juodkaitė (a member of the European Economic and Social Committee) for the discussions on this topical issue, which helped to develop the statements presented in the article.

13 Liaudginas Erdvilas Radavičius, *Teisės psichiatrija: istorija ir dabartis* (Mykolo Romerio universiteto Leidybos centras 2004) 64.

14 *ibid* 118.

Already in modern times, in the United States in 1872 the Supreme Court ruled that the fundamental idea of a contract requires the participation and agreement of two rational parties, and that a mad person (still referred to by the Latin term *non compos mentis*) does not have what is legally considered sound mind, and therefore, in principle, cannot enter into a valid transaction or contract.¹⁵

In interwar Lithuania, it was declared that “a mentally ill person who, due to their illness, is unable to correctly understand the meaning and consequences of their actions, must be recognised as incapable of performing legal acts and not responsible for their behaviour”. In such a case, “guardianship should be imposed immediately”. Under the laws of that time, any civil act was deemed invalid (“false”) if witness testimony or expert examination established that the person performing the act was suffering from a mental illness at the time.¹⁶

During the Soviet era, the legal concept of incapacity did not function as a protective mechanism for the rights of persons with disability, as it was often used as a means of silencing opponents of the regime.¹⁷ According to the model of the time, the status of incapacity essentially meant the social and legal death of a person, and the process of recognition of incapacity did not even comply with the most basic provisions for the implementation of human rights.¹⁸

Thus, although the concepts of incapacity and guardianship were created as “protective” mechanisms to defend the rights of individuals, historical experience (especially during the Soviet era) has shown that they can be transformed into instruments of oppression and often result in severe human rights violations affecting thousands of people.¹⁹

Therefore, in recent decades, fundamental reforms have been underway in European countries to restructure this mechanism. In many European countries, the rules governing the legal incapacity system have recently been changed to strengthen the legal protection of persons with intellectual or mental disabilities, or to abandon this system altogether, adopting alternative measures to protect the rights and interests of persons with mental disabilities.

It should be noted that before these reforms, the laws regulating the status of incapacitated persons in most countries (especially in Eastern and Central Europe) had remained unchanged for decades. This process was influenced by the fact that it took several decades after the adoption of the first human rights documents for the international community to recognise that the non-discrimination provisions enshrined in them also applied to persons

15 *ibid* 64.

16 *ibid* 67.

17 Pūraitė-Andrikienė (n 11) 75.

18 *ibid* 77.

19 *ibid* 75.

with disabilities.²⁰ The most prominent reflection of this metamorphosis is the UN CRPD, adopted in 2006, which is the first binding international human rights document to formalise fundamental issues related to the protection of the rights of persons with disabilities. Although the Convention was created in response to the failure of the existing human rights protection system to adequately protect the rights of persons with disabilities, the purpose of this Convention is not to establish separate or special rights for persons with disabilities, but to include these persons in the existing human rights protection system by adapting existing rights to their needs.

Article 12 of this Convention establishes that individuals with disabilities have the right to be recognised as subjects of law in all cases, possess juridical capacity on an equal basis with others in all areas of life, and that States Parties to this Convention shall take appropriate measures to provide individuals with disabilities with access to the support they may require in exercising their juridical capacity. The revolution brought about by Article 12 has become a symbol of the changes that have taken place in recent years in the field of the rights of persons with disabilities and lies at the very heart of the Convention. Nevertheless, academic literature emphasises that Article 12 was among the most controversial provisions discussed during the negotiation process of this international treaty.

In addition to disputes over the provision of support, the nature of the procedure for altering decisions, and the safeguards ensuring “due process” in relation to legal capacity, the main dispute concerned whether a distinction should be drawn between legal capacity in relation to rights and legal capacity in relation to actions.²¹ Before the adoption of this Convention, the standards for the protection of persons with mental disabilities who had been declared legally incapacitated were regulated internationally mainly through non-binding instruments, the most comprehensive of which was Recommendation No. R(99) on the principles of legal protection of adults who are legally incompetent.²²

The European Court of Human Rights (hereinafter – ECtHR) and the constitutional justice institutions of European states have played a significant role in the process of modernising the institution of legal incapacity by assessing the constitutionality of the provisions regulating it.²³ The need to reform the institution of incapacity established in the legislation of the Republic of Lithuania was also signalled by the ECtHR judgment of 14 February 2012 in the case of *D. v. Lithuania*,²⁴ in which the ECtHR raised some problematic aspects of the legal regulation

20 Dovilė Juodkaitė, ‘Neveiksnų asmenų statuso reglamentavimas tarptautinių žmogaus teisių kontekste’ in *Neveiksnų problematika Europos sąjungos deklaruojamų vertybių kontekste* (Globali iniciatyva psichiatrijoje 2007) 6.

21 Dinerstein (n 9) 8.

22 Recommendation No R (99) 4 of the Committee of Ministers to Member States ‘On Principles Concerning the Legal Protection of Incapable Adults’ (23 February 1999) <<https://search.coe.int/cm?i=09000016805e303c>> accessed 8 July 2025.

23 For more on this, see: Pūraitė-Andrikienė (n 11).

24 *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) <<https://hudoc.echr.coe.int/fre?i=001-109091>> accessed 8 July 2025..

of the national system of incapacity. However, as discussed in the next section of this paper, the views of the ECtHR and the CRPD Committee differ on several issues.

On 17 September 2010, upon the entry into force of the CRPD, Lithuania made a commitment to respect and fully implement the rights of persons with disabilities and to preserve their legal capacity. However, the legal concept of incapacity, inherited from the Soviet era—which, as mentioned above, was not designed to protect the rights of people with mental disabilities but was often used as a means of silencing opponents of the regime—was reformed rather slowly.

Significant reforms were implemented on 1 July 2016, when amendments to the Civil Code entered into force, replacing the institution of full incapacity with the concept of incapacity in specific areas.²⁵ The reform aimed to implement the requirements of Article 12 of the Convention. The principal outcome of this reform is that a court may now recognise a person as having limited capacity in certain areas. Concerning electoral rights, following the entry into force of these amendments, this right may be restricted only by a court decision. However, even after these changes were adopted, experts on the rights of persons with disabilities pointed out that, to fully implement the provisions of the Convention, Lithuania must completely abandon the institution of incapacity, since individuals must make their own decisions and no exceptions can be justified. It can therefore be argued that the introduction of partial incapacity represents only a small step towards change.²⁶ These legal changes were also criticised in academic works.²⁷

Despite these significant reforms, the CRPD Committee, after evaluating Lithuania's initial report on the implementation of the Convention, recommended “to eliminate laws, policies, and practices that allow for the guardianship and property management of adults with disabilities, and to replace the process of decision-making on behalf of another person with a process of support in decision-making.”²⁸

In 2024, the Ministry of Justice attempted to take further steps in improving the legal protection for persons with mental or intellectual disabilities. It prepared draft amendments to the Civil Code, the Code of Civil Procedure, and other laws.²⁹ The draft laws implemented

25 Law of the Republic of Lithuania No XII-1566 ‘Amendment of the Civil Code’ (26 March 2015) [2015] TAR 5573.

26 Aidas Makštutis, ‘Neveiksnimo instituto reforma – ar teisingą kryptį pasirinkome?’ (*Lrytas*, 21 December 2015) <<https://www.lrytas.lt/asgaliiu/lygios-galimybes/2015/12/21/news/neveiksnimo-instituto-reforma-ar-teisinga-krypti-pasirinkome--2718864>> accessed 8 July 2025.

27 Juodkaitė (n 11).

28 CRPD, ‘Concluding Observations on the Initial Report of Lithuania’ (11 May 2016) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FCO%2FLTU%2FCO%2F1&Lang=en> accessed 8 July 2025.

29 Ministry of Justice of the Republic of Lithuania to the Government of the Republic of Lithuania No 1.5E)2T-1023 ‘On Submission of the Amended Draft Law on Amendment of the Civil Code of the Republic of Lithuania and Related Draft Laws’ (18 July 2024) <<https://lrv.lt/media/viesa/saugykla/2024/8/AAyusVh1V6M.pdf>> accessed 8 July 2025.

the provisions of the Implementation Plan for the Eighteenth Programme of the Government of the Republic of Lithuania, which in subparagraph 8.1, provides for the following measure: “In implementing the United Nations Convention on the Rights of Persons with Disabilities and taking into account the results of public consultations, to abandon the institution of full incapacity, while proposing measures that would help persons with disabilities to effectively exercise their rights.”³⁰

The draft laws were prepared with a view to implementing the provisions of the Convention and proposed measures to help persons with disabilities effectively exercise their rights, taking into account the general comment and related recommendations of the CRPD Committee addressed to Lithuania. Summarising all the amendments proposed in the drafts, it should be noted that they aim to completely abolish both the concepts of incapacity and limited capacity. The objective was to ensure that persons with disabilities could participate in all areas of life on an equal basis with others. These draft laws also aimed to implement Article 29 of the Convention, under which Member States undertake to guarantee the participation of persons with disabilities in political and public life, including the right and opportunity to vote and to be elected.

However, on 11 September 2024, the Legal Department of the Seimas Chancellery concluded that the proposed amendments to the Civil Code were contrary to the Constitution.³¹ The Legal Department pointed out that a systematic interpretation of the proposed legal regulation—pursuant to Article 6 of the draft, Article 2.6(2) of the Civil Code—would mean that the right to vote of persons who, due to their personal disabilities or impairments, are unable to understand the significance of their actions or to control them, and who are therefore placed under guardianship, could not be restricted. Meanwhile, the Constitution expressly prohibits persons who have been declared legally incompetent by a court from participating in elections.³²

30 Resolution of the Government of the Republic of Lithuania No 155 ‘On the Approval of the Implementation Plan for the Provisions of the Eighteenth Programme of the Government of the Republic of Lithuania’ (10 March 2021) [2021] TAR 5318.

31 Conclusion of the Legal department of the Chancellery of the Seimas of the Republic of Lithuania No XIVP-4079 ‘On the Draft Law on Amendments to the Civil Code of the Lithuanian Republic’ (11 September 2024) <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/a26ea59070111ef9c779dd37198d447?positionInSearchResults=0&searchModelUUID=d10aa865-e826-4428-a606-5908dba2dcb5>> accessed 8 July 2025.

32 Article 34(3) of the Constitution stipulates that citizens who have been declared incapacitated by a court of law may not participate in elections. Under Article 56(2) of the Constitution, persons who have been declared incapacitated by a court may not be elected as members of the Seimas; under Article 78(1), a citizen who is not eligible for election as a member of the Seimas may not be elected as President of the Republic.

3 INTERNATIONAL AND COMPARATIVE CONTEXT OF EU COUNTRIES REGARDING RESTRICTIONS ON VOTING RIGHTS BASED ON LEGAL INCAPACITY

Historically, individuals with disabilities have been denied the enjoyment of human rights, including the right to participate in politics. The UN CRPD responded to this situation by proposing a solution. Article 29 regulates the establishment and implementation of a non-discriminatory electoral process. It requires states to ensure that voters with disabilities have access to adapted conditions and other facilitating measures, enabling them to exercise their voting rights on an equal basis with others.³³

The CRPD seeks to advance, safeguard, and guarantee that all people with disabilities fully and equally enjoy all human rights and fundamental freedoms, while fostering respect for their inherent dignity. It marks a transformative shift away from charity- and medical-based perspectives on disability towards a human rights-based approach.³⁴ This vision is reflected in Article 29, which requires State Parties to guarantee political rights and the opportunity to enjoy them on an equal basis with others. Both the European Union itself and its Member States are parties to this convention; consequently, they are obliged to align their legislation and practices with its provisions.

Article 29 of the CRPD obliges Member States to guarantee that persons with disabilities can effectively and fully participate in political and public life on an equal footing with others, whether directly or through freely chosen representatives, including enjoying the right and opportunity to be elected. The provision also calls for the adoption of specific measures to support such participation. Furthermore, the CRPD Committee has emphasised that this right must not be limited on the grounds of legal capacity.³⁵

In its interpretive provision, the CRPD Committee stressed that a person's decision-making capacity cannot be invoked as a reason to deny individuals with disabilities their political rights, such as the right to vote, to stand for election, or to serve as jurors. The Committee further underscored that excluding persons with disabilities from electoral processes and other aspects of political life constitutes a common form of disability-based discrimination. Accordingly, it urged Member States to adopt legal reforms aimed at facilitating the participation of persons with disabilities in electoral processes by ensuring accessibility, providing reasonable accommodation, and offering adequate support.³⁶

33 Lord, Stein and Fiala-Butora (n 3) 120.

34 Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) Laws 35. doi:10.3390/laws5030035.

35 Communication No 4/2011(2013) *Zsolt Bujdosó and five others v Hungary* (CRPD Committee, 9 September 2013) <<https://www.refworld.org/jurisprudence/caselaw/crpd/2013/en/95560>> accessed 8 July 2025; CRPD, *General Comment No 1 – Article 12: Equal Recognition Before the Law* (11 April 2014) <<https://docs.un.org/CRPD/C/GC/1>> accessed 8 July 2025.

36 CRPD, *General Comment No 6 on Equality and Non-Discrimination* (26 April 2018) <<https://docs.un.org/CRPD/C/GC/6>> accessed 8 July 2025.

Scholarly literature highlights that the CRPD Committee's interpretation compels legal professionals to reflect on crucial questions: Can we truly evaluate a person's inner capacities and thoughts objectively, without projecting our own interpretations and expectations? Is the legal system fundamentally structured to serve only the majority or those with certain abilities?³⁷

Nevertheless, the ECtHR, in its case law, has maintained that under Article 3 of Protocol No. 1 to the ECHR, the voting rights of persons placed under guardianship may be subject to restrictions. However, such restrictions must be grounded in an individual judicial decision.³⁸ As a result, the diverging approaches among Member States arise from two competing interpretations of international human rights instruments. On the one hand, the CRPD Committee's reading of the Convention advocates for the unrestricted participation of persons with disabilities in elections, irrespective of their legal capacity. On the other hand, the ECtHR's interpretation continues to permit limitations on the voting rights of individuals under guardianship.³⁹

Despite the aforementioned CRPD Committee's interpretation, the Roman legal concept of legal capacity continues to persist in various forms in the legislation of several European countries. Its endurance is understandable: the concept is deeply rooted in the foundations of legal thought and remains difficult to abandon entirely.⁴⁰

Academic literature has criticised the ECtHR, arguing that by focusing on the "actual abilities" of individuals exercising their electoral rights, the ECtHR perpetuates the medical model of disability, ignoring the changes brought about by the UN CRPD and the European Union and Council of Europe institutions that support the human rights model. In this way, the ECtHR—together with a significant number of Council of Europe member states—refuse to recognise the relevant interpretations of the Committee.⁴¹

However, when analysing the position of EU countries in this area, it should be noted that between 2014 and 2024, there has been a strong push to remove restrictions on voting rights based on legal incapacity. In 2014, 10 countries had completely removed the restrictions on voting rights in question; in 13 countries, individuals under legal guardianship are automatically excluded from voting; and four countries provided for certain intermediate options. Meanwhile, by 2024, 14 countries had completely abolished the restrictions on

37 Jovičić (n 10) 700.

38 *Strøbye and Rosenlind v Denmark* App nos 25802/18 and 27338/18 (EctHR, 2 February 2021) <<https://hudoc.echr.coe.int/fre?i=001-207667>> accessed 8 July 2025; *Caamaño Valle v Spain* App no 43564/17 (EctHR, 11 May 2021) <<https://hudoc.echr.coe.int/fre?i=001-210089>> accessed 8 July 2025; *Anatoliy Marinov v Bulgaria* App no 26081/17 (EctHR, 15 February 2022) <<https://hudoc.echr.coe.int/eng?i=001-215603>> accessed 8 July 2025.

39 Jovičić (n 10) 710.

40 Cera (n 2).

41 Jovičić (n 10) 710.

voting rights in question, and only seven countries have legal provisions that automatically exclude persons under legal guardianship from exercising their right to vote.⁴²

As of 2023, the legal acts of Bulgaria, Estonia, Cyprus, Greece, Malta, Poland, and Romania continued to provide for the automatic exclusion of people under legal guardianship from the voting process. In contrast, Austria, Croatia, Denmark, Germany, Finland, France, Italy, Latvia, Luxembourg, the Netherlands, Slovakia, Slovenia, and Sweden no longer imposed any restrictions on voting rights related to determinations of incapacity.⁴³

Reforms across EU Member States have taken diverse forms: 1) in some countries, constitutional amendments were introduced to align national frameworks with the requirements of the Convention; 2) in others, legislative reforms alone were sufficient; and 3) in some instances, national courts had to intervene to ensure compliance with the requirements of the Convention.

A recent and notable example of constitutional reform is Luxembourg, which amended its Constitution in early 2023 to abolish the exclusion of adults under guardianship from electoral rights. This constitutional reform was accompanied by partial amendments to the 2003 Election Act, which now grants adults under guardianship the right to participate in local, national, and European elections.⁴⁴

Several other EU Member States—France, Spain, Ireland, and Slovenia—have also recently amended their national laws. In 2018, Spain amended Law No. 5/1985 on the general electoral system by removing provisions that deprived persons with disabilities of their right to vote. In addition, a new provision was added to the law, which reads: “Every person has the right to exercise their right to vote consciously, freely, and voluntarily, regardless of the method of voting and the assistance they may need.” In addition, a paragraph was also added, which reads as follows: “... any restrictions on the right to vote imposed by court order shall cease to have effect. Persons whose right to vote has been restricted or revoked on the grounds of disability shall be fully restored to that right.”⁴⁵

In 2019, France adopted a law prohibiting courts from depriving individuals with disabilities of their voting rights. As a result, 300,000 French citizens with physical or mental disabilities have regained their right to vote.⁴⁶ In Ireland, the 2023 legal reforms abolished the guardianship system and established new frameworks to support adult decision-making. Under this legislation, all persons are presumed to have decision-making capacity,

42 European Union Agency for Fundamental Rights, *Political Participation of People with Disabilities – New Developments: Report* (Publications Office of the European Union 2024). doi:10.2811/098625.

43 Ibid 14.

44 ibid.

45 Kristijan Grdan, *Right to Vote for Persons with Psychosocial Disabilities in the European Union Guidelines* (Mental Health Europe 2023) 7.

46 ‘Helping People with Disabilities Vote: A French Approach’ (Redem, 2020) <https://www.redem-h2020.eu/handeo_desjeux.html> accessed 8 July 2025.

with an emphasis on providing support to enable people to make their own decisions. However, in certain situations, a person's decision-making capacity may still be assessed in relation to their ability to make a specific decision at a given time.⁴⁷

A similar reform took place in Slovenia, where a partial amendment to Article 79 of the 2024 European Parliament Election Act introduced a decision-making assistance mechanism. Under the revised provisions, persons with mental disabilities may receive assistance from a person of their choice when voting. Furthermore, the law prohibits courts from depriving individuals of their voting rights on the basis of disability.⁴⁸ However, the Slovenian Supreme Court ruled that the voting rights of persons who are truly incapable of understanding the meaning, purpose, and consequences of elections may be restricted in the public interest. The Court observed that Article 29 of the CRPD does not create new rights, but rather outlines the accommodations that States must ensure to enable persons with disabilities to exercise their political rights.⁴⁹

Several Member States that still maintain restrictions have signalled their intention to address them in national strategies and action plans. For instance, Poland has announced plans to introduce legislative changes allowing persons under guardianship to vote and stand for election. Similarly, Belgium and Cyprus have committed to exploring ways to reduce existing limitations on the voting rights of individuals under guardianship.⁵⁰

In some cases, failure to amend national legislation has led to judicial intervention, particularly by constitutional courts. In Germany, until 2019, people who had been wholly deprived of their legal capacity, as well as those declared incompetent after a criminal offence and subsequently admitted to a psychiatric hospital, were denied the right to vote. That year, the German Constitutional Court annulled both provisions of the relevant electoral law, ruling that they completely deprived persons with disabilities of their legal capacity and incapacitated persons of the right to vote.⁵¹ The Court held that such provisions contravene the constitutional principles of universal suffrage and the prohibition of discrimination on the grounds of disability. German law also does not impose a general ban on persons with mental health conditions or psychosocial disabilities from standing for election; however, a court may prohibit an individual from

47 European Union Agency for Fundamental Rights (n 42) 15.

48 Law of the Republic of Slovenia 'On the Election of Members of the European Parliament from the Republic of Slovenia' (25 October 2002) <<https://pisrs.si/pregledPredpisa?id=ZAKO3401>> accessed 8 July 2025.

49 Judgment No X Ips 29/2021 (Supreme Court of the Republic of Slovenia, 23 February 2022) <https://www.sodnapraksa.si/?q=volilna%20pravica&database%5bSOVS%5d=SOVS&_submit=i%C5%A1%C4%8Di&order=date&direction=desc&rowsPerPage=20&page=0&id=2015081111458788> accessed 8 July 2025.

50 European Union Agency for Fundamental Rights (n 42) 15.

51 Decision 2 BvC 62/14 (BVerfG, 29 January 2019) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/01/cs20190129_2bvc006214.html> accessed 8 July 2025.

running for office if it determines that the person lacks the capacity to hold public office—typically in cases involving certain offences.⁵²

In Romania, the Constitutional Court declared the guardianship system unconstitutional, finding that it lacked sufficient safeguards to protect human rights. The Court ruled that provisions of the Civil Code, which allow a person to be placed under guardianship, are unconstitutional and contrary to Article 12 of the CRPD. The Court noted that the contested provision does not take into account the different degrees of “capacity” and does not provide for a periodic review of the protective measure.⁵³ Following this Constitutional Court judgment, the Romanian Government announced a comprehensive reform of the legislation governing the guardianship system, encompassing electoral law.⁵⁴

Under the Estonian Civil Code, individuals under guardianship may face automatic restrictions on their voting rights. However, the Supreme Court ruled that persons deprived of legal capacity should not be deemed legally incapacitated for the purpose of exercising their right to vote.⁵⁵ In Poland, a district court ruled that the total exclusion of persons with partially reduced legal capacity from voting in European Parliament elections violated the ECHR, the CRPD and EU law, emphasising the need for an individual evaluation before denying a person the right to vote.⁵⁶

These trends demonstrate that many European Union countries are increasingly striving to guarantee the political rights of persons with disabilities. The academic literature highlights that this is expected to eventually lead to a more unified application of the UN CRPD in European states and to a reversal of the current restrictive ECtHR case law.⁵⁷

4 REMOVING RESTRICTIONS ON THE RIGHT TO VOTE IN LITHUANIA: THE ISSUE OF COMPATIBILITY BETWEEN THE CONSTITUTION AND THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

As mentioned above, based on similar arguments, in 2024 the Lithuanian Ministry of Justice drafted draft amendments to the law which, among other objectives, sought to implement Article 29 of the Convention. This article obliges Member States to ensure the participation of persons with disabilities in political life, including the right and opportunity to vote and to stand for election.

52 Grdan (n 45) 7.

53 Decision No 601 (Constitutional Court of Romania, 16 July 2020) <https://www.ccr.ro/wp-content/uploads/2021/01/Decizie_601_2020.pdf> accessed 8 July 2025.

54 Grdan (n 45) 8.

55 Case No 3-2-1-32-17 (Supreme Court of Estonia, 19 April 2017) <<https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=206133329>> accessed 8 July 2025.

56 Case No I Ns 376/19 (District Court in Nowy Sącz, 19 April 2019) <[https://orzeczenia.nowysacz.sr.gov.pl/content/\\$N/152015150000503_I_Ns_000376_2019_Uz_2019-04-19_001](https://orzeczenia.nowysacz.sr.gov.pl/content/$N/152015150000503_I_Ns_000376_2019_Uz_2019-04-19_001)> accessed 8 July 2025.

57 Jovičić (n 10) 710.

It should be noted that various international institutions have also issued similar recommendations to Lithuania. For example, as early as 2016, the CRPD Committee recommended that Lithuania repeal provisions denying persons with disabilities the right to vote and stand for election, including by removing the possibility of declaring persons with disabilities legally incapacitated solely on the basis of their disability. The Committee further urged Lithuania to restore voting rights to all people with disabilities.⁵⁸

The Mental Health Europe report, funded by the European Union, likewise recommends: “Repeal national laws or legal provisions that deny people with psychosocial disabilities to participate in elections based on their perceived lack of legal capacity or of being perceived as of ‘unsound mind’.” This recommendation applies to all types of elections, including local, regional, national, presidential, and European Parliament elections, as well as referendums.⁵⁹

As mentioned, the ECtHR has taken a different view in its jurisprudence, holding that under Article 3 of Protocol 1 to the ECHR, the voting rights of persons under guardianship may be restricted, provided that the restriction is based on an individual court decision. However, the above-mentioned MHE report stresses that EU Member States should give priority to Article 29 UN CRPD over Article 3 Protocol No. 1 of the ECHR.⁶⁰

In Lithuania, however, the main problems regarding the implementation of the electoral rights of persons with disabilities do not stem from a potential incompatibility between these international instruments, but rather from the strict provisions of the Constitution. According to these provisions, citizens declared incapacitated by a court are not entitled to participate in elections (Article 34(2)); persons declared incapacitated by a court may not be elected as members of the Seimas (Article 56(2)); the mandate of a member of the Seimas is terminated when a court declares him or her to be incapacitated (Article 63(4)); and a citizen who is incapacitated is not eligible for election as the President of the Republic (Article 78(1)).⁶¹

In assessing the aforementioned proposals submitted by the Ministry of Justice, the Legal Department of the Seimas Chancellery noted that, under the draft, the abolition of the institution of declaring a natural person legally incapacitated in a certain area—as established in the current Civil Code—would mean that natural persons who are unable to understand the significance of their actions or to control them would not be recognised as legally incapacitated in certain areas. Instead, they would be placed under guardianship in a specific area by court decision, if social services, personal healthcare services, or other less restrictive measures proved insufficient to help them exercise their legal capacity. Therefore,

58 CRPD (n 28).

59 Grdan (n 45) 11.

60 *ibid.*

61 Constitution of the Republic of Lithuania (approved on 25 October 1992) [1992] Valstybės Žinios 33/1014.

based on a systematic interpretation of this proposed legal regulation (in particular, Article 6 of the draft, Article 2.6(2) of the Civil Code), it follows that persons who, due to impaired or insufficient personal abilities, are unable to understand the significance of their actions or to control them and who are therefore placed under guardianship, cannot have their voting rights restricted.

The Legal Department pointed out that the Constitution expressly prohibits persons who have been declared legally incapacitated by a court from participating in elections. It should be noted that this has also been stated by the Constitutional Court, which states that “the restriction of active and passive electoral rights established in Article 34(3) of the Constitution applies to persons who have been declared legally incapacitated by a court.”⁶²

The Department also cited various provisions of the Constitutional Court's official constitutional doctrine, summarising that “the constitutional regulation, according to which persons recognised by the court as legally incompetent do not have active and passive voting rights, should be interpreted as intended to ensure that persons who are unable to express their will do not participate in elections, which are a responsible political process in which citizens express their will through universal suffrage, exercising their right to participate in the governance of their country. To define these persons, use was made of the institution of legal incapacity by court decision, which existed in the Lithuanian legal system at the time of the drafting and adoption of the Constitution and is still in force today (the essence of which, regardless of certain changes, was and is that a court decision recognises incapacity if a person is unable to understand the significance of their actions or to control them), thus constitutionally establishing the powers of the court to take a decision determining the restriction of the active and passive electoral rights of a person who is unable to understand the significance of their actions or to control them.”

In the opinion of the Department, since that the Constitution (Articles 34(3) and 56(2)) explicitly provides for restrictions on active and passive electoral rights in connection with a person being declared legally incapacitated by a court decision, the law cannot establish legal regulations whereby, after the abolition of the institution of declaring a person legally incapacitated, the right to vote of persons who are unable to express their will (regardless of how they are referred to in the law) would not be restricted at all. Such legal regulation would entirely negate the constitutional restriction of electoral rights and the constitutional powers of the court to apply this restriction to specific persons.

Summarising its arguments, the Department expressed the opinion that Article 6 of the draft law, which proposes to amend Article 2.6(2) of the Civil Code so that the right to vote of persons who are unable to express their will would not be restricted, contradicts Article 34(2) and (3) and Article 56(2) of the Constitution, the constitutional principle of the rule of law, as well as Articles 4, 9(1) and 11(2) of the Election Code.

62 Ruling No KT59-N5/2021 (Constitutional Court of the Republic of Lithuania, 19 April 2021) [2023] TAR 8338.

The Department also noted that, as the explanatory memorandum to the draft law bases the proposed legal regulation on the UN CRPD—which the Republic of Lithuania has ratified and thus “has undertaken to take all measures to ensure equal rights for persons with disabilities,” it should be noted that, according to official constitutional doctrine, the provision set out in Article 138(3) of the Constitution, which establishes that international treaties ratified by the Seimas constitute an integral component of Lithuania’s legal framework, must be understood in light of the Constitution’s supremacy principle.

According to the Constitutional Court, if a conflict arises between the legal regulation established by an international treaty ratified by the Seimas and the provisions of the Constitution, the treaty does not take precedence in terms of legal application—the Constitution remains the supreme legal authority. When implementing Lithuania’s international obligations in domestic law, it is necessary to take into account the principle of constitutional supremacy. Lithuania’s legal system is based on the principle that no law or other legal act, including international treaties of Lithuania, may contradict the Constitution, as Article 7(1) of the Constitution stipulates: “No law or other act contrary to the Constitution shall be valid.”⁶³ Thus, in the event of a conflict between the provisions of an international treaty and the Constitution, Article 135(1) of the Constitution imposes an obligation to resolve such incompatibility. This may be done, *inter alia*, by withdrawing from the relevant international obligations following the norms of international law or by amending the Constitution accordingly.

The Legal Department of the Seimas Chancellery is not an institution authorised to officially interpret the Constitution or to review the constitutionality of legal acts. In Lithuania, only the Constitutional Court has such powers. It should be noted that the Lithuanian Constitutional Court has not ruled on a case examining the right and opportunity of persons with disabilities to vote and be elected. However, perhaps this constitutional problem could be analysed by relying not only on the provisions above, but also on other provisions of official constitutional doctrine.

The human rights and freedoms enshrined in the Constitution form a coherent system, meaning that no right may be interpreted in such a way that negates another. Therefore, when interpreting the content of a specific constitutional right, its limits must be considered in the context of the system of constitutional rights and freedoms and their interrelationship. For example, any restriction on electoral rights should be interpreted in the light of the prohibition of discrimination enshrined in Article 29 of the Constitution. This provision contains a non-exhaustive list of grounds for non-discrimination, which, in the author’s opinion, also includes non-discrimination on the grounds of disability.

Moreover, when establishing restrictions on human rights and freedoms under the Constitution, it is necessary to take into account the requirements arising from the

63 Ruling No KT11-N4/2014 (Constitutional Court of the Republic of Lithuania, 18 March 2014) [2014] TAR 3226.

constitutional principle of the rule of law, including the principle of equality of persons before the law. According to the Constitution, when establishing restrictions on human rights and freedoms, the constitutional principle of the rule of law requires consideration of equality and the prohibition of discrimination.

Furthermore, the principle of equality enshrined in Article 29 of the Constitution is fundamentally linked to the constitutional principle of the rule of law, within which the principle of proportionality plays a crucial role. This principle mandates that legal measures correspond to legitimate and socially significant aims, are necessary to attain those aims, and do not impose excessive restrictions on individual rights and freedoms beyond what is essential. It remains doubtful whether the electoral rights limitation in question complies with these standards.

Another aspect concerns the possible conflict between the provisions of the CRPD and the provisions of the Constitution. It can be argued that, despite the principle of supremacy enshrined in the Constitution, the Constitution and international law operate in dialogue, reflecting the Constitution's openness and "friendliness" towards international law. The Constitutional Court has repeatedly noted that the respect for universally accepted principles of international law constitutes a foundational legal tradition and a constitutional tenet of the restored independent Lithuanian state.⁶⁴

The Constitutional Court has also stated that, by recognising the principles and norms of international law, the Lithuanian state cannot apply fundamentally different standards to its residents. As an equal member of the international community, it voluntarily accepts and recognises these principles and norms, their customs, and integrates itself into the global legal order. Lithuanian laws, therefore, cannot establish lower standards than those set by universally recognised international law. Failure to comply with this would conflict with the goals of an open, just, and harmonious civil society and the rule of law—principles enshrined in the preamble to the Constitution and embodied in the constitutional principle of the rule of law.⁶⁵

On the other hand, as mentioned above, the concept of incapacity is expressly referenced three times in the Constitution, each time in the context of electoral rights. Thus, this restriction is enshrined *expressis verbis* in the Constitution. Even when pursuing legitimate goals—such as protection of human dignity, equality, the principle of proportionality, respect for universally recognised norms of international law—it would be difficult to interpret the Constitution in a way that would ignore the provisions directly enshrined in the Constitution, according to which "citizens who have been declared legally incompetent by a court shall not participate in elections". Doing so could set a dangerous precedent, allowing future circumvention of constitutional provisions for less positive purposes.

64 Inter alia, Ruling (Constitutional Court of the Republic of Lithuania, 14 March 2006) [2006] Žin 30-1050.

65 Ruling No KT11-N4/2014 (n 63).

Therefore, although the arguments presented by the Seimas Legal Department may be criticised for adhering to the medical model of disability and overlooking the paradigm shift introduced by the UN CRPD—which promotes the human rights model of disability—implementing Article 29 of the CRPD would require constitutional amendments to remove provisions establishing the institution of legal incapacity. The CRPD Committee expressed a similar view in 2016, noting concern that the Lithuanian Constitution denies persons with disabilities the right to vote and stand for election if they have been declared legally incapacitated, and recommending the repeal of such provisions.⁶⁶ Following the example of Luxembourg, the reform to remove restrictions on electoral rights based on legal incapacity should therefore begin not with ordinary legislation but with amendments to the Constitution.

However, such constitutional amendments are unlikely, as Lithuanian society and its political representatives exhibit limited tolerance toward people with mental and intellectual disabilities. According to a 2022 survey, a quarter of Lithuanian residents would not wish to live next door to a person with mental health issues; two-thirds reported they would not trust such a person to perform their job; and one in five agreed that children with mental health problems should not attend mainstream schools.⁶⁷ In such a social context, the complete removal of restrictions on the electoral rights of persons with intellectual or mental disabilities would likely be unacceptable to a large part of society. Nonetheless, as the Constitutional Court has stated, in a democratic state governed by the rule of law, prevailing societal attitudes or stereotypes cannot justify discrimination against individuals.⁶⁸

Such amendments could also be impeded by the ECtHR's aforementioned position that Article 3 of Protocol 1 to the ECHR permits restrictions on the electoral rights of persons under guardianship, provided that such restrictions are based on an individual court decision. When assessing the constitutionality of legal acts, the Constitutional Court consistently refers to various international legal instruments, *inter alia*, United Nations instruments, but most often to the ECHR. Academic literature emphasises that this Convention and the case law of the ECtHR have the most significant influence on the interpretation of human rights enshrined in the Constitution.⁶⁹

In 2000, the Constitutional Court affirmed—and has since reiterated—that the case law of the ECtHR, as a source of legal interpretation, is important for the interpretation and

66 CRPD (n 28).

67 'Tolerance is Growing, but the Stigma Surrounding Mental Health in Lithuania is still Prevalent: The Ministry Presents Further Steps' (*Ministry of Health of the Republic of Lithuania*, 28 March 2023) <<https://sam.lrv.lt/lt/news/tolerancijos-daugeja-taciau-psichikos-sveikatos-stigma-lietuvoje-vis-dar-gaji-ministerija-pristato-tolesnius-zingsnius/>> accessed 8 July 2025.

68 Ruling No KT3-N1/2019 (Constitutional Court of the Republic of Lithuania, 11 January 2019) [2019] TAR 439.

69 Danutė Jočienė, 'Tarptautinės teisės ir Europos Sąjungos teisės įtaka Lietuvos Respublikos Konstitucinio Teismo oficialiajai konstitucinei doktrinai' in Bronius Sudavičius (ed), *Kelįje su Konstitucija: recenzuotų mokslinių straipsnių rinkinys* (Vilniaus universiteto leidykla 2022) 105.

application of Lithuanian law.⁷⁰ The Convention and the ECtHR's practice serve as authoritative interpretative sources not only for other Lithuanian legal acts but also for the Constitution.⁷¹ When interpreting the Constitution, the Constitutional Court often relies on the interpretation of the Convention provided by the ECtHR. Thus, the ECHR has a special status in the Lithuanian legal system. Given these trends, if the question in the Constitutional Court regarding restrictions on the electoral rights based on established incapacity were raised, the Constitutional Court would likely rely on the interpretation provided by the ECtHR rather than that of the CRPD Committee.

5 CONCLUSIONS

The evolution of the concept of legal incapacity demonstrates that, historically, it was perceived primarily as a protective mechanism for individuals who, due to their mental or intellectual condition, were unable to properly comprehend the consequences of their actions. However, in practice, especially during periods of totalitarian regimes, this institution often became a repressive measure that violated human rights. The evolution of the international human rights system, especially the UN CRPD adopted in 2006, has significantly changed the approach to the legal capacity of persons with disabilities—from complete separation and guardianship to a model of support in decision-making.

This transformation has prompted the Lithuanian legal system to modernise its approach to legal incapacity. Nevertheless, implementation has been gradual and confronted by both constitutional and practical challenges. Although significant steps have been taken—a transition to a model of limited legal capacity, and draft laws prepared in 2024 that seek to completely abolish the institution of legal incapacity—their compatibility with the Constitution, especially in the area of electoral rights, remains subject to legal debate.

Article 29 of the CRPD embodies a fundamental shift in the human rights approach to political participation by persons with disabilities. The Convention's human rights model requires that all persons, regardless of their disability or legal capacity status, be guaranteed equal opportunities to vote and stand for election. Yet, the ECtHR continues to adhere to a more traditional approach that allows restrictions on the right to vote for persons under guardianship, which highlights the tension between different interpretations of human rights instruments. Nevertheless, over the past decade, EU Member States have taken important steps to align their legal systems with the CRPD, ranging from constitutional and legislative changes to court rulings that have repealed discriminatory provisions. This shows a clear trend towards the comprehensive protection of the political rights of persons with disabilities. These changes offer hope

70 Ruling (Constitutional Court of the Republic of Lithuania, 8 May 2000) [2000] Žin 39-1105.

71 Dovilė Pūraitė-Andrikienė, *Žmogaus teisių apsauga ir gynimas Lietuvos Respublikos Konstituciniame Teisme: mokslo studija* (Lietuvos socialinių mokslų centro Teisės institutas 2023) 27.

that, in the long term, a more unified approach to political participation grounded in human rights principles will be established across Europe.

In Lithuania, the issue of removing electoral restrictions for persons with disabilities presents a constitutional dilemma between ensuring the rights of persons with disabilities and strict regulations enshrined in the Constitution. Although Article 29 of the CRPD requires that all persons, regardless of disability, be guaranteed the right to vote and to be elected, implementing these provisions in Lithuania faces obstacles due to constitutional provisions that expressly restrict the electoral rights of persons declared legally incapacitated by a court. As long as these constitutional provisions remain in force, it is not possible to remove restrictions on electoral rights for persons with limited legal capacity at the legislative level. Conversely, invoking Article 29 of the Constitution (equality and non-discrimination), alongside the principles of the rule of law and proportionality, raises questions as to whether these restrictions are consistent with broader constitutional values.

Accordingly, to effectively implement Article 29 of the Convention and ensure the equality of persons with disabilities in political life, it is necessary to start not with laws but with amendments to the Constitution itself, abolishing the institution of legal incapacity in the context of the right to vote. However, given societal attitudes towards mental disability, such reforms seem politically and socially unlikely in the near future. Nevertheless, discussion of amending the Constitution in this regard remains necessary to bring national law into line with international human rights standards and to create a more inclusive democracy.

REFERENCES

1. Cera R, 'Article 29 [Participation in Political and Public Life]' in Della Fina V, Cera R and Palmisano G, *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham 2017) 525. doi:10.1007/978-3-319-43790-3_33
2. Degener T, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35. doi:10.3390/laws5030035
3. Dinerstein RD, 'Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making' (2012) 19(2) *Human Rights Brief* 8
4. Fallon-Kund M and Bickenbach J, 'Strengthening the Voice of Persons with Mental Health Problems in Legal Capacity Proceedings' (2016) 5(3) *Laws* 29. doi:10.3390/laws5030029
5. Grdan K, *Right to Vote for Persons with Psychosocial Disabilities in the European Union Guidelines* (Mental Health Europe 2023)
6. Jočienė D, 'Tarptautinės teisės ir Europos Sąjungos teisės įtaka Lietuvos Respublikos Konstitucinio Teismo oficialiajai konstitucinei doktrinai' in Sudavičius B (ed), *Kelyje*

- su Konstitucija: recenzuotų mokslinių straipsnių rinkinys* (Vilniaus universiteto leidykla 2022) 91.
7. Jovičić S, 'ECHR v UNCRPD: Ending Restrictions on Voting Rights of Persons with Disabilities' (2021) 22 ERA Forum 699. doi:10.1007/s12027-021-00692-4
 8. Juodkaitė D, 'Neveikusių asmenų statuso reglamentavimas tarptautinių žmogaus teisių kontekste' in *Neveiksnimo problematika Europos sąjungos deklaruojamų vertybių kontekste* (Globali iniciatyva psichiatrijoje 2007) 5
 9. Juodkaitė D, 'Teisinio veiksnio reforma Lietuvoje: nuo sovietinio konteksto iki šiuolaikinių žmogaus teisių standartų' (2015) 16(2) Socialinis darbas: Patirtis ir metodai 25. doi:10.7220/2029-5820.16.2.2
 10. Krutulytė K, 'Jungtinių Tautų asmenų su negalia teisių konvencijos atitiktis Lietuvos Respublikos Konstitucijai ir Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijai dilema' (*TeisePro*, 26 September 2025) <<https://www.teise.pro/index.php/2025/09/26/k-krutulyte-jungtiniu-tautu-asmenu-su-negalia-teisiu-konvencijos-atitiktis-lietuvos-respublikos-konstitucijai-ir-europos-zmogaus-teisiu-ir-pagrindiniu-laisviu-apsaugos-konvencijai-dilema/>> accessed 30 September 2025.
 11. Krutulytė K and Genienė R, 'Pilnamečio veiksnio asmens rūpyba Lietuvoje: ar nacionalinė teisė atitinka tarptautinius Lietuvos įsipareigojimus?' (2025) 135 Teisė 71. doi:10.15388/Teise.2025.135.4
 12. Lord JE, Stein MA and Fiala-Butora J, 'Facilitating an Equal Right to Vote for Persons with Disabilities' (2014) 6(1) Journal of Human Rights Practice 115. doi:10.1093/jhuman/hut034
 13. Martinez-Pujalte A, 'Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms' (2019) 8(1) Laws 4. doi:10.3390/laws8010004
 14. Pūraitė-Andrikienė D, 'Kai kurie Lietuvos teisės aktuose įtvirtinto neveiksnio instituto probleminiai aspektai' (2012) 3(77) Teisės Problemos.
 15. Pūraitė-Andrikienė D, *Žmogaus teisių apsauga ir gynimas Lietuvos Respublikos Konstituciniame Teisme: mokslo studija* (Lietuvos socialinių mokslų centro Teisės institutas 2023)
 16. Radavičius LE, *Teisės psichiatrija: istorija ir dabartis* (Mykolo Romerio universiteto Leidybos centras 2004)

AUTHORS INFORMATION

Dovilė Pūraitė-Andrikienė

PhD (Law), Senior Researcher of Law institute, Lithuanian Centre for Social Sciences, Vilnius, Lithuania

dovile.puraite-andrikiene@tf.vu.lt

<https://orcid.org/0000-0001-6964-1568>

Corresponding author, solely responsible for the manuscript preparing.

Competing interests: No competing interests were disclosed.

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Dovilė Pūraitė-Andrikienė. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Pūraitė-Andrikienė D, 'Legal Capacity and Electoral Rights in Lithuania: The Issue of Compatibility between the Constitution and the UN Convention on the Rights of Persons with Disabilities' (2025) 8(4) Access to Justice in Eastern Europe 16-41 <<https://doi.org/10.33327/AJEE-18-8.4-a000136>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000136>

Summary: 1. Introduction. – 2. Historical Development of Legal Incapacity and its Conceptual Changes in Recent Decades. – 3. International and Comparative Context of EU Countries Regarding Restrictions on Voting Rights Based on Legal Incapacity. – 4. Removing Restrictions on the Right to Vote in Lithuania: The Issue of Compatibility Between the Constitution and the Convention on the Rights of Persons with Disabilities. – 5. Conclusion.

Keywords: *Electoral Rights, Rights of Persons With Disability, United Nations Convention on the Rights of Persons With Disabilities, Constitution, ECHR, Incapacity, Political Participation.*

DETAILS FOR PUBLICATION

Date of submission: 10 Jul 2025

Date of acceptance: 11 Sep 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The author declares that no artificial intelligence tools were used in the writing, translation, or editing of this manuscript. The research and the content of the article represent the author's own original work.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВІДНОСТІ ТА ВИБОРЧІ ПРАВА В ЛИТВІ: ПИТАННЯ УЗГОДЖЕНОСТІ КОНСТИТУЦІЇ ТА КОНВЕНЦІЇ ООН ПРО ПРАВА ОСІБ З ІНВАЛІДНІСТЮ

Довіле Пурайте-Андрікене

АНОТАЦІЯ

Вступ. Протягом десятиліть особи з інвалідністю в Литві, а також в інших країнах Центральної та Східної Європи, стикалися зі значними перешкодами у здійсненні своїх політичних прав, зокрема щодо права голосу та балотування на виборах, через обмеження, що закріплені у правових нормах, та соціальні упередження. Ухвалення Конвенції Організації Об'єднаних Націй про права осіб з інвалідністю (CRPD) у 2006 році започаткувало зміну парадигми від медичної та благодійної моделей інвалідності до підходу, що заснований на правах людини. Стаття 29 CRPD зобов'язує держави-учасниці забезпечувати повну політичну участь осіб з інвалідністю. Однак реалізація цих положень у Литві стикається з конституційними обмеженнями, що не допускають осіб, які визнані судом недієздатними, до участі у виборах. Це створило суперечності між міжнародними зобов'язаннями у сфері прав людини та національними конституційними положеннями.

Методи. У цьому дослідженні використовується багатометодний підхід до правового дослідження для вивчення узгодженості Конституції Литви зі статтею 29 Конвенції ООН про права осіб з інвалідністю в контексті виборчих прав. Було проведено аналіз змісту документів щодо відповідних положень литовського законодавства, рішень Конституційного Суду та міжнародних документів з прав людини. Було здійснено порівняльний аналіз для оцінки реформ у державах-членах ЄС, спрямованих на скасування обмежень щодо права голосу на підставі недієздатності. Історичні та телеологічні методи були використані для відстеження еволюції недієздатності та виявлення передбачуваного значення конституційних положень. Також за допомогою системного та логічного аналізу була здійснена оцінка потенційних конституційних змін, необхідних для дотримання положень Конвенції про права осіб з інвалідністю.

Результати та висновки. Аналіз показав, що виборчі права осіб з інвалідністю все ще можуть бути обмежені рішенням суду, хоча у 2016 році в Литві було запроваджено значні реформи для заміни повної недієздатності частковою в певних сферах. Законопроекти, запропоновані у 2024 році, мали на меті повне скасування інституту недієздатності та реалізацію статті 29 Конвенції про права осіб з інвалідністю. Однак ці реформи були зупинені через питання, що виникли у зв'язку з занепокоєнням щодо їхньої відповідності Конституції Литви, яка прямо забороняє особам, визнаним недієздатними, здійснювати

виборчі права. Порівняльний аналіз показав, що багато держав-членів ЄС успішно реформували свої правові бази відповідно до Конвенції про права осіб з інвалідністю, зокрема це стосується конституційних змін в Люксембурзі. Дослідження демонструє, що повна імплементація статті 29 CRPD у Литві перешкоджається конституційними положеннями, які прямо обмежують виборчі права осіб, визнаних недієздатними. Самих лише законодавчих реформ недостатньо для вирішення цього питання, тож конституційні зміни будуть необхідні для того, щоб забезпечити дотримання міжнародних стандартів у сфері прав людини. З огляду на панівні суспільні настрої щодо осіб з психічними та інтелектуальними вадами, такі зміни, ймовірно, зіткнуться з політичним та соціальним опором. Тим не менш, узгодження національного законодавства з Конвенцією про права осіб з інвалідністю залишається важливим для сприяння інклюзивній демократії та підтримки принципу рівності, закріпленого як у міжнародних, так і в національних правових системах.

Ключові слова: виборчі права, права осіб з інвалідністю, Конвенція Організації Об'єднаних Націй про права осіб з інвалідністю, конституція, ЄСПЛ, недієздатність, участь у політичному житті.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000126>

Date of submission: 28 Jun 2025

Date of acceptance: 07 Aug 2025

Last Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Maya Khater, Yasser Alhowaish, Yassine Chami, Mohamed El Arbi Aoka and Hayssam Hammad

Research Article

LEGAL RESPONSIBILITY OF IRAN FOR COMPENSATING VICTIMS OF THE SYRIAN WAR

**Maya Khater*, Yasser Alhowaish, Yassine Chami,
Mohamed El Arbi Aoka and Hayssam Hammad**

ABSTRACT

Background: Since the outbreak of the armed conflict in 2011, Syria has suffered widespread destruction, resulting in the collapse of its infrastructure and substantial human and material losses, which continue to affect millions of civilians today. Iran has played a major role in supporting the Syrian regime politically, financially, and logistically throughout the conflict, thereby potentially prolonging hostilities and exacerbating the humanitarian situation. This paper examines the extent of Iran's responsibility toward Syrian victims under international humanitarian law and public international law and explores potential legal mechanisms to hold Iran accountable while safeguarding the rights of affected individuals.

Methods: The study employs a descriptive-analytical method to document violations and examine relevant international legal texts. The study also employs a comparative method to analyse similar international experiences, such as the conflicts in the former Yugoslavia and Rwanda, to develop tangible legal solutions applicable to the Syrian context.

Results and conclusions: *The results demonstrate that Iran and its affiliated militias bear clear legal responsibility for violations of international humanitarian law. The findings underscore the necessity of establishing a competent international criminal court to address the crimes committed during the Syrian conflict, ensure accountability for perpetrators, and facilitate the redress of victims and the restoration of their rights.*

1 INTRODUCTION

International law places great significance on safeguarding human rights during armed conflicts, starting with the necessity to uphold and respect fundamental rights and freedoms. This protection is pursued through binding rules designed to mitigate the effects of war on civilians and to ensure the redress of victims. Consequently, the matter of reparations for victims of violations of the international humanitarian law constitutes a critical means for judicial remedy, based on the principle of state responsibility, which compels states to bear the legal consequences of their internationally wrongful acts.

Given the multiplicity of the parties involved in the Syrian conflict—including the Syrian regime, Iran, Russia, and Hezbollah—all of which have contributed to the serious violations of international humanitarian law, this study specifically focuses on Iran's role in these violations and the resulting legal consequences within the framework of its international obligations. Iran plays a pivotal role due to its direct impact on prolonging the war and complicating the humanitarian disaster. Accordingly, this research raises the following fundamental questions: To what extent does Iran bear legal responsibility for compensating the victims of the Syrian war? And what are the available legal frameworks that hold it accountable and restore the rights of the victims?

This research focuses on examining the legal framework of Iran's responsibility in the context of the Syrian conflict, given its position as one of the regime's primary supporters. The study covers the period from the outbreak of the conflict on 3 May 2011 until the fall of the Syrian regime at the hands of Syrian opposition forces on 8 December 2024.

Iran's support for the Syrian regime stems from both geopolitical and strategic considerations.¹ The Iranian government views the pro-Iranian Syrian government as a vital ally and a core national interest for Tehran, despite the significant economic and political costs.² Geopolitical and ideological interests have driven Iran to support the Syrian regime, as it is the most prominent regional ally that advances its interests in the area. Maintaining this alliance is seen as an extension of Iran's "forward defence" doctrine, which it relies on

1 Rafał Ożarowski, 'Iran's Engagement in Syrian Conflict: Causes and Consequences' (2018) 11 *Przegląd Strategiczny* 201. doi:10.14746/ps.2018.1.14.

2 Andrew Terrill, 'Iran's Strategy for Saving Asad' (2015) 69(2) *The Middle East Journal* 222. doi:10.3751/69.2.13.

to protect its national security by cultivating its regional allies. The Syrian regime stands at the forefront of this strategy.³

To that end, Iran has provided significant military and diplomatic support in recruiting militias to assist it. This support plays an important role in prolonging the war, helping the Syrian regime and increasing its ability to continue the conflict to preserve its interests.⁴ Beyond the military, political and economic assistance to Bashar al-Assad's regime, Syria has been used as a strategic corridor linking Iran with allies in Lebanon, Iraq, and Yemen. This has contributed to consolidating the Iranian influence in the Middle East, preserving its strategic interests, and strengthening its image as a power opposed to Western and Israeli hegemony.⁵

Iran's approach to the Syrian crisis has been characterised by consistency and continuity since the outbreak of the war in 2011, even in light of major humanitarian crises. Notably, this includes its stance following the chemical attacks carried out by regime forces in Eastern Ghouta in Damascus in 2013, which resulted in the deaths of hundreds and injuries to thousands of civilians.⁶ This reflects Iran's persistent will to protect the Syrian regime and its key role in maintaining the regime's stability. As such, Iran is held directly liable to compensate for the humanitarian damages brought about by its intervention in the Syrian conflict.

The research confirms that Iran's military strategy in Syria is centrally directed by its high command, reflecting the significance of the Syrian war as a tool for advancing Iran's regional goals and consolidating field control, even at the cost of exacerbating sectarian conflicts and destabilising the region. In this context, since the outbreak of the war in 2011, the Iranian government has supported the Syrian regime, emerging as a key player in the conflict. This support, estimated at around \$6 billion annually, has led to international criticism of Iran's role in human rights violations.

-
- 3 Gawdat Bahgat and Anoushiravan Ehteshami, *Defending Iran: From Revolutionary Guards to Ballistic Missiles* (CUP 2021); Karim Sadjadpour, *Reading Khamenei: The World View of Iran's Most Powerful Leader* (Carnegie Endowment for International Peace 2015).
 - 4 Murat Cingöz, Muharrem Hilmi Özev and Ramazan İzol, 'Saudi Arabia's Quest for Regional Hegemony on the Basis of Opposition to Iran' [2025] *Journal of Asian and African Studies*. doi:10.1177/00219096251313551; Göktuğ Sönmez, 'Foreign Shiite Fighters in the Syrian Civil War: Actors, Recruitment Strategies and Iran's Regional Role' (2022) 24(2) *Güvenlik Çalışmaları Dergisi* 158. doi:10.54627/gcd.1130746.
 - 5 Hadi Ajili and Mahsa Rouhi, 'Iran's Military Strategy' (2019) 61(6) *Survival* 139. doi:10.1080/00396338.2019.1688575; Hassan Ahmadian, 'Dignity, Wisdom and Expediency: How Ideational Factors Shape Iran's Foreign Policy' (2021) 56(4) *The International Spectator* 33. doi:10.1080/03932729.2021.1991118; Murat Cingöz and others, 'Iran's Axis of Resistance through the Lens of Ontological Security' (2024) 45(13) *Third World Quarterly* 1963. doi:10.1080/01436597.2024.2398613.
 - 6 Sinem Cengiz, 'Assessing the Astana Peace Process for Syria: Actors, Approaches, and Differences' (2020) 7(2) *Contemporary Review of the Middle East* 200. doi:10.1177/2347798920901876.

In the same respect, Iran's backing of the Syrian regime has contributed to the aggravation of violations against civilians. The intervention of Iranian-backed militias in military operations and indiscriminate attacks has led to catastrophic consequences, namely the deaths of thousands of civilians, widespread destruction, and heavy human losses. It also led to forced displacement and demographic change targeting Sunni-majority areas, aimed at establishing Shiite spheres of influence. Beyond this, militias seized the properties of displaced people and used them as military headquarters or residences for fighters, in addition to recruiting young people and children into the ranks of the militias and exploiting the difficult economic conditions.⁷

The research highlights several massacres and crimes committed by Iranian-backed militias that amount to war crimes or crimes against humanity. These include indiscriminate shelling, starvation sieges, summary executions, and systematic arrests of thousands of civilians, the use of chemical weapons, and the perpetration of sexual violence. Further complicating accountability, Iranian-backed militias have at times worn Syrian military uniforms as a way to hide their true identity and evade responsibility, despite the evident causal connection between Iranian sponsorship and the violations committed.⁸

It can be said that the violations committed by Iran in Syria bear a systematic and widespread character, which necessitates taking legal measures to hold the perpetrators accountable for these crimes that amount to war crimes and crimes against humanity. Despite the challenges of holding those responsible for the crimes liable, such as the non-membership of Syria and Iran in the International Criminal Court, serious attempts are being made in some European countries, such as Germany, Sweden, and France, to prosecute the perpetrators for the violations committed in Syria by invoking the principle of universal jurisdiction.⁹

A thorough examination of past literature confirms Iran's pivotal role in supporting the Syrian regime and prolonging the conflict for nearly 14 years. However, despite extensive research addressing Iran's strategic intervention in the Syrian war, little attention has been given to the legal consequences resulting from these unlawful violations, most precisely, Iran's responsibility for the material and human damages inflicted, or to the question of providing practical solutions to redress and compensate the victims for the extensive harm they have endured.

7 Yehuda Blanga, "If This Is the People's Will, the People Should Be Replaced": The Shi'ization of Syria During the Civil War, 2011–2018' (2022) 33(4) *Diplomacy & Statecraft* 794. doi:10.1080/09592296.2022.2143123.

8 Malik Al-Abdeh and Lars Hauch, 'Iran's Crimes in the Syrian Conflict: A Need for Documentation and Accountability' (2024) 154 TOAEP Policy Brief Series <<https://www.toaep.org/pbs-pdf/154-abdeh-hauch/>> accessed 15 July 2025.

9 Celeste Kmietek and others, *The Far Reach of Justice: Holding the Islamic Republic of Iran Accountable in European Courts* (US Atlantic Council 2023).

Accordingly, the significance of this study lies in this particular aspect, in that it focuses on addressing this gap by investigating possible mechanisms for compensating victims of the Syrian war, in accordance with the rules set forth by the International humanitarian law, while also assessing the effectiveness of existing rules in ensuring victims' rights to fair and comprehensive compensation. The research further contributes to the literature by proposing practical legal solutions that may contribute to achieving justice for victims and restoring stability in Syria, while at the same time focusing on holding Iran legally liable for its role in the Syrian war.

2 METHODOLOGY

This research employs a descriptive-analytical methodology to examine international legal texts addressing state responsibility for violations of international humanitarian law, including the Geneva Conventions and the Rome Statute of the International Criminal Court. The research also relies on primary sources, such as official reports and reports from international organisations, as well as secondary sources, including studies published in international journals and specialised books. This is done with the aim of achieving a comprehensive understanding of the mechanisms for claiming compensation in the context of the Syrian war. To ensure the data is up-to-date, academic databases such as Google Scholar and ResearchGate are utilised.

Furthermore, the research relies on a comparative approach to study previous international experiences related to reparations and compensation in the aftermath of armed conflicts, with the aim of deriving applicable solutions for the Syrian context.

The research also reviews the nature of Iran's continued support for the Syrian regime, encompassing logistical, technical, financial, and military training assistance, as well as the direct participation of combat forces. Such involvement has exacerbated the damage to the Syrian people and the country's infrastructure. The research also focuses on the legal means available to ensure fair and effective compensation for victims of the material, physical, and psychological damages they have suffered, while reviewing models from previous international experiences of reparations, such as Yugoslavia and Rwanda. The research also addresses the most significant political and legal challenges that hinder compensation efforts.

Ultimately, the study aims to evaluate the effectiveness of the existing international legal framework in compensating victims and concludes by providing recommendations aimed at improving accountability and redress mechanisms. This enhances the achievement of justice for victims of Syrian war crimes and ensures the accountability of parties liable for violations within the framework of international humanitarian law.

3 FINDINGS

The laws governing international responsibility are designed to establish the responsibility of states for severe violations against individuals and nations. By defining the legal framework for attributing responsibility, the international legislator enables the prosecution of states liable for these violations before various judicial bodies by defining the legal framework for establishing the responsibility of these states for their actions.¹⁰ Iran's intervention in the Syrian war is a real-world example that, at least in theory, embodies this international liability.

3.1. The Legal Framework of the State's Responsibility for Compensating Victims of International Humanitarian Law Violations

Victims of violations of international humanitarian law are defined as individuals or groups who have endured harm, including physical and mental harm, economic loss, psychological suffering, and other forms of deprivation of fundamental rights, due to committing an act or refraining from acting, that results in a serious violation of international humanitarian law.¹¹

Severe breaches of international humanitarian law are a fundamental pillar of international liability, through which victims' rights to fair compensation for losses or harm caused by the violations are realised.¹²

According to the United Nations document entitled *Responsibility of States for Internationally Wrongful Acts* of 2001, States are held liable for compensating for damages resulting from wrongful acts attributable to them, whether committed by their official bodies, agents, or persons acting under their direction or control.¹³ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 also imposes an obligation on states to compensate victims for severe breaches, including unlawful acts committed by their armed forces, as well as militias and armed groups supported by them. These violations include willful killing, torture, inhuman treatment or punishment, and causing serious injury or serious damage to physical integrity. In addition, other crimes include forcible transfer, hostage-taking, unlawful detention, compelling protected persons to serve in the armed forces of a hostile power, and depriving them of a fair trial.

10 Nicolás Zambrana-Tévar, 'The International Responsibility of the Holy See for Human Rights Violations' (2021) 13(6) Religions 520. doi:10.3390/rel13060520.

11 Ahmed Alameldeen, Erik Beuck and Tayyab Sagheer, 'Violations of International Humanitarian Law: Threats to Noncombatants in the Syrian Crises, 2011–2020' (2021) 8(10) The International Journal of Social Sciences and Humanities Invention 6649. doi:10.18535/ijsshi/v8i10.06.

12 Rebecca Crootof, 'War Torts' (2022) 97(4) New York University Law Review 1063. doi:10.2139/ssrn.4040075.

13 Natalie R Hajdin, 'Responsibility of Private Individuals for Complicity in a War of Aggression' (2022) 116(4) American Journal of International Law 788. doi:10.1017/ajil.2022.50.

Available redress or compensation means for a claimant who prevails in a case include several practical forms. These remedies include appropriate, effective, and prompt financial compensation, rehabilitation, and guarantees of non-repetition.¹⁴

According to Article 38 of the Responsibility of States for Internationally Wrongful Acts of 2001, mechanisms of reparation for violations of international humanitarian law encompass restoring the situation to what it was before the wrongful act. This may involve, for instance, the release of detainees if the violations relate to arbitrary arrest or unlawful detention, or the return of confiscated property, such as returning land and property seized during the conflict to their owners. If this procedure is not practically possible due to changed circumstances or the continuation of the conflict, monetary compensation is provided instead to cover the material and moral damages incurred by victims due to these violations. The amount of compensation is determined based on a comprehensive assessment of the damages and accurate documentation by the victims or their representatives.

Compensation may also include moral or symbolic forms intended to ease tensions and recognise the rights of victims in ways that cannot be materially repaired. Such measures include a formal apology from the State or responsible parties, a public expression of regret and clear acknowledgement of responsibility, or commemorating the victims through the creation of memorials or the organisation of commemorative events.

For example, the Algiers Agreement of 2000 stipulated the establishment of an Eritrea-Ethiopia Claims Commission to “decide through binding arbitration all claims for loss, damage or injury by one Government against the other” related to the armed conflict and resulting from “violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.”¹⁵ This example underscores the importance of compensation in addressing the consequences of war, achieving a comprehensive agreement to end the war and the establishment of normal relations between the conflicting parties.

Additionally, compensation emerges as a fundamental tool in addressing the consequences of wars, such as compensation for material damages, economic losses, and harm caused by violations of international humanitarian law, while also addressing their psychological, social, and economic impacts. The research, therefore, affirms that compensation is an essential part of State responsibility, as it achieves equality and justice and provides immediate financial support to victims. However, it may undermine the international legal system if it lacks a comprehensive vision to assist these victims in the future, which would also be in their long-term interest.¹⁶

14 Adriana Garcia, Fatima Yasmin Bokhari and Masha Lisitsyna, *Repairing from the Bench: From Finding Responsibility to Fashioning Judicial Redress* (ICTJ 2024).

15 Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (12 December 2000) A/55/686 - S/2000/1183, art 5.

16 Oona A Hathaway, Maggie M Mills and Thomas M Poston, ‘War Reparations: The Case for Countermeasures’ (2024) 76(5) *Stanford Law Review* 971.

3.2. Manifestations of Iran's International Responsibility for Violations of International Humanitarian Law in the Syrian War

The Syrian regime, with direct support from Iran, committed widespread violations and grave breaches of international humanitarian law during the Syrian war that began in 2011. United Nations Secretary-General Ban Ki-moon expressed his deep concern about the humanitarian situation in Syria, resulting from indiscriminate bombing, the targeting of civilians, and the destruction of infrastructure, in addition to the lack of access to humanitarian aid to besieged areas and the suffering of the population from hunger and lack of medical care.¹⁷

Several international reports have demonstrated Iran's direct involvement in the Syrian conflict since its outbreak in 2011. Iran has played a pivotal role in exacerbating the war by providing military, financial, and intelligence support,¹⁸ as well as deploying military advisors and members of the Iranian Revolutionary Guard. Additionally, Iran has financed, trained, and armed local and foreign armed groups.¹⁹

The militias supported by Iran fall into two categories. Local militias, including the Soldiers of Mahdi, the Mahdi Army, the Faiq al-Sadiq Corps, the Zain al-Abidin Brigade, and the Mukhtar al-Thaqafi Brigade. Foreign militias include Iraqi, Afghan, and Pakistani groups, as well as Lebanese Hezbollah, which is widely considered Iran's most prominent arm in the region. These militias have directly contributed to military operations that have caused widespread destruction, targeted civilians, destroyed infrastructure, and launched prohibited chemical attacks.²⁰

From this perspective, Iran cannot be regarded as a merely supporting party but rather as a major actor in the conflict. Tehran bears legal responsibility for the violations committed, especially given the causal relationship between the support provided and the damage inflicted on the civilian population. This establishes a legal basis for imposing international responsibility in accordance with the rules of international humanitarian law, which apply extraterritorially whenever a State exercises effective or legal control over individuals or foreign territory. This rule is of great importance in the case of Iranian intervention in Syria, where Iran exercises forms of de facto authority through its militias, security services, and military proxies. Such involvement entails direct legal obligations under the provisions of

17 UN, 'Letter dated 17 February 2016 from the Secretary-General addressed to the President of the Security Council' (17 February 2016) S/2016/152.

18 Amnesty International, *The State of the World's Human Rights: April 2024* (Amnesty International Ltd 2024) <<https://www.amnesty.org/en/documents/pol10/7200/2024/en/>> accessed 15 July 2025.

19 Shahram Akbarzadeh, William Gourlay and Anoushiravan Ehteshami, 'Iranian Proxies in the Syrian Conflict: Tehran's "Forward-Defence" in Action' (2023) 46(3) *Journal of Strategic Studies* 683. doi:10.1080/01402390.2021.20230.

20 Marina Calulli, 'Self-Determination at All Costs: Explaining the Iran-Syria-Hezbollah Axis' (2020) 54(2) *Annals of the Fondazione Luigi Einaudi* 95. doi:10.26331/1118.

the International Covenant on Civil and Political Rights and other relevant international agreements and instruments.²¹

Amnesty International's report *Syria: Relentless Bombing of Civilians in Eastern Ghouta Amounts to War Crimes* stated that the Syrian government, with support from Iran, "is intentionally targeting its own people in Eastern Ghouta.²² People have not only been suffering a cruel siege for the past six years, they are now trapped in a daily barrage of attacks that are deliberately killing and maiming them, and that constitute flagrant war crimes." During the conflict, heavy weapons and warplanes were used to target residential areas and humanitarian facilities such as hospitals and schools, resulting in the deaths of thousands of civilians. This is a clear violation of the rules of international humanitarian law.²³

In addition, international reports have demonstrated the existence of arbitrary arrests of thousands of civilians and opponents, along with systematic killings and torture carried out by Syrian government forces with the participation of Iranian forces and affiliated armed militias. These violations included cruel methods of torture in detention centres and prisons affiliated with the regime, such as Saydnaya Military Prison, widely regarded as a symbol of these crimes. In its 2017 report *Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison*, Amnesty International described Saydnaya as a "human slaughterhouse" due to the inhumane conditions and horrific violations of human rights and international humanitarian law to which detainees were subjected there, including physical, psychological, and sexual torture; cruel and degrading treatment; mass executions; extermination; and other grave violations of human rights and international humanitarian law.

The report estimated that between 5,000 and 13,000 detainees were executed at Saydnaya between 2011 and 2015. These executions followed mock trials before the Military Field Court that lasted no more than one to three minutes, during which the detainees were convicted and sentenced to death after confessions were extracted under torture. Detainees were transferred at night to the execution chambers, where groups of 20 and 50 were hanged at a time, at a rate of once or twice a week. The bodies of the victims were subsequently buried in mass graves.²⁴

21 Frederic Megret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2018) 86. doi:10.1093/he/9780198767237.003.0005.

22 'Syria: Relentless Bombing of Civilians in Eastern Ghouta Amounts to War Crimes' (*Amnesty International*, 20 February 2018) <<https://www.amnesty.org/en/latest/news/2018/02/syria-relentless-bombing-of-civilians-in-eastern-ghouta-amounts-to-war-crimes/>> accessed 15 July 2025.

23 Maya Khater, 'Sexual Violence against Women during Armed Conflicts: Russian Aggression against Ukraine as an Example' (2022) 5(Spec) Access to Justice in Eastern Europe 102. doi:10.33327/AJEE-18-5.4-n000431.

24 Amnesty International, *Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria* (Amnesty International Ltd 2017) 4-5 <<https://www.amnesty.org/en/documents/mde24/5415/2017/en/>> accessed 15 July 2025.

The crimes committed in Saydnaya Prison—including mass executions, brutal torture, and arbitrary arrests—amount to crimes against humanity, given their widespread and systematic nature, and thus constitute serious violations of international humanitarian law.

Iran's role in the Syrian regime, however, was not merely limited to intervening in Syrian internal affairs or preventing the collapse of the regime. Its responsibility also extends to the severe violations of the international humanitarian law committed either directly by Iranian forces or by armed groups supported by the Iranian government. These include the deaths of large numbers of civilians due to disproportionate attacks, indiscriminate bombing of civilian areas, the targeting of infrastructure, and the use of prohibited weapons, such as the use of intentionally banned cluster munitions and chemical agents. Notably, chemical weapons attacks in areas such as Eastern Ghouta constitute flagrant violations of the Geneva Conventions and the international prohibitions on chemical weapons.

International reports have also documented the forced displacement of millions of Syrians, both internally and across borders, as part of demographic engineering operations aimed at achieving strategic gains for the regime and its allies by forcing local residents to leave their areas.²⁵ This was compounded by severe restrictions on access to supplies and humanitarian aid, which intensified the suffering of civilians in besieged areas where residents suffered from hunger and lack of healthcare.²⁶

These violations, in their severity and scope, reflect Iran's role as a prominent strategic ally in the Syrian war, whose actions have significantly exacerbated the humanitarian situation and increased civilian casualties. This involvement included the deployment of Revolutionary Guard and regular Iranian forces, the formation and support of local and foreign militias, the provision of critical financial and military supplies, and operational and intelligence coordination with Syrian government forces. Additionally, Iran bears legal responsibility for the serious violations committed by its forces and affiliated militias it supports—acts that amount to crimes against humanity and war crimes, and that constitute a blatant violation of the principles and provisions of international humanitarian law.²⁷

Despite the severity of these crimes—including indiscriminate bombing, the targeting of civilians, the use of prohibited weapons, and forced displacement—neither the Syrian nor Iranian authorities have, to date, taken steps to hold any entity liable, reflecting a state of impunity. This entrenched impunity underscores the necessity of holding government forces and their supporters, including Iran, liable for these crimes, while affirming the victims' right to reparation as a fundamental pillar of justice, peace, the restoration of rights,

25 Amnesty International (n 18).

26 Maya Khater, 'Humanitarian Assistance in Cases of Natural Disasters and the 2023 Earthquake in Turkey and Syria' (2023) 24(2) Environment Conservation Journal 423. doi:10.36953/ECJ.22842584.

27 Maya Khater, 'The Legality of the Russian Military Operations against Ukraine from the Perspective of International Law' (2022) 5(3) Access to Justice in Eastern Europe 107. doi:10.33327/AJEE-18-5.3-a000315.

and the preservation of dignity. The diversity of legal trial mechanisms, represented by a range of international, regional, and national courts, can contribute to establishing Iran's international responsibility for compensating the victims of the Syrian war.

It is worth noting that Iran has reportedly demanded repayment from the Syrian government of an estimated \$50 billion, claimed as dues for its continued support during the war. However, the extent of Syria's future commitment to repaying these debts remains a matter of legal debate, particularly in light of the "odious debt" principle. According to this principle, new governments may be exempt from repaying debts incurred by despotic regimes where such debts were used to oppress their people. If Iran is proven to have used those funds to empower an oppressive regime, these debts may be considered personal debts of the former regime, and the new state will not bear their consequences.²⁸ Indeed, this opens the door for the new Syrian government to demand that Iran compensate for the serious damage caused to the Syrian people and the state's infrastructure as a result of its political, military and economic support for the Assad regime throughout the years of conflict—an argument advanced by this research.

3.3. Legal Standards for Aiding and Abetting Responsibility

One of the underexplored legal dimensions of Iran's involvement in the Syrian conflict is the doctrine of aiding and abetting responsibility under international law. Aiding and abetting refers to the provision of practical assistance, encouragement, or moral support that has a substantial effect on the commission of crimes, even when the assisting party does not directly perpetrate them.

This principle has been affirmed by international courts, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone, both of which recognised that states or individuals can be held responsible for indirectly facilitating war crimes or crimes against humanity.²⁹ In the Syrian context, Iran's extensive logistical, financial, and military support to the Assad regime and affiliated militias—acts responsible for well-documented violations—may meet the legal threshold for aiding and abetting.

To establish such responsibility, it must be shown that the assisting party (i) had knowledge that its support would likely contribute to the commission of international crimes, and (ii) that the assistance had a substantial effect³⁰ on the occurrence of those crimes. In this regard, Iran's sustained and coordinated involvement over more than a decade arguably satisfies

28 Ziarat Ali and others, 'Iran-Syria Relations During the Syrian Civil War (2010-2024)' (2025) 3(1) *Dialogue Social Science Review (DSSR)* 579.

29 Case IT-95-17/1-T *Prosecutor v Furundžija* (ICTY, Trial Chamber, 10 December 1998) paras 235, 236 <<https://www.refworld.org/jurisprudence/caselaw/icty/1998/en/20418>> accessed 6 August 2025.

30 Case SCSL-03-01-T *Prosecutor v Taylor* (SCSL, Trial Chamber III, 26 April 2012) <<https://www.refworld.org/jurisprudence/caselaw/scsl/2012/en/85716>> accessed 6 August 2025.

both elements. Incorporating this legal framework strengthens the argument that Iran's conduct is not merely politically consequential but legally actionable under established principles of state responsibility.

4 DISCUSSIONS

The international community agrees on the right of victims of violations of international humanitarian law to obtain fair and comprehensive compensation for the damage incurred. However, despite this theoretical recognition, national human rights institutions, victims' rights groups, and other human rights defenders face many challenges in their efforts to obtain compensation from government actors involved in armed conflicts.³¹ These difficulties relate to the complexities of sovereignty and state immunity, as well as political and legal obstacles, in addition to the difficulty of proving the causal link between the violation and the damage.³²

In this context, the research presents the legal mechanisms available to victims of the Syrian war to claim compensation from Iran, including recourse to international committees as well as international, regional, and local courts, considering the limited effectiveness of these mechanisms under the current circumstances.

4.1. International Committees

International commissions provide an important mechanism for holding states liable for serious violations of international humanitarian law and for providing compensation to victims. For example, the International Commission of Inquiry, established in 1991, was tasked with investigating and documenting allegations of serious violations of international humanitarian law. While such commissions lack judicial authority to compel states to pay compensation, their reports serve as powerful tools that can be utilised before international, regional, and national courts to establish state responsibility. Consequently, the reports of international investigative committees can be used to document Iran's violations resulting from its support for the Syrian regime.

A key example is the Independent International Commission of Inquiry on Syria's task, mandated to investigate all violations of international human rights law committed in Syria

31 Francesco De Santis di Nicola, 'Civil Actions for Damages Caused by War Crimes vs State Immunity from Jurisdiction and the Political Act Doctrine: ECtHR, ICJ and Italian Courts' (2017) 3(1) *International Comparative Jurisprudence* 45. doi:0.1016/j.icj.2017.02.002.

32 Liydmyla Panova and others, 'Expropriation and Other Forms of Reparation in Terms of Compensation for Damage Caused as a Result of War Crimes: International Legal Experience' (2023) 41(78) *Cuestiones Políticas* 723. doi:10.46398/cuestpol.4178.49.

since March 2011, to identify those responsible and to ensure their interrogation.³³ The Commission has recorded a range of serious violations, including the use of chemical weapons, indiscriminate attacks on civilians, torture, enforced disappearances, sexual violence, and extrajudicial executions. It has also identified the parties responsible for these violations, including government forces and non-state armed groups, emphasising the need for interrogation. The Commission has urged the international community to take concrete measures to this end, such as referring the situation in Syria to the International Criminal Court or establishing a competent court.

Given the scale of violations linked to Iran's support for the Syrian regime and its allied militias, investigative committees can play a pivotal role in documenting these violations and demanding that Iran provide compensation to victims. This mirrors the precedent set by previous international committees, such as the United Nations Compensation Commission (UNCC), which was established after the Gulf War between Iraq and Kuwait. The UNCC successfully provided a framework for international accountability by documenting violations of international humanitarian law and compensating parties harmed by the violations in the conflict.³⁴

Therefore, the significance of these investigative committees lies in their ability to generate robust reports that can be employed as compelling evidence before international, regional, and national courts to condemn the implicated states and secure justice for victims.

4.2. The United Nations Compensation Commission (UNCC): A Precedent for Institutional Accountability

An important precedent for institutional accountability and victim compensation is the United Nations Compensation Commission (UNCC), established by the UN Security Council in 1991 following Iraq's invasion of Kuwait. The UNCC processed approximately 2.7 million claims and awarded over \$52 billion in compensation for losses and damages directly resulting from the conflict.³⁵ This mechanism stands out as a tangible and structured international effort to ensure that victims of armed conflict receive reparations.

The significance of the UNCC lies in its ability to effectively combine political will, legal authority, and administrative structure to implement compensation in a timely and equitable manner. It relied on clearly defined claims categories, a robust evidentiary framework, and a

33 The Independent International Commission of Inquiry on the Syrian Arab Republic was established on 22 August 2011 by the Human Rights Council through resolution, see: HRC Res S-17/1 'Situation of Human Rights in the Syrian Arab Republic' (22 August 2011) <<https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/independent-international-commission>> accessed 15 July 2025.

34 Robert C O'Brien, 'The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission' (1998) 31(1) Cornell International Law Journal 1.

35 'Establishment and Mandate of the United Nations Compensation Commission (UNCC)' (*United Nations*, 2025) <<https://uncc.un.org/en>> accessed 6 August 2025.

transparent funding mechanism derived from Iraqi oil revenues. Such a model could serve as an institutional prototype for addressing compensation claims in the Syrian context, especially considering Iran's financial and military involvement in the conflict.

Drawing on lessons from the UNCC, the establishment of a similar mechanism—funded by the seizure of Iranian assets or coordinated contributions from the international community—could provide a credible and enforceable path toward victim redress. This would also reinforce the normative claim that state actors engaged in systematic violations of international humanitarian law must bear the costs of their conduct.

4.3. International Courts

International responsibility laws allow for the recourse to a variety of courts to condemn states accused of human rights violations. Despite differences in their roles, jurisdictions, and origins, this diversity can enhance the prospects for victims to secure accountability and obtain compensation for the damages incurred.

4.3.1. International Court of Justice

The International Court of Justice, under Article 36 of its 1945 Statute, is competent to review disputes filed by sovereign states, when the subject relates to “the nature or extent of the reparation to be made for the breach of an international obligation.” However, individuals do not have a standing to bring claims directly before the Court.

Based on this, Syrian war victims, as individuals, cannot directly sue Iran or demand compensation before the court. However, the Syrian state, as a representative of the victims, can file a case against Iran to secure reparations on behalf of affected individuals. Such reparations could include financial compensation or restoring the situation to its pre-violation state, encompassing reconstruction and providing psychological support to the victims.

It should be noted that the success of such a mechanism depends on Iran's acceptance of the court's jurisdiction, which requires diplomatic cooperation and strong international legal support.

Notably, in 2023, Canada and the Netherlands jointly filed a lawsuit against the former Syrian government at the International Court of Justice, accusing the Syrian government of committing serious violations, including:

“The use of torture and other cruel, inhuman or degrading treatment or punishment ..., including through abhorrent treatment of detainees, inhumane conditions in places of detention, enforced disappearances, the use of sexual and gender-based violence, and violence against children.”

This move came after Russia used its veto power in the United Nations Security Council, preventing the referral of the Syrian regime to the International Criminal Court for accountability regarding war crimes.

4.3.2. International Criminal Court

The International Criminal Court, under Article 5 of the Rome Statute of the International Criminal Court (1998), is responsible for prosecuting and punishing those responsible for committing the most serious crimes that threaten international peace and security, including genocide, war crimes, crimes against humanity, and crimes of aggression. At the same time, the Statute places special importance on compensating victims for all material and moral damages they have incurred.

The ICC is empowered to assess the damages resulting from crimes in its rulings, determining the extent of harm, loss, or injury suffered by victims or their family members. This can be based on a request from the victims or initiated by the court itself in exceptional circumstances. Article 75 of the Rome Statute allows victims or their representatives to claim reparations that include financial compensation, restitution, rehabilitation, or apologies.

A notable example of the International Criminal Court's commitment to providing complete justice and ordering reparations is the ruling on 8 July 2019, when the court convicted Congolese warlord Bosco Ntaganda of war crimes and crimes against humanity, including child recruitment, murder, rape, and sexual slavery. He was sentenced to 30 years in prison³⁶ and on 8 March 2021, the Court ordered the payment of \$30 million in reparations to the victims. Similarly, Congolese militia leader Thomas Lubanga Dyilo was convicted in 2012 for the recruitment and use of children in armed conflict. On 15 December 2017, the Court issued a decision awarding \$10 million in individual and collective reparations to the victims.³⁷

As for the crimes attributed to Iran in the Syrian war, significant obstacles hinder prosecution before the International Criminal Court, and consequently, the process of compensating victims. One of the most significant challenges is that neither Iran nor Syria is a party to the Rome Statute, which prevents the Court from exercising direct jurisdiction to investigate crimes arising from Iran's intervention in Syria or to indict those who committed them.

However, under Article 13(b) of the Rome Statute of the International Criminal Court (1998), the United Nations Security Council can refer cases involving non-member states to

36 Case ICC-01/04-02/06 *Prosecutor v Bosco Ntaganda* (ICC, Trial Chamber VI, 8 July 2019) <<https://www.icc-cpi.int/drc/ntaganda>> accessed 15 July 2025.

37 Case ICC-01/04-02/06 *Prosecutor v Bosco Ntaganda*, Order (ICC, Trial Chamber II, 25 October 2022) <<https://www.icc-cpi.int/court-record/icc-01/04-02/06-2786>> 25 October 2022) accessed 15 July 2025.

the ICC Prosecutor under Chapter VII of the Charter, subject to the condition that such cases include grave breaches of international humanitarian law. Through this mechanism, the Council could address Iran's liability, including obligations to compensate victims, notwithstanding Iran's non-membership under the Statute.³⁸

Beyond the lack of traditional jurisdiction, ICC intervention remains contingent on a Security Council referral. Referring the situation in Syrian, however, faces significant political obstacles, particularly the potential use of veto powers by Russia and China, which creates a further barrier.³⁹ In this context, Syria's accession to the Rome Statute becomes essential to ensure the court's legal authority to investigate crimes committed on its territory. Such accession would enhance the ICC's capacity to exercise its jurisdiction and prosecute Iranian officials for serious violations, even in the absence of a Security Council referral.

Furthermore, international law also allows for holding states accountable for human rights violations through special criminal tribunals. However, these tribunals are susceptible to political obstacles, which may impede their ability to fulfil their mission of establishing international responsibility.

4.3.3. Special International Criminal Courts

Competent international courts provide important avenues for achieving justice. These provisional judicial authorities are established to prosecute those accused of committing serious international crimes within a specific context or region. These courts have established a clear legal avenue for ensuring the rights of victims, including their right to claim reparations.

Prominent examples of special international criminal tribunals include the Nuremberg Tribunal, which had jurisdiction to try senior Nazi leaders after World War II on charges of committing crimes against humanity, war crimes, and crimes against peace, and the Tokyo Tribunal, which prosecuted Japanese leaders for crimes committed during the same period. Other notable examples include international criminal courts for the former Yugoslavia and Rwanda.

International criminal courts are typically established through UN Security Council resolutions under Chapter VII of the UN Charter. For instance, the International Criminal Court for the former Yugoslavia was established under Security Council Resolution 827 in 1993 to hold accountable those responsible for genocide committed during the Bosnian War, crimes of ethnic cleansing, mass rape, and indiscriminate bombing committed in the territory of Yugoslavia since 1991. Its Statute included provisions affirming the right of

38 Jennifer M Welsh, 'The Security Council's Role in Fulfilling the Responsibility to Protect' (2021) 35(2) Ethics & International Affairs 227. doi:10.1017/S089267942100023X.

39 Kmietek and others (n 9).

victims to claim compensation, including the restitution of property and proceeds obtained from crimes to their owners.

Similarly, the International Criminal Court for Rwanda was established under the Security Council Resolution 955 in 1994 in response to the crimes of genocide, sexual violence, forced displacement, torture, and mass killings witnessed in Rwanda in 1994. The provisions of the Court's Statute reflected the same commitments as those in the Statute of the International Court of Yugoslavia regarding the accountability of perpetrators and the compensation of victims, even extending compensation to include psychological and social support for victims, rehabilitation, and formal apologies.

The widespread violations in Rwanda and the former Yugoslavia bear strong similarities to the nature and scale of the violations in Syria. Based on these precedents, the importance of establishing a competent international court for the Syrian conflict would be crucial to ensure the accountability of perpetrators, including supporting parties, foremost among them Iran, and to provide a legal framework for compensating victims.

However, the lack of consensus among the permanent members of the Security Council constitutes one of the most significant challenges facing the establishment of a competent international court. These states often leverage their influence to align court decisions with their strategic interests. Russia and China, in particular, are the most prominent opponents within the Council, having previously used their veto power in 2014 to block the referral of the Syrian file to the ICC, complicating any attempts to reach an international consensus on legal responsibility.⁴⁰

The Syrian conflict also presents unique complexities due to the multiplicity of participating parties, including the Syrian regime and militias supported by Iran, Russia, and other countries. This makes establishing the responsibility of a given party extremely difficult from a legal perspective, especially in light of the absence of conclusive evidence, the complex and intertwined nature of the conflict, and its evolution over many years, along with extensive military and political interventions. Additional obstacles arise from the near-total collapse of the legal infrastructure in Syria, lack of resources and capabilities, loss of evidence and documents and difficulties in accessing victims and witnesses. These factors significantly hinder the documentation of crimes and the identification of perpetrators.⁴¹

From this perspective, coordinated diplomatic efforts are essential to pressure opposing Security Council members to support resolutions establishing such a court. Additionally,

40 'UN: Russian and Chinese Vetoes of Syria ICC Resolution "Callous"' (*Amnesty International*, 17 August 2021) <<https://www.amnesty.org/en/latest/news/2014/05/un-russian-chinese-vetoes-syria-icc-resolution-callous/>> accessed 15 July 2025.

41 Eduardo Almón and Juan-Pablo Pérez-León-Acevedo, 'Reparation for Victims of Serious Violations of International Humanitarian Law: New Developments' (2022) 104(919) *International Review of the Red Cross* 1315. doi:10.1017/S1816383122000297.

providing comprehensive financial and technical support for the court's work is crucial. If undertaken within the framework of international law, these measures would help promote accountability, achieve justice for victims, and uphold international principles of justice.

4.4. Regional Human Rights Courts

Regional human rights courts, such as the Inter-American Court of Human Rights and the European Court of Human Rights, provide effective legal solutions for victims of violations of international humanitarian law. These courts not only enable victims to file complaints regarding violations but also allow them to claim fair and equitable compensation for the material and moral damages they have suffered.

These courts have witnessed successful cases in which victims have demanded redress and compensation. For example, in 2005, the European Court of Human Rights ruled in favour of Roma children in Greece⁴² whose right to education had been violated. The children were subjected to racial discrimination, being placed in segregated schools or separate classrooms within public schools. The Court ordered the State to provide financial compensation for the damages incurred and to implement corrective measures to prevent future violations and ensure equal educational opportunities.⁴³

However, victims of violations resulting from Iranian support for the Syrian regime cannot file complaints to the regional human rights courts or claim compensation for damages resulting from severe violations, as Iran is not subject to the jurisdiction of these courts. Iran is not a party to any regional human rights system that provides a legal platform for considering its violations. Regional courts generally have jurisdiction only over member states, making it impossible to hold Iran accountable through them.

Thus, alternative mechanisms, such as international commissions of inquiry into violations or national courts applying the principle of universal jurisdiction, must be pursued. These mechanisms can provide an effective means of holding Iran accountable and ensuring justice for victims of the Syrian war.

4.5. National Courts

The principle of universal competence permits states to prosecute parties accused of committing serious international crimes, regardless of where the crime occurred or the nationality of the perpetrators or victims, on the grounds that these crimes threaten the

42 *Sampanis and Others v Greece* App no 32526/05 (ECtHR, 5 June 2008) <<https://hudoc.echr.coe.int/eng?i=001-86798>> accessed 15 July 2025.

43 Anita Danko and Iulius Rostas, 'Setting the Roma Policy Agenda: The Role of International Organizations in Combating School Desegregation' in Iulius Rostas (ed), *Ten Years After: A History of Roma School Desegregation in Central & Eastern Europe* (Central European UP 2012) 48.

international community as a whole.⁴⁴ This principle is grounded in international treaties and conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the four Geneva Conventions, which mandate states to enact laws necessary to pursue, prosecute, and extradite those accused of committing such violations.⁴⁵

Sanctions imposed by some Western countries on individuals involved in human rights violations also represent an effective alternative mechanism for recovering looted funds and providing indirect reparations to victims. In the Syrian case, these measures could target Iranian officials and leaders of militias supported by Tehran, whose assets abroad can be frozen and later confiscated to benefit victims affected by Iranian intervention in Syria.⁴⁶

Based on the principle of universal jurisdiction, victims of severe violations of international law may file cases before national courts in states exercising this jurisdiction, seeking compensation even if the defendants are not citizens of that country, the crimes were not committed on its territory, or its national interests were not directly affected. Given Iran's responsibility for war crimes and crimes against humanity committed in Syria—such as torture, extrajudicial killings, and arbitrary detention—victims or their representatives can pursue legal redress against Iranian authorities before these courts. Several European nations, including Germany, France, and Sweden, have initiated large-scale investigations into serious breaches of international law committed during the Syrian war under the principle of universal jurisdiction.⁴⁷

For example, on 15 November 2023, a French court issued international arrest warrants against Syrian President Bashar al-Assad and his brother Maher al-Assad, in addition to other officials, for complicity in crimes against humanity, linked to chemical attacks in rural Damascus in 2013. In January 2022, a German court sentenced former Syrian security official Anwar Raslan to temporary imprisonment for committing crimes against humanity, namely torture and murder in detention centres affiliated with the Syrian regime. Furthermore, on 21 January 2025, France issued a new arrest warrant against Bashar al-Assad for complicity in war crimes related to the 2017 bombing of the Syrian city of Daraa, which resulted in the death of a civilian holding both French and Syrian nationalities.

Although the investigations have primarily targeted Syrian officials, and no specific investigations have been conducted on Iranian officials, they demonstrate the possibility of conducting future investigations targeting Iranian officials for crimes committed in Syria, as well as the potential for victims to claim fair compensation for their losses.

44 Jessica Doumit, 'Accountability in a Time of War: Universal Jurisdiction and the Strive for Justice in Syria' (2021) 52(2) *Georgetown Journal of International Law* 263.

45 Bernard Ntahiraja, 'The Legality and Scope of Universal Jurisdiction in Criminal Matters: Is there Any Question to Answer?' (2022) 91(3) *Nordic Journal of International Law* 390. doi:10.1163/15718107-91030005

46 Cecily Rose, 'Magnitsky Sanctions, Corruption, and Asset Recovery' in Robert Rotberg and Fen Hampson (eds), *Grand Corruption: Curbing Kleptocracy Globally* (Routledge 2024) 224.

47 Kmietek and others (n 9).

5 CONCLUSIONS

The research addressed the international legal frameworks related to the right of victims of the Syrian war to seek and obtain compensation for the material and moral damages resulting from the armed conflict. It reviewed the legal means available for victims to claim their rights, including international committees, and national, regional, and international courts, while highlighting the challenges that hinder the achievement of justice. The research demonstrated that international humanitarian law is not merely limited to the principle of preventing impunity for perpetrators; it places significant importance on the right of victims to compensation. However, existing legal tools are insufficient for practical and effective implementation, as the international legal system lacks a binding international mechanism that enables victims to directly claim their rights through international courts, thereby limiting their ability to achieve justice and recover their legitimate rights.

The research demonstrates that Iran bears legal liability for compensating Syrian war victims due to its political, financial, and military support for the Syrian regime, and that victims affected by violations committed by Iran or its affiliated forces have the right to seek financial compensation and other forms of reparations from Iran.

Furthermore, the research emphasises that the lack of effective mechanisms to hold Iran and other involved parties accountable contributes to the spread of impunity and increases the risk of repeated violations on the international stage, underscoring the need to develop more effective legal mechanisms to ensure justice and protect victims' rights.

In light of the identified legal gaps and institutional weaknesses that hinder the enforcement of victims' rights to compensation, the research recommends the development of an independent international authority to monitor the effective implementation of compensation decisions, in cooperation with national governments, international organisations and NGOs, to ensure transparent and non-discriminatory compensation to victims. Additionally, drawing on lessons from the United Nations Compensation Commission (UNCC) and guided by trust-based victim support, the research proposes the establishment of an international fund for Syrian victims. This fund would be financed through confiscated properties owned by Iranian entities and individuals identified as having assisted the Assad regime, and would operate in collaboration with regional and international institutions as well as civil society organisations to ensure equity, accountability, and non-repetition.

The research recommends the following:

- Signing and ratifying the Rome Statute to ensure the International Criminal Court has jurisdiction to investigate serious violations committed on Syrian territory during the war without the need to refer the case through the UN Security Council.

- Forming an independent international commission of inquiry tasked with gathering evidence and documenting the severe violations committed during the Syrian conflict, requiring the cooperation of all involved parties, to ensure accountability and effectively address victims' compensation claims.
- Establishing a competent international criminal court to hold those responsible for serious violations during the Syrian conflict accountable, with particular attention to crimes involving Iran and its militias, and to ensure that perpetrators provide adequate compensation to victims.
- Forming an international body specialised in monitoring the implementation of compensations in collaboration with governments and NGOs to ensure that compensation effectively and transparently reaches those impacted.
- Establishing a special international fund for Syrian victims, funded by the financial and real estate assets confiscated by Iranian entities and officials implicated in supporting the Syrian regime, with active participation from international and regional organisations and civil society in financing and managing the fund.

REFERENCES

1. Ahmadian H, 'Dignity, Wisdom and Expediency: How Ideational Factors Shape Iran's Foreign Policy' (2021) 56(4) *The International Spectator* 33. doi:10.1080/03932729.2021.1991118
2. Ajili H and Rouhi M, 'Iran's Military Strategy' (2019) 61(6) *Survival* 139. doi:10.1080/00396338.2019.1688575
3. Akbarzadeh S, Gourlay W and Ehteshami A, 'Iranian Proxies in the Syrian Conflict: Tehran's "Forward-Defence" in Action' (2023) 46(3) *Journal of Strategic Studies* 683. doi:10.1080/01402390.2021.2023014
4. Al-Abdeh M and Hauch L, 'Iran's Crimes in the Syrian Conflict: A Need for Documentation and Accountability' (2024) 154 *TOAEP Policy Brief Series* 1
5. Alameldeen A, Beuck E and Sagheer T, 'Violations of International Humanitarian Law: Threats to Noncombatants in the Syrian Crises, 2011–2020' (2021) 8(10) *The International Journal of Social Sciences and Humanities Invention* 6649. doi:10.18535/ijsshi/v8i10.06
6. Ali Z and others, 'Iran-Syria Relations During the Syrian Civil War (2010-2024)' (2025) 3(1) *Dialogue Social Science Review (DSSR)* 579
7. Almón E and Pérez-León-Acevedo JP, 'Reparation for Victims of Serious Violations of International Humanitarian Law: New Developments' (2022) 104(919) *International Review of the Red Cross* 1315. doi:10.1017/S1816383122000297

8. Bahgat G and Ehteshami A, *Defending Iran: From Revolutionary Guards to Ballistic Missiles* (CUP 2021)
9. Blanga Y, "If This Is the People's Will, the People Should Be Replaced": The Shi'ization of Syria During the Civil War, 2011-2018' (2022) 33(4) *Diplomacy & Statecraft* 794. doi:10.1080/09592296.2022.2143123
10. Calculi M, 'Self-Determination at All Costs: Explaining the Iran-Syria-Hezbollah Axis' (2020) 54(2) *Annals of the Fondazione Luigi Einaudi* 95. doi:10.26331/1118
11. Cengiz S, 'Assessing the Astana Peace Process for Syria: Actors, Approaches, and Differences' (2020) 7(2) *Contemporary Review of the Middle East* 200. doi:10.1177/2347798920901876
12. Cingöz M and others, 'Iran's Axis of Resistance through the Lens of Ontological Security' (2024) 45(13) *Third World Quarterly* 1963. doi:10.1080/01436597.2024.2398613
13. Cingöz M, Özev MH and İzol R, 'Saudi Arabia's Quest for Regional Hegemony on the Basis of Opposition to Iran' [2025] *Journal of Asian and African Studies*. doi:10.1177/00219096251313551
14. Crotoft R, 'War Torts' (2022) 97(4) *New York University Law Review* 1063. doi:10.2139/ssrn.4040075
15. Danko A and Rostas I, 'Setting the Roma Policy Agenda: The Role of International Organisations in Combating School Desegregation' in Rostas I (ed), *Ten Years After: A History of Roma School Desegregation in Central & Eastern Europe* (Central European UP 2012) 48
16. De Santis di Nicola F, 'Civil Actions for Damages Caused by War Crimes vs State Immunity from Jurisdiction and the Political Act Doctrine: ECtHR, ICJ and Italian Courts' (2017) 3(1) *International Comparative Jurisprudence* 45. doi:10.1016/j.icj.2017.02.002
17. Doumit J, 'Accountability in a Time of War: Universal Jurisdiction and the Strive for Justice in Syria' (2021) 52(2) *Georgetown Journal of International Law* 263.
18. Garcia A, Bokhari FY and Lisitsyna M, *Repairing from the Bench: From Finding Responsibility to Fashioning Judicial Redress* (ICTJ 2024)
19. Hajdin NR, 'Responsibility of Private Individuals for Complicity in a War of Aggression' (2022) 116(4) *American Journal of International Law* 788. doi:10.1017/ajil.2022.50
20. Hathaway OA, Mills MM and Poston TM, 'War Reparations: The Case for Countermeasures' (2024) 76(5) *Stanford Law Review* 971
21. Khater M, 'Humanitarian Assistance in Cases of Natural Disasters and the 2023 Earthquake in Turkey and Syria' (2023) 24(2) *Environment Conservation Journal* 423. doi:10.36953/ECJ.22842584

22. Khater M, 'Sexual Violence against Women during Armed Conflicts: Russian Aggression against Ukraine as an Example' (2022) 5(Spec) Access to Justice in Eastern Europe 102. doi:10.33327/AJEE-18-5.4-n000431
23. Khater M, 'The Legality of the Russian Military Operations against Ukraine from the Perspective of International Law' (2022) 5(3) Access to Justice in Eastern Europe 107. doi:10.33327/AJEE-18-5.3-a000315
24. Kmietek C and others, *The Far Reach of Justice: Holding the Islamic Republic of Iran Accountable in European Courts* (US Atlantic Council 2023)
25. Megret F, 'Nature of Obligations' in Moeckli D, Shah S and Sivakumaran S (eds), *International Human Rights Law* (3rd edn, OUP 2018) 86. doi:10.1093/he/9780198767237.003.0005
26. Ntahiraja B, 'The Legality and Scope of Universal Jurisdiction in Criminal Matters: Is there Any Question to Answer?' (2022) 91(3) Nordic Journal of International Law 390. doi:10.1163/15718107-91030005
27. O'Brien RC, 'The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission' (1998) 31(1) Cornell International Law Journal 1
28. Ożarowski R, 'Iran's Engagement in Syrian Conflict: Causes and Consequences' (2018) 11 Przegląd Strategiczny 201. doi:10.14746/ps.2018.1.14
29. Panova L and others, 'Expropriation and Other Forms of Reparation in Terms of Compensation for Damage Caused as a Result of War Crimes: International Legal Experience' (2023) 41(78) Cuestiones Políticas 723. doi:10.46398/cuestpol.4178.49
30. Rose C, 'Magnitsky Sanctions, Corruption, and Asset Recovery' in Rotberg R and Hampson F (eds), *Grand Corruption: Curbing Kleptocracy Globally* (Routledge 2024) 224
31. Sadjadpour K, *Reading Khamenei: The World View of Iran's Most Powerful Leader* (Carnegie Endowment for International Peace 2015)
32. Sönmez G, 'Foreign Shiite Fighters in the Syrian Civil War: Actors, Recruitment Strategies and Iran's Regional Role' (2022) 24(2) Güvenlik Çalışmaları Dergisi 158. doi:10.54627/gcd.1130746
33. Terrill A, 'Iran's Strategy for Saving Asad' (2015) 69(2) The Middle East Journal 222. doi:10.3751/69.2.13
34. Welsh JM, 'The Security Council's Role in Fulfilling the Responsibility to Protect' (2021) 35(2) Ethics & International Affairs 227. doi:10.1017/S089267942100023X
35. Zambrana-Tévar N, 'The International Responsibility of the Holy See for Human Rights Violations' (2021) 13(6) Religions 520. doi:10.3390/rel13060520

AUTHORS INFORMATION

Maya Khater*

PhD (Law), Associate Professor, Abu Dhabi University, Abu Dhabi, United Arab Emirates
maya.khater@adu.ac.ae

<https://orcid.org/0000-0002-5892-9176>

Corresponding author, responsible for conceptualization, methodology, data curation, formal analysis, supervision, project administration, validation, writing – original draft, writing – review & editing.

Yasser Alhowaish

PhD (Law), Full Professor, Damascus University, Damascus, Syria
y.hwaich@damsacusuniversity.edu.sy

<https://orcid.org/0009-0000-3461-7154>

Co-author, responsible for methodology, investigation, writing – original draft, validation, review & editing.

Yassine Chami

Ph.D. (Law), Assistant Professor, Abu Dhabi University, Abu Dhabi, United Arab Emirates
yassine.chami@adu.ac.ae

<https://orcid.org/0000-0003-0065-3936>

Co-author, responsible for research methodology, data collection, writing – original draft,.

Mohamed El Arbi Aoka

Ph.D. (Law), Assistant Professor, Université de Bretagne Sud, Lorient, France
mohamed-arbi-aoka@hotmail.fr

<https://orcid.org/0009-0009-6701-2827>

Co-author, responsible for resources, investigation, writing – original draft.

Hayssam Hammad

Ph.D. (Law), Assistant Professor, Abu Dhabi University, Abu Dhabi, United Arab Emirates
hayssam.hammad@adu.ac.ae

<https://orcid.org/0000-0002-3506-1650>

Co-author, responsible for resources, visualization, writing – review & editing.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Maya Khater, Yasser Alhwaish, Yassine Chami, Mohamed El Arbi Aoka and Hayssam Hammad. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Khater M, Alhwaish Y, Chami Y, El Arbi Aoka M and Hammad H, 'Legal Responsibility of Iran for Compensating Victims of the Syrian War' (2025) 8(4) Access to Justice in Eastern Europe 42-68 <<https://doi.org/10.33327/AJEE-18-8.4-a000126>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000126>

Summary: 1. Introduction. – 2. Methodology. – 3. Findings. – 3.1. *The Legal Framework of State's Responsibility for compensating Victims of International Humanitarian Law Violations.* – 3.2. *Manifestations of Iran's International Responsibility for Violations of International Humanitarian Law in the Syrian War.* – 3.3. *Legal Standards for Aiding and Abetting Responsibility.* – 4. Discussions. – 4.1. *International Committees.* – 4.2. *The United Nations Compensation Commission (UNCC): A Precedent for Institutional Accountability.* – 4.3. *International Courts.* – 4.3.1. *International Court of Justice.* – 4.3.2. *International Criminal Court.* – 4.3.3. *Special International Criminal Courts.* – 4.4. *Regional Human Rights Courts.* – 4.5. *National Courts.* – 5. Conclusions.

Keywords: *compensation, international humanitarian law, international liability, Iranian support for the Syrian regime, Syrian war.*

ADDITIONAL INFORMATION

This research was supported by Abu Dhabi University, United Arab Emirates. The researchers are grateful for the university's contribution in facilitating and funding this study.

DETAILS FOR PUBLICATION

Date of submission: 28 Jun 2025

Date of acceptance: 07 Aug 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with conditionally acceptance

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

AI technologies have only been used to enhance language clarity and grammar. No AI tools were used to generate ideas, structure arguments, analyze data, or produce conclusions.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЮРИДИЧНА ВІДПОВІДАЛЬНІСТЬ ІРАНУ ЗА ВІДШКОДУВАННЯ ШКОДИ ЖЕРТВАМ СИРІЙСЬКОЇ ВІЙНИ

Мая Хатер*, Яссер Альговайш, Яссин Чамі, Могамед Ель-Арбі Аока та Гайссам Хаммад

АНОТАЦІЯ

Вступ. З початку збройного конфлікту в 2011 році Сирія зазнала масштабних руйнувань, що призвело до нищення її інфраструктури та значних людських і матеріальних втрат, які продовжують впливати на мільйони мирних жителів і сьогодні. Іран відігравав важливу роль у політичній, фінансовій та логістичній підтримці сирійського режиму протягом усього конфлікту, тим самим потенційно продовжуючи воєнні дії та загострюючи гуманітарну ситуацію. У цій статті було розглянуто ступінь відповідальності Ірану перед жертвами сирійської війни згідно з міжнародним гуманітарним правом та міжнародним публічним правом, вивчено потенційні правові механізми притягнення Ірану до відповідальності, а також досліджено механізми захисту прав постраждалих осіб.

Методи. У статті використовується описово-аналітичний метод для документування порушень та вивчення відповідних міжнародно-правових текстів. У дослідженні також

використовується порівняльний метод для аналізу аналогічного міжнародного досвіду, такого як конфлікти в колишній Югославії та Руанді, з метою розробки реальних правових рішень, що можуть бути застосовані у сирійському контексті.

Результати та висновки. З огляду на результати дослідження було виявлено, що Іран та пов'язані з ним збройні угруповання несуть чітку юридичну відповідальність за порушення міжнародного гуманітарного права. У висновках наголошено на необхідності створити компетентний міжнародний кримінальний суд для розгляду злочинів, скоєних під час сирійського конфлікту, забезпечити притягнення до відповідальності винних, сприяти відшкодуванню шкоди жертвам та відновленню їхніх прав.

Ключові слова: відшкодування, міжнародне гуманітарне право, міжнародна відповідальність, підтримка Іраном сирійського режиму, сирійська війна.

ABSTRACT IN ARABIC

مقال بحثي

المسؤولية القانونية لإيران عن تعويض ضحايا الحرب السورية

مايا خاطر، ياسر الحويش، ياسين شامي، محمد العربي عكة، هيثم حماد

الملخص

منذ اندلاع النزاع المسلح في سوريا عام 2011، تعرّضت البلاد لدمار واسع النطاق، وانهيار في البنية التحتية، وخسائر بشرية ومادية جسيمة لا زالت تؤثر على ملايين المدنيين حتى اليوم. وقد لعبت إيران دوراً محورياً في دعم النظام السوري سياسياً ومالياً ولوجستياً، الأمر الذي ساهم في إطالة أمد الحرب وتفاقم الوضع الإنساني. تهدف هذه الدراسة إلى تقييم مدى مسؤولية إيران تجاه الضحايا السوريين وفقاً لقواعد القانون الدولي الإنساني والقانون الدولي العام، مع استعراض بعض الآليات القانونية الممكنة لمساءلة إيران وضمن حقوق المتضررين.

اعتمدت الدراسة على المنهج الوصفي-التحليلي لتوثيق الانتهاكات ودراسة النصوص القانونية الدولية ذات الصلة، بالإضافة إلى المنهج المقارن من خلال تحليل تجارب دولية مشابهة، مثل النزاعات في يوغسلافيا ورواندا، بغرض صياغة حلول قانونية قابلة للتطبيق على الحالة السورية.

تُظهر النتائج أن إيران والمليشيات التابعة لها تتحمل مسؤولية قانونية واضحة عن انتهاكات القانون الدولي الإنساني. كما تؤكد النتائج على ضرورة إنشاء محكمة جنائية دولية مختصة لمحاسبة مرتكبي الجرائم خلال النزاع السوري، وضمن إنصاف الضحايا واستعادة حقوقهم.

Research Article

FEATURES AND STATUS OF EXECUTION OF THE ECtHR JUDGMENTS IN UKRAINE IN TERMS OF THE EUROPEAN EXPERIENCE

Iryna Bondar, Liubov Maliarchuk and Oleksandr Snidevych*

ABSTRACT

Background. *The European Court of Human Rights is an authoritative international institution, and its judgments are crucial for the protection of the rights proclaimed by the Convention for the Protection of Human Rights and Fundamental Freedoms. This article aims to analyse the state of execution of ECtHR judgments in Ukraine, the role of state authorities in this process, and the challenges of their interaction in implementing the measures prescribed by the Court.*

Methods. *A general analysis of selected ECtHR judgments concerning the measures applied made it possible to differentiate between the types of measures, their specific features, and their impact on both the implementation of judgments and the prevention of similar applications in the future. Using statistical methods, the article assesses the extent to which Ukraine and other states have fulfilled their obligations under the Convention, forming the basis for the final conclusions.*

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-r000131>

Date of submission: 01 Nov 2023

Date of acceptance: 09 Sep 2025

Last Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Iryna Bondar, Liubov Maliarchuk and Oleksandr Snidevych

Results and Conclusions. *The article provides a comprehensive analysis of methods for implementing ECtHR judgments, including the payment of just satisfaction, the adoption of additional individual and general measures, and the procedures applied by competent authorities at different levels. This analysis enabled an evaluation of their variability, interrelation, and effectiveness in ensuring compliance with the Convention, and most importantly, in addressing the root causes of violations to reduce the recurrence of similar applications before the ECtHR. Based on this, the article proposes improving the procedure for executing ECtHR judgments in Ukraine as a respondent state.*

1 INTRODUCTION

In the context of a full-scale war, the rights proclaimed by the Convention for the Protection of Human Rights and Fundamental Freedoms¹ (hereinafter referred to as the "Convention") have a special value and significance. However, the level of human rights violations in the territory of Ukraine is exceptionally high. In this regard, the European Court of Human Rights (hereinafter referred to as the "ECtHR" or the "European Court") is the international institution capable of protecting these rights through the measures defined in its judgments.

Non-execution of judgments, particularly those of the ECtHR, has been recognised as a systemic problem in Ukraine. The non-execution or long-term execution of final judgments is influenced by various factors, including a lack of budgetary funds, inactivity of officials, deficiencies in legislation and shortcomings in its application. In general, however, this situation leads to a wide range of negative consequences, highlighting problems in the functioning of state authorities and their interactions.

Moreover, the problems that existed before the full-scale aggression against Ukraine have not disappeared; on the contrary, new obstacles have emerged for the execution of judgments, thereby worsening the situation with their implementation. The state of execution of judgments serves as an indicator of the functioning of the economy and the country's investment attractiveness, as well as its ability to fulfil its obligations at the international level. This is of great importance for the reconstruction of post-war Ukraine.

Therefore, the identification and analysis of the problems with the non-execution of court judgments, particularly those of the ECtHR, and the development of proposals to overcome them—especially in terms of individual and general measures determined by the ECtHR, their essence, content, and effectiveness—are both justified and relevant.

1 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) [1955] UNTS 213/222.

2 METHODOLOGY

What is the role of the ECtHR judgments in ensuring observance of the rights protected by the Convention in the territories of the States Parties after exhaustion of all national remedies, and what are the main grounds for filing complaints? What measures are applied by the international institution as a result of such consideration, and what are the features of their implementation? What is the status of execution of ECtHR judgments in terms of their effectiveness, and what are the ways to improve the situation, primarily to overcome the root causes of the applications to the ECtHR?

The purpose of this research is to evaluate the indicators of execution of ECtHR judgments and analyse the measures applied by the ECtHR and their implementation by the respondent state. The authors also aim to consider proposals for improving the procedural aspects of executing ECtHR judgments and the mechanisms of interaction among competent state authorities involved in their execution, with a view to guaranteeing the rights proclaimed by the Convention. In general, the focus is directed at ways of overcoming the causes of violations of the rights declared by the Convention and addressing their consequences through the measures proposed in ECtHR judgments, in order to minimise repeated applications to the ECtHR in similar cases.

In view of the statistics presented in the article, indicating a low level of execution of the ECtHR judgments, inconsistency in the actions of various authorities, lack of proper interaction between them, and most importantly, insufficient funding to ensure execution of the measures defined in ECtHR judgments, the authors determined that the following key research tasks should be set:

1. To highlight the common grounds for applying to the ECtHR under the Convention for the Protection of Human Rights and Fundamental Freedoms, and to identify new ones arising in connection with the armed aggression of the Russian Federation.²
2. To study the types of measures applied by the ECtHR as a result of case outcomes, their essence and purpose.
3. To examine the features and status of enforcement of the ECtHR judgments in Ukraine through the prism of foreign experience.
4. To develop proposals for optimising the procedure for execution of ECtHR judgments, particularly with a view to reducing the number of judgments delivered against Ukraine by means of peaceful settlement by the parties.

Research sources and methods. The article draws on ECtHR judgments to establish and analyse the measures that may be applied and proposed to the state in response to violations,

2 In this article the words "Russian Federation", "Russian", etc. are written in lowercase under the author's decision and should not be considered as a spelling error.

to identify the most common measures, and to provide their characteristics using specific examples, particularly their consideration by Ukrainian courts in law enforcement practice. The analysis of the application procedure for various measures and the role of state authorities is carried out with reference to specific national legislation, relevant Recommendations of the Committee of Ministers, international acts declaring fundamental human rights and guaranteeing their protection, as well as the mechanisms for their restoration in case of violation through the ECtHR. Evaluation of the status of execution of the judgments is based on reporting and statistical materials of the ECtHR.

The study of foreign experience and the development of conclusions on improving the execution of ECtHR judgments are informed by doctrinal works of scholars, as well as articles in periodicals by legal practitioners and officials of state authorities. The earlier work of K. Pilkov, *Reopening cases following judgments of the European Court of Human Rights: Room for a European Consensus?*³ formed the basis of the evaluation of the significance of the ECtHR judgments concerning internal application of the Convention by the State Party and the restoration of the rights enshrined therein, particularly through review of the judgments by national courts. The analysis of the legal nature of ECtHR decisions, through the prism of violated rights declared by the Convention and their impact on civil proceedings in Ukraine with respect to the realisation of the right to a fair trial was also facilitated by V. Komarov and T. Tsvina's article, *The impact of the ECHR and the case law of the ECtHR on civil procedure in Ukraine*.⁴

In conducting this research, a comparative method was employed, along with dialectical, systemic-structural, and normative-logical methods of scientific knowledge, as well as statistical and analytical methods. The method of analysing individual ECtHR judgments made it possible to generalise the types of measures applied by the Court, to characterise them, and to evaluate their effectiveness. A comparison of the procedure and level of execution of ECtHR judgments in Ukraine with the relevant provisions in individual countries allowed the authors to develop proposals for improving and optimising the work of state authorities at various levels with respect to the implementation of ECtHR judgments.

3 Kostiantyn Pilkov, 'Reopening Cases Following Judgments of the European Court of Human Rights: Room for a European Consensus?' (2022) 5(4) Access to Justice in Eastern Europe 7. doi.org:10.33327/AJEE-18-5.4-a000415.

4 Vyacheslav Komarov and Tetiana Tsvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 79. doi:10.33327/AJEE-18-4.1-a000047.

3 THE MAIN GROUNDS FOR APPLYING TO THE ECtHR IN TODAY'S CONDITIONS IN UKRAINE

The Constitution of Ukraine,⁵ Part 5, Article 55, establishes the right for every individual to appeal for the protection of his/her rights and freedoms to relevant international judicial institutions of which Ukraine is a member. In 1997, Ukraine ratified the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and its protocols. Accordingly, under the principle of subsidiarity, Ukraine bears responsibility for protecting the rights and freedoms defined therein. The ECtHR was established to ensure that the states parties fulfil these obligations, and it only hears claims associated with violations of the rights and freedoms guaranteed by the Convention. Accordingly, every individual and legal entity may apply to the ECtHR if a state party to the Convention violates one or more of these stipulated rights.

During a full-scale war, the rights enshrined in the Convention have a special value and importance, as they must be protected more than ever. In the current situation, the Convention remains operational; therefore, the contracting parties are still obligated to guarantee everyone under their jurisdiction the rights and freedoms defined in the Convention. Unfortunately, the scale of violations of fundamental human rights in Ukraine is extremely high. In this context, the ECtHR remains the international institution with effective protection mechanisms, which are urgently needed today.

Following the termination of the Russian Federation's membership in the Council of Europe, and in accordance with Article 58 of the Convention, Russia ceased to be a party to the Convention. However, such denunciation does not relieve a Contracting Party of its responsibility for violations that occurred before the withdrawal took effect. On 22 March 2022, the ECtHR adopted a resolution⁶ defining the terms and consequences of Russia's withdrawal. Under this resolution, the Russian Federation ceased to be a party to the Convention as of 16 September 2022, and the ECtHR may only examine complaints against Russia in relation to violations that occurred before this date.

With the onset of Russian aggression across Ukraine, victims had the right to apply to the ECtHR against Russia to seek moral and material compensation and to hold the aggressor accountable for violations protected under the Convention. Due to the limited timeframe before Russia's withdrawal from the ECtHR, an electronic system was developed to simplify the process for victims. The system provided step-by-step guidance, required fields to be filled in, and informed applicants about the necessary information to enter, and examples

5 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>> accessed 21 August 2024.

6 Resolution of the European Court of Human Rights on the Consequences of the Cessation of membership of the Russian Federation to the Council of Europe in Light of Article 58 of the European Convention on Human Rights (22 March 2022) <https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf> accessed 21 August 2024.

of admissible grounds for complaints, such as the death of a relative, a destroyed home, injury, illegal deprivation of liberty, torture, rape or enforced disappearance. For comparison, in 2023 alone, 130 judgments were issued against Ukraine, including: 6 for lack of effective investigation (Article 2), 40 for inhuman or degrading treatment (Article 3), 10 for lack of effective investigation (Article 3), 77 for right to liberty and security (Article 5), 12 for right to a fair trial (Article 6), 38 for excessive length of proceedings (Article 6), 13 for violations of the right to respect for private and family life (Article 8), 56 for denial of the right to an effective remedy (Article 13), 7 for the violations of the protection of property (Protocol 1, Article 1), among others.⁷

Thousands of Ukrainians have filed applications with the ECtHR, and the sheer volume of cases from Russian aggression in Ukraine poses a significant challenge for the Court. Loss of life, health, property, housing, torture and other ill-treatment of a person, capture, restriction of the right to movement and violation of other fundamental rights become grounds for applying to the ECtHR during an armed conflict. On 23 June 2022, the ECtHR accepted Ukraine's complaint against Russia, following four earlier submissions and approximately 8,500 individual complaints. This application concerns serious violations of human rights committed by the Russian Federation during military operations on the territory of Ukraine, including the killing, injury, detention, and disappearance of thousands of civilians, the destruction of hundreds of thousands of properties, and the displacement of millions of people.⁸ According to official statistics, by the end of 2024, the ECtHR had 61,250 pending applications, of which 36.7% were against Turkey, 12.9% against Russia, 12.6% against Ukraine, 6.2% against Romania, and 4.3% against Greece.⁹

Before the full-scale Russian invasion, Ukrainian citizens typically turned to the ECtHR for issues such as unfair trials, non-execution of court judgments, excessive duration of proceedings in civil and criminal cases, lack of legal protection, inhumane treatment of prisoners, conditions of detention, violation of the right to freedom of peaceful possession of property, etc. The most common ground for applying to the ECtHR was the violation of Article 6 of the Convention (right to a fair trial) in connection with the persistent non-execution of domestic court judgments in Ukraine, which the Court recognised as a systemic problem in *Zhovner v. Ukraine*,¹⁰ *Yuriy Mykolayovych Ivanov v. Ukraine*,¹¹ and

7 ECtHR, 'Violation by Article & by State - 2023' (*European Court of Human Rights*, 2024) <<https://www.echr.coe.int/d/stats-violation-2023-eng>> accessed 20 December 2024.

8 Tetiana Voitiuk, 'The European Court of Human Rights Will Consider Ukraine's Lawsuit Against Russia' (*Social News*, 29 June 2022) <<https://suspilne.media/255247-evropejskij-sud-z-prav-ludini-rozglane-pozov-ukraini-proti-rosii/>> accessed 27 August 2024.

9 ECtHR, 'Pending Applications Allocated to a Judicial Formation Requête Pendantes Devant Une Formation Judiciaire' (*European Court of Human Rights*, 30 November 2024) <<https://www.echr.coe.int/documents/d/echr/stats-pending-month-2024-bil>> accessed 20 December 2024.

10 *Zhovner v Ukraine* App no 56848/00 (ECtHR, 29 June 2004) <<https://hudoc.echr.coe.int/eng?i=001-66417>> accessed 30 August 2024.

11 *Yuriy Mykolaiovych Ivanov v Ukraine* App no 40450/04 (ECtHR, 15 October 2009) <<https://hudoc.echr.coe.int/eng?i=001-95032>> accessed 30 August 2024.

Burmych and Others v. Ukraine,¹² requiring an urgent settlement. These systemic issues have not disappeared with the war; rather, their resolution has been postponed. Accordingly, the identification and analysis of the non-execution of court judgments, including those of the ECtHR, and the development of proposals to address this issue, both at the individual and general level, remain highly relevant today.

4 MEASURES ADOPTED BY THE ECtHR FOLLOWING THE DECISION AND FEATURES OF THEIR APPLICATION IN UKRAINE

Applying to the ECtHR not only provides a real opportunity for individuals to protect their violated rights but also serves as a broader mechanism for strengthening and ensuring the protection of citizens' rights at the national level. The judgment of the ECtHR highlights a problem that exists in a state party to the Convention, which this state has not only to solve and eliminate negative consequences, but also to prevent similar possible situations. A large number of cases against a state party to the Convention is an alarming signal, pointing to problems in the work of authorities and their interaction. An important role is also played by the pilot judgments of the ECtHR, which are targeted to address systemic problems at the national level. The pilot judgment procedure was introduced as a response to the increase in applications to the ECtHR on the same issue to ensure the operation of the Court and eliminate the shortcomings causing violations of the rights and consequences of such violations.

When issuing a pilot judgment, the ECtHR not only states a violation of the Convention and points out the systemic nature of the problem,¹³ but also provides the state party with instructions on the type of measures necessary to resolve it at the national level. Also, in the operative part, the Court may envisage the period during which the specified measures must be taken.

Since the non-execution of court judgments was recognised by the ECtHR as a systemic problem as early as 2009, the pilot judgment in the case *Yuriy Mykolayovych Ivanov v. Ukraine*¹⁴ was adopted.

As the respondent state failed to resolve the problem at the national level, the ECtHR, in the judgment, in *Burmych and Others v. Ukraine*,¹⁵ revised its approach to handling this

12 *Burmych and Others v Ukraine* App no 46852/13 (ECtHR, 12 October 2017) <<https://hudoc.echr.coe.int/hudoc?i=001-178082>> accessed 20 December 2024.

13 Marharyta Kinakh, 'Execution of the ECtHR Judgments is Not Just a Legal Obligation of the State, But also a Tool for Fulfilling Human Rights' *Yurydychna Hazeta* (Kyiv, 22 November 2021) <<https://yur-gazeta.com/golovna/vikonannya-rishen-espl-ne-prosto-pravove-zobov'yazannya-derzhavi-ale-y-instrument-napovnennya-prav-l.html>> accessed 29 August 2024.

14 *Yuriy Mykolaiovych Ivanov v Ukraine* (n 11).

15 *Burmych and others v Ukraine* (n 12).

type of application. The Court consolidated five submitted applications with an additional 12,143 applications listed in annexes I and II to the judgment, noting that they should be considered in accordance with the obligations arising from the pilot judgment in *Yuriy Mykolayovych Ivanov v. Ukraine*. These statements were removed from the register of cases on the grounds that further consideration was not justified and were transferred to the Committee of Ministers of the Council of Europe for action within general measures to implement the pilot judgment. This included providing compensation for non-execution or delayed execution of national court judgments, as well as payment of debts based on such judgments. The Grand Chamber noted that continuing to examine the cases *individually* would not achieve the objectives of the Convention, and, therefore, further consideration was unjustified.

Once a judgment becomes final, the individual shall acquire the status of a creditor and may demand its execution. The Supreme Court holds that a final judgment of the ECtHR is binding on Ukraine and must be implemented as specified, which may include either general measures or individual compensation in favour of a specific person.¹⁶ However, due to the new approach of the ECtHR in *Burmych and Others v. Ukraine*, the Supreme Court of Ukraine concluded that measures of an individual nature could not be applied under this judgment, as Ukraine was obliged to take measures of a general nature.

According to the ECtHR, the essence of a pilot judgment is that the respondent state must not only eliminate the root cause of the violation but also provide a means of compensation for damage already caused, not only to the individual applicant(s) in the "pilot" case but also to all other victims of a similar violation. The logic is that, as part of the general measures required of the respondent state, all other victims must be included (para. 161 *Burmych and Others v. Ukraine*).

In practice, the defendant state must establish a legal remedy for all victims of a systemic violation; the responsibility for providing compensation rests with national authorities.

The ECtHR's purpose in issuing a pilot judgment is to identify a systemic problem at the national level and facilitate its resolution, with the award of satisfaction serving as an additional component. The primary task of the States Parties is to comply with their obligations under the Convention and its protocols. Accordingly, implementation of court judgments, including those of the ECHR, is a key mechanism for ensuring human rights and fundamental freedoms.

Thus, payment of monetary compensation for the violation of the applicant's rights and its consequences is an important, but not the only, means of implementing an ECtHR judgment. In some cases, the Court may determine that recognition of a Convention violation alone constitutes sufficient just satisfaction, making financial compensation

16 Case No 823/1181/18 (Cassation Administrative Court Supreme Court of Ukraine, 14 January 2021) <<https://reyestr.court.gov.ua/Review/94129824>> accessed 30 August 2024.

unnecessary. For reasons of equity, the Court may also award compensation in an amount less than the value of the actual damage incurred, or even provide no compensation at all.¹⁷

In addition to this, depending on the circumstances of the case, the defendant state may be obliged to take further measures. These can include direct action to rectify the situation for the claimant and general measures aimed at preventing similar violations against other individuals in the future.

Given the above, ECtHR judgments are intended to eliminate systemic deficiencies underlying the violation established by the Court, ensure the state's compliance with the provisions of the Convention, and create prerequisites for reducing the number of applications to the ECtHR against Ukraine.

To restore the rights of the creditor, in addition to payment of compensation, the defendant state may be obliged to take measures of both an individual and a general nature. The Law provides for a list of such additional measures, and other measures may also be applied as provided for in the ECtHR judgment.

Moreover, just satisfaction is not consistently awarded to the aggrieved party; in some cases, the judgment "satisfaction of claims on the merits" shall be applied. In such a case, recognition of the right as violated and providing the opportunity to restore it at the national level is considered to be just.¹⁸

However, there are negative examples of implementation. Even when the ECtHR judgment prescribed re-examination of the case by a national court, applicants were sometimes denied such a review and forced to reapply to the ECtHR to establish a violation of the right to a fair trial a second time, which was in turn assessed as "denial of justice" (*Bochan v. Ukraine* No. 2, *Shabelnyk v. Ukraine* No. 2).¹⁹ Only after these duplicated ECtHR judgments were the national courts' previous judgments annulled, and cases sent back to the court of first instance.²⁰ Ideally, the response to the applicant should have been observed in the first ECtHR judgment, due to its binding nature and the specifics of the established method of implementation.

17 ECtHR, 'Just Satisfaction Claims: Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court of 28 March 2007 (amended 9 June 2022) <https://www.echr.coe.int/documents/d/echr/pd_satisfaction_claims_eng> accessed 30 August 2024.

18 'The Procedure for Execution of Judgments of the European Court of Human Rights in Ukraine with Regard to Payment of Just Satisfaction' (*I Law*, 12 June 2014) <<https://www.i-law.kiev.ua/%D0%BF%D1%80%D0%BE%D1%86%D0%B5%D0%B4%D1%83%D1%80%D0%B0-%D0%B2%D0%B8%D0%BA%D0%BE%D0%BD%D0%B0%D0%BD%D0%BD%D1%8F-%D1%80%D1%96%D1%88%D0%B5%D0%BD%D1%8C-%D1%94%D0%B2%D1%80%D0%BE%D0%BF%D0%B5%D0%B9%D1%81/>>> accessed 30 August 2024.

19 *Bochan v Ukraine* No 2 App no 22251/08 (ECtHR, 5 February 2015) <<https://hudoc.echr.coe.int/fre?i=001-152331>> accessed 30 August 2024; *Shabelnyk v Ukraine* No 2 App no 15685/11 (ECtHR, 1 June 2017) <<https://hudoc.echr.coe.int/fre?i=001-173775>> accessed 30 August 2024.

20 Case No 6-1430ts15 (Supreme Court, 22 February 2016) <<https://reyestr.court.gov.ua/Review/56786343>> accessed 30 August 2024.

The Committee of Ministers of the Council of Europe recommends that member states “bear in mind that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving restitutio in integrum.”²¹ In Ukraine, Supreme Court judges emphasise the importance of reviewing national court judgments following ECtHR decisions to restore the applicant's rights.²²

At the same time, not all categories of cases allow for review of judgments. In particular, those related to the excessive duration of court proceedings or the absence of effective legal protection in national legislation cannot serve as a basis for review, because such a review would not restore the rights that have been violated. An example of an effective way to restore violated rights through case review is judgments in which the ECtHR establishes violations of the right to a fair trial by an independent and impartial court, or breaches of the right to property protection.²³

In ECtHR practice, other individual measures may include reinstatement, measures to mitigate negative impacts, provision of certain information by competent authorities, destruction of unlawfully obtained data, resumption of proceedings, annulment of judgments (e.g., deportation cases), and other corrective actions.

However, in *Burmych and Others v. Ukraine*, the ECtHR did not specify the amount of compensation for each applicant, as it is generally considered impossible to apply measures of an individual nature under this judgment; Ukraine was obliged to take measures of a general nature.

Implementation of general measures begins with quarterly submissions by the Commissioner for Human Rights, reviewing the regulatory framework and circumstances causing violations, and providing proposals to eliminate relevant regulatory deficiencies. The essence of these measures is to address legislative problems that led to violations recognised by the ECtHR. As noted, “in cases where the violation is the result of problems with specific laws or the lack of proper legal regulation, the state must eliminate problems in the internal legal order in order to implement the judgment, that is, make changes to existing normative legal acts or adopt relevant laws.”²⁴

21 Recommendation No R (2000) 2 of the Committee of Ministers to member states On the Re-examination or Reopening of Certain Cases at Domestic Level Following Judgements of the European Court of Human Rights (19 January 2000) <<https://rm.coe.int/16805e2f06>> accessed 30 August 2024.

22 Pilkov (n 3).

23 Iryna Kobets, ‘Execution of the ECtHR Judgments: Application of the Measures of an Individual Nature’ *Yurydychna Hazeta* (Kyiv, 06 December 2017) <<https://yur-gazeta.com/publications/practice/inshe/vikonannya-rishen-espl-zastosuvannya-zahodiv-individualnogo-harakteru.html>> accessed 10 September 2024; Komarov and Tsuvina (n 4).

24 Viktoriia V Tisnohuz, ‘Execution of Judgments of the European Court of Human Rights in Ukraine’ (*Ministry of Justice*, 2024) <https://minjust.gov.ua/m/str_4905> accessed 10 September 2024.

Unlike monetary or measures of an individual nature, the ECtHR does not specify what special measures must be taken to prevent further violations, as states have discretion under the Convention.²⁵ The Committee of Ministers similarly notes that “it is for the competent authorities of the respondent state to decide what measures are most appropriate to achieve restitutio in integrum, taking into account the means available under the national legal system.”²⁶ The ECtHR may suggest legislative improvements, leaving the specifics to the state based on the legal field in which the violation occurred and the state of its regulation. Deadlines for implementing such measures may also be indicated.

For example, the ECtHR's pilot judgment in *Yuriy Mykolayovych Ivanov v. Ukraine* envisaged a provision for Ukraine to implement effective legal remedies by amending procedural legislation to eliminate the systemic problem of excessive executive proceedings. Accordingly, the Law of Ukraine on State Guarantees of the Enforcement of Judgments was adopted, introducing an extra-procedural order for automatic calculation of compensation for untimely execution of court judgments and requiring certain actions concerning property owned by governmental authorities, state-owned enterprises, or entities whose property may not be forcibly sold under law. However, the ECtHR found the law ineffective in protecting the right to timely enforcement, which led to the second judgment in *Burmych and Others v. Ukraine*.

Non-execution or slow execution of judgments is a problem faced by many countries, including Albania, Armenia, Georgia, Greece, Italy, Montenegro, North Macedonia, Romania, and Serbia. Different strategies have been employed to address this issue.

For example, Albania has implemented a strategy and action plan aimed at providing transparent settlement of overdue state obligations and maintaining financial discipline. Currently, the Ministry of Finance and Economy controls the State obligations payments. Moreover, the privatisation of the bailiff service, the compulsory cooperation between the General Police and the Private Bailiff Service in enforcement executive documents, and the development of an electronic management system of bailiffs have contributed to improving the effectiveness of judicial decision enforcement in Albania.²⁷

In Armenia, if funds are insufficient to cover state debts, fixed amounts are allocated from the budget to the Compulsory Enforcement Service. Furthermore, the electronic judicial management system and the Compulsory Enforcement Service are linked, making sure that the Compulsory Enforcement Service receives a copy of final judicial judgments.²⁸

25 *ibid.*

26 Recommendation No R (2000) 2 (n 21).

27 Department for the Execution of Judgments of the ECtHR, 'Albania: Execution of the European Court of Human Rights' Judgments Main Achievements in Member States' (2024) <<https://rm.coe.int/ma-albania-eng/1680a18676>> accessed 17 February 2025.

28 Department for the Execution of Judgments of the ECtHR, 'Armenia: Execution of the European Court of Human Rights' Judgments Main Achievements in Member States' (2024) <<https://rm.coe.int/ma-armenia-eng/1680a1869c>> accessed 17 February 2025.

In Georgie, the enforcement system is also being upgraded through the approval of a special budget, which allows the state to pay off old judgment debts, as well as legislative changes, including the establishment of a special Department for enforcement in cases where the debtor is the state. This department coordinates with the Finance Ministry to ensure payments of amounts owed by the Government Fund to creditors. Compensation for damages and loss of earnings is also provided for under the Code of Civil Procedure.²⁹

Greece has also introduced amendments to the procedure for compulsory enforcement of judgments against the State, local authorities, and public legal entities. The State's civil liability for damages caused by the actions or omissions of governmental authorities has been increased, while the disciplinary and civil liability of public officials has been strengthened. Complaints concerning non-execution are now referred to "compliance committees" set up in each administrative court.³⁰

Therefore, the main areas of overcoming problems of non-execution of judgments include: fostering cooperation between various state authorities in the execution of decisions, improving electronic management systems, allocating budgetary funds to settle old debts, strengthening state liability for damages caused by governmental actions or inaction, and enhancing disciplinary and civil liability of public officials.

5 FEATURES AND STATUS OF EXECUTION OF THE ECtHR JUDGEMENTS IN UKRAINE THROUGH THE PRISM OF FOREIGN EXPERIENCE

To implement the provisions of Article 46 of the Convention regarding Ukraine's obligation to enforce final judgments of the ECtHR in cases where it is a party, the Law of Ukraine on the Execution of Judgments and Application of the Case Law of the European Court of Human Rights³¹ was adopted (hereinafter referred to as the "Law") at the national level in 2006.

Pursuant to this Law, execution of ECtHR judgments shall be carried out by means of:

- payments to the creditor of compensation awarded by the European Court (just satisfaction);
- taking additional measures of an individual nature;
- taking measures of a general nature.

29 Department for the Execution of Judgments of the ECtHR, 'Georgia: Execution of the European Court of Human Rights' Judgments Main Achievements in Member States' (2024) <<https://rm.coe.int/ma-georgia-eng/1680a186a9>> accessed 17 February 2025.

30 Department for the Execution of Judgments of the ECtHR, 'Greece: Execution of the European Court of Human Rights' Judgments Main Achievements in Member States' (2024) <<https://rm.coe.int/ma-greece-eng/1680a186ab>> accessed 17 February 2025.

31 Law of Ukraine No 3477-IV 'On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights' (23 February 2006) [2006] Bulletin of the Verkhovna Rada of Ukraine 30/260 <<https://zakon.rada.gov.ua/laws/show/3477-15#Text>> accessed 11 September 2024.

At the doctrinal level, the execution of ECtHR judgments includes the payment of compensation and the adoption of additional measures of an individual nature by the state aimed at eliminating the specific violation defined in the Court's judgment, as well as general measures aimed at preventing similar applications against Ukraine in the future.³²

Typically, the primary obligation of the state is to pay fair monetary compensation to the applicant. Pursuant to Article 41 of the Convention, the ECtHR may require the state to compensate the applicant for material and moral damage, as well as court costs, with amounts clearly specified in the judgment.

According to Article 3 of the Law of Ukraine on Executive Proceedings,³³ an ECtHR judgment is considered an executive document and thus serves as the direct basis for initiating executive proceedings, which shall be solely entrusted to the bodies of the state executive service. That is, the European Court of Human Rights, unlike national courts, should not issue an executive document for the adopted judgment, because the judgment itself has dual legal status, serving as a judgment and an executive document. In cases against Ukraine, an executive document consists of the original text and a translation of the operative part of the final judgment entered into the Unified State Register of Executive Documents of ECtHR cases, though this register is not yet functional.

Contrary to the generally accepted dispositive principles of presenting an executive document, the creditor is not personally concerned with the issue of initiating execution of the ECtHR judgment; failure to submit a compensation request shall not be an obstacle to implementation of such a judgment (Part 2 Article 7 of the Law). This approach aligns with the ECtHR's position that the individual in whose favour the court is rendered is not obliged to commence execution, as the state authority, acting as the defendant, must be adequately informed and may take all necessary measures to execute the judgment or transfer it to another competent state authority.³⁴

Therefore, in implementing ECtHR judgments, the state, in accordance with the provisions of the Law, independently initiates execution in favour of the creditor. The nature of ECtHR judgments and the state's obligation to execute them independently of the creditor's will determine the specificity of their execution.

The procedure for executing ECtHR judgments, particularly payment of compensation, is governed by the Law on the Execution of Judgements and Application of the Case Law

32 Olena O Halus, 'Peculiarities of Execution of Judgments of the European Court of Human Rights' (Problems of the Theory and Practice of Execution of Judgments of Courts and other Authorities: IV international scientific and practical conference, Khmelnytskyi, 18-19 October 2013) 66.

33 Law of Ukraine No 1404-VIII 'On Executive Proceedings' (2 June 2016) [2016] Bulletin of the Verkhovna Rada of Ukraine 30/542 <<https://zakon.rada.gov.ua/laws/show/1404-19#Text>> accessed 11 September 2024.

34 *Metaxas v Greece* App No 8415/02 (ECtHR, 27 May 2004) <<https://hudoc.echr.coe.int/rus?i=001-66338>> accessed 11 September 2024.

of the ECtHR, not by the Law of Ukraine on Executive Proceedings. Within ten days of receiving notice of the judgment's final acquisition of status, the representative body (the Secretariat of the Commissioner for Human Rights) sends the original text and translation of the operative part of the judgment to the enforcement body. The Government Commissioner, as approved by the Cabinet of Ministers of Ukraine, ensures Ukraine's representation before the ECtHR, monitors the progression of execution, and informs the Committee of Ministers of the Council of Europe about the progress of the Court's judgments.³⁵

Although the Law provides for enforcement bodies, they perform primarily an intermediary role, which has drawn criticism at the scientific level. Experts argue that enforcement bodies should not have direct powers to execute ECtHR judgments and that this responsibility should be carried out exclusively by a representative body, such as the State Treasury Service of Ukraine.³⁶ However, the state executive service plays a substantive role: it oversees execution, ensures distribution of compensation, verifies compliance with all operative requirements of the judgment, and has the authority to terminate the proceedings.

Given the complexity and multi-subject nature of the ECtHR judgment execution, the process still needs to be optimised. In particular, one of the best options is to empower the executive service to forward the judgment for commencement of executive proceedings and issue payment instructions directly to the State Treasury Service of Ukraine, using the functionality of ASVP (Automated System of Executive Proceedings) in electronic form.

Some scholars have proposed further improving execution by reducing the total duration of executive proceedings from three to one month.³⁷ However, due to the multi-vector nature of the directions of execution and the complexity of taking the required measures necessary, the time needed to fully implement ECtHR-mandated actions, and the potential lack of allocated budget funds, such a short time may be infeasible. Attempting to enforce judgments in one month could complicate the situation, increase penalties for delays, and worsen Ukraine's existing challenges.

In general, executive proceedings have shifted away from strict timing regulations, introducing a principle of reasonableness. However, given the importance of ECtHR judgments, their multi-stage execution, the time required to apply all individual and general

35 Resolution of the Cabinet of Ministers of Ukraine No 784 'On Measures to Implement the Law of Ukraine on Execution of Judgments and Application of Practice of the European Court of Human Rights' (31 May 2006) [2006] Official Gazette of Ukraine 22/138 <<https://zakon.rada.gov.ua/laws/show/784-2006-%D0%BF#Text>> accessed 12 September 2024.

36 Svitlana Ya Fursa and Ye I Fursa, 'Judgments of the European Court of Human Rights: Topical Issues of Their Execution' (Reform of Executive Proceeding: Present Days and Prospects: International Scientific and Practical Conference, Kyiv, 30 March 2018) 127.

37 S Asiryan, Y Milonenko and V Prilipko, 'Problems of Execution of Echr Decisions in Ukraine and ways to Overcome them on the Example of the Federative Republic of Germany' (2021) 63 *Uzhhorod National University Herald. Series: Law* 307. doi:10.24144/2307-3322.2021.63.54.

measures, and the periodic reporting to the Committee of Ministers of the Council of Europe, a three-month execution period is considered acceptable. This timeframe is also justified by the presence of sanctions for delays, which serve as incentives. Nevertheless, the execution speed may still be improved through the proposed electronic interaction between the state executive service and the State Treasury Service. The three-month period minimises penalties in the absence of allocated funds for the execution of ECtHR judgments or the duration of other measures of an individual or general nature.

A European Court is considered enforced only after the Committee of Ministers of the Council of Europe adopts the relevant resolution, based on the state's report that all individual and general measures have been taken to execute the relevant judgment.³⁸

At the end of 2024, the total number of cases transmitted for supervision in Ukraine was 2,249, and only 63% of them were closed. In comparison, Turkey had 4,482 cases transmitted, of which 90% are already closed.³⁹ In Ukraine, some cases have remained pending for more than five years or even more than ten years.⁴⁰ Such statistics significantly impact the country's reputation, as one of the primary factors in ensuring the rights and fundamental freedoms of a person is the execution of ECtHR judgments.⁴¹ Execution is also necessary in the context of Ukraine's international commitments to the Council of Europe, as well as the International Monetary Fund and the European Union as a whole. Developing an effective mechanism for execution and proper allocation of resources is, therefore, critical.

Since the mid-2000s, budget funding for programs related to Ukraine's execution of ECtHR judgments has increased significantly; however, the level of funding varies substantially annually. For example, under the 2020 Law of Ukraine on the State Budget of Ukraine, the budget program "Payments for execution of judgments of foreign jurisdictions adopted as a result of consideration of cases against Ukraine," which includes, among other things, expenses for ECtHR judgments, was allocated UAH 42,377,400.00.⁴² By contrast, a similar

38 'Information about Execution of Judgments of the European Court of Human Rights in Cases Against Ukraine' (*Ministry of Justice*, 2024) <<https://minjust.gov.ua/m/informatsiya-schodo-vikonannya-rishen-evropeyskogo-sudu-z-prav-lyudini-u-spravah-proti-ukraini>> accessed 12 September 2024.

39 'Ukraine and the Council of Europe' (*Council of Europe, Department for the Execution of Judgements of the ECtHR*, 2024) <<https://www.coe.int/en/web/execution/ukraine>> accessed 19 December 2024.

40 Natalka Mamchenko, 'Ukraine Remains in Default of Execution of the ECtHR Judgments' *Sudovo-Yurydychna Hazeta* (Kyiv, 22 December 2021) <<https://sud.ua/ru/news/publication/224175-ukrayina-zalishayetsya-liderom-z-nevikonanikh-rishen-yespl>> accessed 13 September 2024.

41 Ministry of Justice, 'Ivan Lishchyna: Implementation of ECtHR Decisions is a Determining Factor in Ensuring Human Rights and Fundamental Freedoms' (*Government Portal*, 2 September 2021) <<https://www.kmu.gov.ua/news/ivan-lishchina-vikonannya-rishen-yespl-viznachalnij-chinnik-zabezpechennya-prav-ta-osnovopolozhnykh-svobod-lyudini>> accessed 14 September 2024.

42 Law of Ukraine No 294-IX 'On the State Budget of Ukraine for 2020' (14 November 2019) [2020] Bulletin of the Verkhovna Rada of Ukraine 5/31 <<https://zakon.rada.gov.ua/laws/show/294-20#Text>> accessed 11 September 2024.

program in the 2021 budget provided UAH 582,377,400.00—more than ten times the previous year's funding.⁴³

Long-term non-execution of court judgments is often caused by the absence or lack of the funds necessary for payment. The ECtHR has emphasised, however, that a state's inability to enforce a judgment due to lack of sufficient budget funds cannot serve as an excuse for non-execution.⁴⁴ Timely execution depends not only on the proper financing for debt repayment under court judgments but also on the coordinated action of competent authorities at all levels, particularly the development and implementation of measures of both individual and general nature.

In this regard, it is worth noting Germany's experience. As one of the most developed and influential countries in the European Union, Germany ranks among the top three countries in terms of the quality and quantity of decisions implemented by the ECtHR. Thus, the implementation of general measures in Germany is characterised by its comprehensiveness and timeliness. The implementation of these measures is clearly distributed according to the content and the competence of the relevant authorities.

The successful implementation of ECtHR decisions demonstrates the effectiveness of this practice and may therefore be helpful for Ukraine to adopt in the context of the above conclusion regarding the need to involve state authorities in the implementation of ECtHR decisions, organise their interaction, and assign specific functions based on the type of measures taken. Furthermore, Germany integrates ECtHR legal positions into national legislation, with federal courts playing a crucial role. Their duties include the interpretation and application of the practice of the ECtHR in the administration of justice, provided that the latter does not lead to the restriction of the rights and freedoms of citizens guaranteed by the Federal Constitution. This alignment ensures consistency between ECtHR norms and national law, guaranteeing compliance with conventional norms in the Federal Republic of Germany.⁴⁵

Judgments of the ECtHR in most European states are acts of direct effect, meaning they are communicated to the courts and relevant authorities whose actions led to the violation. Such measures are sufficient to prevent further violations of a similar nature. Consequently, domestic courts can prevent similar violations when individuals use national legal remedies and may adjust their procedures accordingly. For example, non-observance of a reasonable term of court proceedings is considered to be a violation of paragraph 1 of Article 6 of the Convention. When a state recognises such a violation, the ECtHR judgment is disseminated

43 Law of Ukraine No 1082-IX 'On the State Budget of Ukraine for 2021' (15 December 2020) [2021] Bulletin of the Verkhovna Rada of Ukraine 16/144 <<https://zakon.rada.gov.ua/laws/show/1082-20#Text>> accessed 11 September 2024.

44 *Kechko v Ukraine* App no 63134/00 (ECtHR, 08 November 2005) <<https://hudoc.echr.coe.int/eng?i=001-70863>> accessed 14 September 2024.

45 Asiryany, Milonenko and Prilipko (n 37).

to all domestic courts for information. Since passing legislation through parliament takes time, in other European states, it is not the legislators but the highest judicial authorities—the supreme or constitutional courts—that play the primary role in eliminating the causes of human rights violations.⁴⁶

In Ukraine, some scholars question the unconditional execution of the ECtHR judgments and their role in law enforcement. In particular, they have proposed that the Constitutional Court of Ukraine conduct a legal analysis of individual ECtHR judgments to assess their validity and compliance with national legislation before execution.⁴⁷ However, in the context of Ukraine's commitments to international organisations, including its EU accession and the harmonisation of legislation, such an approach is controversial. It risks undermining the authority of both the Convention and the European Court of Justice. Ukraine must take into account the generally accepted trends of European law, adhere to the standards set by the Convention, and recognise the ECtHR as a leading human rights institution. Its judgments play a key role in shaping the rule of law and legal awareness in society, particularly since, under Ukrainian Law, such judgments are determined directly by the source of law in judicial practice, on par with the Convention itself.

Beyond optimising the procedure for executing ECtHR judgments, it is also necessary to reduce the number of judgments issued against Ukraine. The large number of cases is closely related to Ukraine's limited use of friendly settlement procedures. Over the past four years, the results have been negative: in 2021, friendly settlements were reached in 7 cases, in 2022 – 0, in 2023 – 0,⁴⁸ and in 2024 – 1.⁴⁹ According to experts, when using friendly settlement procedures, the State could offer adequate compensation and other concessions to applicants whose cases clearly violate the Convention. The government could also group cases by specific categories and settle them collectively, removing large groups of complaints from the court's register and effectively satisfying complainants.⁵⁰

Friendly settlement is possible at any stage of ECtHR proceedings and is confidential. Upon reaching a friendly settlement, the Court removes the case from the register by issuing a judgment that contains only a brief summary of the facts and the resolution. This judgment is also submitted to the Committee of Ministers for supervision of compliance with the settlement terms. This approach allows the State to avoid an unwanted judgment while enabling applicants to achieve a prompt and fair resolution of their dispute.

46 *ibid.*

47 S Fursa and Ye Fursa (n 36).

48 ECtHR, *Analysis of statistics 2023* (Council of Europe 2024) <<https://www.echr.coe.int/documents/d/echr/stats-analysis-2023-eng?download=true>> accessed 20 December 2024.

49 ECtHR, 'Violation by Article & by State - 2023' (n 7).

50 'Ukraine Has Left the Top Three Countries that are Most Frequently Sued at the European Court of Human Rights' (*Opendatabot*, 30 August 2021) <<https://opendatabot.ua/analytics/european-court>> accessed 14 September 2024.

6 CONCLUSIONS

In light of European integration, the implementation of European human rights standards into Ukrainian legislation underscores the need for strict compliance. The state should ensure prompt and full execution of final judgments, including ECtHR decisions, while first addressing the root causes of applications to international institutions. This can be done by considering the proposals outlined in this article, in particular:

1. Identify the functional components of the relevant state authorities responsible for executing ECtHR judgments, including general and individual measures, and organise effective interaction between them. Regarding the payment of satisfaction, allow state executive service bodies to directly send a resolution to initiate executive proceedings and payment instructions for debiting funds to the State Treasury Service of Ukraine, utilising the electronic system's functionality to expedite compensation payments.
2. Ensure stable annual funding of budget programmes related to the execution of ECtHR judgments by Ukraine. Allocate a separate budget article for these expenditures, maintaining a sufficient and approximately consistent amount each year, given the importance of Ukraine's compliance with its obligations to the Council of Europe to uphold its membership.
3. Reduce the number of applications to the ECtHR and, consequently, the number of judgments against the state. Eliminate the grounds for such applications by amending legislation with provisions that would eliminate their root causes. In the process of elaboration, actively utilise the positions of the ECtHR in judicial practice as norms for direct actions to identify the relevant violations and prevent them.
4. Address non-execution of national court decisions. Since the long-term non-execution of domestic court decisions remains the main reason for applications to the ECtHR, review existing moratoria on enforcement against public sector debtors. Reduce such moratoria to the minimum strictly necessary, except those directly connected with critical infrastructure enterprises or adopted to support them under martial law, while limiting their duration to reasonable periods justified by current circumstances.
5. Minimise budgetary burdens. Explore additional mechanisms to reduce state expenditure on the execution of ECtHR judgments, such as reaching friendly settlements prior to a formal ECtHR ruling, especially when the case relates to instances of well-established non-execution or long-term non-execution of judgments of national courts.

REFERENCES

1. Asiryan S, Milonenko Y and Prilipko V, 'Problems of Execution of Echr Decisions in Ukraine and ways to Overcome them on the Example of the Federative Republic of Germany' (2021) 63 Uzhhorod National University Herald. Series: Law 307. doi:10.24144/2307-3322.2021.63.54
2. Fursa SYa and Fursa YeI, 'Judgments of the European Court of Human Rights: Topical Issues of Their Execution' (Reform of Executive Proceeding: Present Days and Prospects: International Scientific and Practical Conference, Kyiv, 30 March 2018) 127
3. Halus O, 'Peculiarities of Execution of Judgments of the European Court of Human Rights' (Problems of the Theory and Practice of Execution of Judgments of Courts and other Authorities: IV international scientific and practical conference, Khmelnytskyi, 18-19 October 2013) 66
4. Kinakh M, 'Execution of the ECtHR Judgments is Not Just a Legal Obligation of the State, But also a Tool for Fulfilling Human Rights' *Yurydychna Hazeta* (Kyiv, 22 November 2021)
5. Kobets I, 'Execution of the ECtHR Judgments: Application of the Measures of an Individual Nature' *Yurydychna Hazeta* (Kyiv, 06 December 2017)
6. Komarov V and Tsuvina T, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine'(2021) 4(1) Access to Justice in Eastern Europe 79. doi:10.33327/AJEE-18-4.1-a000047
7. Mamchenko N, 'Ukraine Remains in Default of Execution of the ECtHR Judgments' *Sudovo-Yurydychna Hazeta* (Kyiv, 22 December 2021)
8. Pilkov K, 'Reopening Cases Following Judgments of the European Court of Human Rights: Room for a European Consensus?' (2022) 5(4) Access to Justice in Eastern Europe 7. doi.org:10.33327/AJEE-18-5.4-a000415

AUTHORS INFORMATION

Iryna Bondar

Dr. Sc. (Law), Associate Professor at the Educational and Scientific Institute of Law of Taras Shevchenko National University of Kyiv, Ukraine

bondariryna@knu.ua

<https://orcid.org/0000-0002-9489-963X>

Co-author, responsible for conceptualization (lead); investigation (equal); writing – original draft (equal); formal analysis (equal); writing – review and editing (equal); resources (lead); methodology (supporting); project administration (supporting).

Liubov Maliarchuk*

PhD (Law), Associate Professor at the Educational and Scientific Institute of Law of Taras Shevchenko National University of Kyiv, Ukraine

malyarchuk@knu.ua

<https://orcid.org/0000-0002-0169-0272>

Corresponding author, responsible for conceptualization (supporting); investigation (equal); writing – original draft (equal); formal analysis (equal); writing – review and editing (equal); methodology (lead); resources (supporting); project administration (lead).

Oleksandr Snidevych

PhD (Law), Associate Professor at the Educational and Scientific Institute of Law of Taras Shevchenko National University of Kyiv, Ukraine

snidevych-o-s@knu.ua

<https://orcid.org/0000-0002-4255-3194>

Co-author, responsible for investigation (equal); writing – original draft (equal); writing – review and editing (equal), formal analysis (equal); supervision (lead).

Competing interests: Although the authors serve at the same institution as the Editor-in-Chief of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this article, including the choice of peer reviewers, were handled by the editor and the editorial board members, who are not affiliated with the same institution

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Iryna Bondar, Liubov Maliarchuk and Oleksands Snidevych. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Bondar I, Maliarchuk L and Snidevych O, 'Features and Status of Execution of the ECtHR Judgements in Ukraine in Terms of the European Experience' (2025) 8(4) Access to Justice in Eastern Europe 69-90 <<https://doi.org/10.33327/AJEE-18-8.4-r000131>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-r000131>

Summary: 1. Introduction. – 2. Methodology. – 3. The Main Grounds for Applying to the ECtHR in Today's Conditions in Ukraine. – 4. Measures Adopted by The ECtHR Following the Decision and Features of Their Application in Ukraine. – 5. Features and Status of Execution of the ECtHR Judgements in Ukraine through the Prism of Foreign Experience. – 6. Conclusions.

Keywords: *Convention for the Protection of Human Rights and Fundamental Freedoms, violation of rights, satisfaction, general measures, individual measures, a state party to the Convention, state authorities, state executive service.*

DETAILS FOR PUBLICATION

Date of submission: 01 Nov 2023

Date of acceptance: 09 Sep 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 2 rounds – first round with major revisions and second round with minor revisions.

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>
Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The authors declare that no artificial intelligence tools were used in the writing, translation, or editing of this manuscript. The research and the content of the article represent the authors' own original work. In the case of co-authorship, the corresponding author confirms that all co-authors complied with this declaration.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ОСОБЛИВОСТІ ТА СТАН ВИКОНАННЯ РІШЕНЬ ЄСПЛ В УКРАЇНІ В УМОВАХ СЬОГОДЕННЯ ЧЕРЕЗ ПРИЗМУ ЄВРОПЕЙСЬКОГО ДОСВІДУ

Ірина Бондар, Любов Малярчук* та Олександр Снідевич

АНОТАЦІЯ

Вступ. Європейський суд з прав людини (ЄСПЛ) є авторитетною міжнародною інституцією, а його рішення мають важливе значення для захисту прав, задекларованих Конвенцією про захист прав людини і основоположних свобод. Метою статті є аналіз оцінки стану виконання рішень Європейського суду з прав людини в Україні, ролі державних органів у цьому процесі та проблем їхньої взаємодії щодо виконання вжитих ЄСПЛ заходів.

Методи. Загальний аналіз окремих рішень ЄСПЛ щодо застосованих заходів, дозволив диференціювати їх види та особливості використання, а також їхній вплив як на виконання рішень ЄСПЛ, так і на запобігання подібним зверненням у майбутньому. За результатами використання статистичних методів була здійснена оцінка стану виконання рішень ЄСПЛ Україною та іншими державами, а також виконання ними зобов'язань як учасниць Конвенції, що є основою остаточних висновків.

Результати та висновки. У статті проведено комплексний аналіз таких способів виконання рішень ЄСПЛ, як виплата сатисфакції, вжиття додаткових заходів індивідуального та загального характеру, а також порядок їх застосування компетентними органами на різних рівнях. Цей аналіз дозволив оцінити їхню варіативність, взаємозв'язок та ефективність для реалізації рішень ЄСПЛ, забезпечення дотримання прав задекларованих Конвенцією про захист прав людини і основоположних свобод, а головне – мінімізації першопричин їх порушення та подібних звернень до ЄСПЛ з цього приводу відповідно. У результаті були запропоновані способи покращення процедури виконання рішень ЄСПЛ Україною як країною-відповідачем.

Ключові слова: Конвенція про захист прав людини і основоположних свобод, порушення прав, сатисфакція, заходи загального характеру, заходи індивідуального характеру, держава-учасниця Конвенції, державна виконавча служба.

Research Article

ECOLOGICAL EXTREMISM IN THE SLOVAK REPUBLIC: CONCEPTUAL AND LEGAL FOUNDATIONS

Diana Repiščáková

ABSTRACT

Background: In recent years, climate change and environmental degradation have given rise to new forms of civic activism aimed at pressuring governments and corporations to take urgent action to protect the environment. While most environmental movements operate within the bounds of the law and democratic principles, a minority of activists resort to more radical and disruptive methods when they perceive existing legal and political processes as too slow or ineffective. This phenomenon, commonly referred to as ecological extremism, does not typically aim to overthrow democratic governance but rather seeks to accelerate environmental policy changes through acts of civil disobedience and sometimes illegal direct action. Despite its growing relevance, the legal aspects and boundaries of ecological extremism remain underexplored, particularly in the context of Central and Eastern Europe.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000134>

Date of submission: 10 Jul 2025

Date of acceptance: 29 Sep 2025

Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Diana Repiščáková

Methods: This article employs traditional methods of legal scientific (jurisprudential) research, combining general scientific methods with methods specific to the field of legal science. Among the general scientific methods applied in this article are primarily logical methods, namely the methods of analysis, synthesis, and description. The method of analysis was used in relation to relevant legal provisions, mainly Section 140, 140a and 140b of the Slovak Criminal Code, and also in relation to doctrinal sources such as various legal commentaries and monographs, studies, scientific articles, and relevant reports. The method of synthesis is closely related to the method of analysis and complements the analytical approach. The descriptive method was employed to define and clarify the concept of ecological extremism. As for the special methods of legal science, the comparative method was predominantly used, facilitating the exploration of the relationship between extremism and terrorism, as well as the concept of ecological extremism and related terms.

Results and Conclusions: For the purposes of further research on ecological extremism, it was first necessary to address the concept itself and related concepts such as ecoterrorism, ecofascism, as well as contrasting concepts like environmental terrorism and ecocide. For the purposes of this article, it is concluded that ecological extremism should be understood as a form of ecologically motivated conduct that exceeds the boundaries of lawful activism but does not necessarily meet the criteria for terrorism. It is distinguished from ecological activism primarily by its radicalised ideology, the use of illegal methods, and the rejection of institutional forms of environmental protection. To illustrate and clarify the distinctions between concepts related to ecological extremism, an overview table has been presented.

As for the criminal law classification of ecological extremism, it has been concluded that it is difficult to envisage ecological extremism falling within the scope of crimes classified as extremism under the Slovak Criminal Code. However, it is conceivable that any crime committed with an ecological motive could be included among crimes of extremism. Currently, however, Slovak criminal law does not recognise such a specific motive. An ecological motive itself does not alter the legal qualification of the act, but it may be relevant when assessing the nature of the crime and determining the sentence. *De lege ferenda*, the ecological motive could form part of a privileged element of a crime, thus lowering the applicable sentence, or it could be explicitly recognised as a mitigating circumstance.

1 INTRODUCTION

Ecological extremism, and the legal response it necessitates, undoubtedly represents a significant challenge for legislators in the coming years—not only at the national level, but also at the supranational and international levels. It is a relatively new, yet rapidly evolving, form of extremism.

In our geographical legal context, ecological extremism remains a relatively under-researched phenomenon. It is therefore necessary to address this issue. This article aims to

serve as a starting point for further legal research into ecological extremism, including areas such as the prevention and repression of ecological extremism, perpetrator profiling, and the role of eco-narratives in the process of radicalisation on social media.

A substantial body of literature on extremism already exists, addressing the topic not only from legal but also from political and sociological perspectives. This, however, does not apply to ecological extremism, which is characterised by certain specific features—such as the fact that it does not inherently oppose democratic principles, and that it is unlikely to fall under the existing definition of crimes of extremism in Slovak criminal law.

Ecological extremism brings with it several challenges that demand a legislative response. There are multiple areas where further research is needed, particularly within our national legal framework, where such research remains largely unexplored. From a legal perspective, ecological extremism has not yet received adequate attention, either at the national or supranational level.

Although ecological extremism remains underexplored in Slovak legal scholarship, it has begun to attract increasing attention in comparative literature. Studies from the United States and Europe illustrate that ecologically motivated conduct is not confined to a single jurisdiction, but constitutes an emerging challenge across legal systems.¹

As a starting point for further research on ecological extremism, it is essential to first clarify the concept of ecological extremism itself, along with related terms such as *ecoterrorism*, *ecofascism*, and opposing notions such as *environmental terrorism* and *ecocide*. This article focuses on defining ecological extremism and distinguishing it from lawful environmental activism and ecoterrorism. Furthermore, it examines the potential for ecological extremism to be subsumed under crimes of extremism as defined by Slovak criminal law.

It must be noted that potential risks arise from the insufficient legal distinction between ecological activism, extremism and terrorism. This ambiguity may result in the criminal prosecution of individuals whose actions are ecologically motivated, raising concerns about legal certainty, procedural safeguards, and the protection of fundamental rights. At the same time, sentences imposed on perpetrators of ecological extremism could be disproportionately harsh if courts fail to take the ecological motive into account.

1 For instance, see: Kristy Champion, 'Defining Ecofascism: Historical Foundations and Contemporary Interpretations in the Extreme Right' (2021) 35(4) *Terrorism and Political Violence* 826. doi:10.1080/09546553.2021.1987895; Brian Hughes, Dave Jones and Amarnath Amarasingam, 'Ecofascism: An Examination of the Far-Right/Ecology Nexus in the Online Space' (2022) 34(5) *Terrorism and Political Violence* 997. doi:10.1080/09546553.2022.2069932; Graham Macklin, 'The Extreme Right, Climate Change and Terrorism' (2022) 34(5) *Terrorism and Political Violence* 979. doi:10.1080/09546553.2022.2069928; Sadi Shanaah, Immo Fritsche and Mathias Osmundsen, 'Support for Pro-Climate and Ecofascist Extremism: Correlates and Intersections' (2023) 20(1) *Democracy and Security* 46. doi:10.1080/17419166.2023.2220111.

If it proves that the legal system is not adequately prepared to address ecological extremism—as we presume—several legislative reforms may be necessary. It is therefore important to examine what ecological extremism is, how it is classified under criminal law, and what impact an ecological motive may have on judicial decision-making.

This article thus serves as a foundational contribution to a broader comparative research project currently underway, which explores how courts in different jurisdictions assess ecological motive in criminal proceedings—whether as mitigating circumstances or as grounds for more lenient sentencing.

2 METHODOLOGY

The primary objective of this article is to define the concept of *ecological extremism* and to distinguish it from lawful environmental activism and terrorism. This clarification represents a necessary first step toward further research that will examine the legal aspects of ecological extremism in greater depth. Another objective is to highlight the current options for criminal classification and prosecution of ecological extremism within existing legal frameworks in the Slovak Republic. Finally, the article concludes with *de lege ferenda* proposals intended to address current legal gaps and suggest potential improvements.

The main research question underpinning this research is: How can ecological extremism be legally and conceptually defined?

This central question is divided into the following sub-questions:

(RQ1): What distinguishes ecological extremism from legal environmental activism and from terrorism?

(RQ2): What is the relationship between the concept of ecological extremism and related concepts such as ecoterrorism, ecofascism, as well as contrasting concepts like environmental terrorism and ecocide?

(RQ3): How is ecologically motivated unlawful conduct addressed under Slovak criminal law, and what are the limits of the current framework?

The primary sources used in this article include scholarly sources—such as various legal commentaries and monographs, studies, scientific articles—and legislative instruments, particularly Slovak national legislation. Relevant reports were also examined, including the European Union Terrorism Situation and Trend Report 2022² and the European Union Terrorism Situation and Trend Report 2023.³

2 Europol, *European Union Terrorism Situation and Trend Report 2022* (European Union 2022).

3 Europol, *European Union Terrorism Situation and Trend Report 2023* (European Union 2024).

Regarding case law, it must be noted that in the past five years, there have been no proceedings in the Slovak Republic concerning ecological extremism or terrorism that resulted in a final conviction. As a result, the research does not rely on national judicial decisions. Instead, it draws upon relevant doctrinal and theoretical discussions, with particular attention to literature addressing extremism and terrorism, even where conceptual distinctions remain insufficiently developed. Accordingly, the article emphasises the relationship between these phenomena, drawing on the limited but existing academic contributions that focus—at least in part—on ecological extremism.

The primary legislative instrument analysed in this research is the Criminal Code of the Slovak Republic (Act No. 300/2005 Coll.),⁴ with particular focus on provisions related to crimes of extremism and crimes of terrorism, as well as the provisions relating to a specific motive. These provisions serve as the legal basis for assessing how acts that could qualify as ecological extremism are currently classified and prosecuted under Slovak criminal law.

Although the Criminal Code is a national instrument, the Slovak legal framework—especially its inclusion of specific motive-based provisions—may serve as inspiration or a comparative value for legislators and scholars in other jurisdictions examining similar phenomena in the context of growing ecological radicalisation.

The adopted methodology facilitated the identification and clarification of the legal and conceptual boundaries between ecological extremism, lawful environmental activism, and terrorism. This was a necessary foundation for addressing the research questions posed in the article. The combined doctrinal and comparative approach facilitated a thorough examination of existing legislation, scholarly literature, and official reports, revealing both terminological ambiguities and normative gaps in the Slovak legal framework.

The analysis of Slovak criminal law demonstrated that although certain ecologically motivated acts may be prosecuted under current provisions, no legal concept or category explicitly addresses ecological extremism. Furthermore, the lack of case law highlights the abstract nature of the concept in practice, which may lead to inconsistent application or overreliance on general provisions.

These findings provided the foundation for the article's *de lege ferenda* recommendations, which call for greater conceptual clarity in legislation and a more nuanced classification of motive-based crimes. The methodological integration throughout the article ensured that conclusions were grounded in systematic source analysis and aligned with the article's normative and comparative aims, thereby enhancing the credibility and practical value of the proposed recommendations.

4 Act No 300/2005 Coll Criminal Code 'Trestný zákon' (20 May 2005) <<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2005/300/20250217>> accessed 29 June 2025.

3 THE CONCEPTUAL RELATIONSHIP BETWEEN EXTREMISM AND TERRORISM

To examine the concept of ecological extremism, it is first necessary to address the notion of extremism itself. However, extremism cannot be analysed in isolation; it must be considered within its international and European legal contexts, as well as in relation to closely connected concepts such as radicalisation and terrorism.

In the social sciences, extremism has gradually come to be understood as an umbrella term referring to anti-democratic political forces situated at the fringes of the left-right political spectrum.⁵ When it comes to defining and delineating the concept of extremism, a wide range of views exists among scholars, primarily due to the ambiguity and vagueness of the term itself.⁶ This lack of clarity can be traced back to the fact that the earliest authors who used the term *extremism* did so without providing a precise definition.⁷

In general, extremism can be described as a marginal and abnormal phenomenon that may manifest either as an internal attitude or as outward conduct.⁸ When a group begins to divide the world into “friends” and “enemies who must be destroyed,” it can be regarded as extremist; without this defining feature, such classification is difficult to justify.⁹ Confrontational narratives (“us vs. them”) are also present in ecological extremism. An example of this rhetoric could be: “The state and corporations are destroying nature – we must stop them!”

Our research indicates that extremism is not a legally defined term in all EU Member States. In this regard, the Slovak Republic is no exception. To this day, there is no legal definition of extremism in Slovak law, and the term does not appear *expressis verbis* in any international treaty or legal document of the European Union. Moreover, the legal codification of the term *extremism* is not expected in the foreseeable future.¹⁰

Within the theory of extremism, radicalism is used to describe views and attitudes that depart from the central, democratically conforming spectrum but have not yet crossed the threshold into extremism, although they remain in close proximity to it.¹¹ Radicalism is thus understood as an intermediate stage between democracy and extremism.¹² Eco-narratives can serve as a factor in the radicalisation process: when individuals perceive the world through a lens of apocalyptic urgency and helplessness, this perception may motivate them

5 Štefan Danics and Ladislava Tejchmanová, *Extremismus, Radikalismus, Populismus a Euroskepticismus* (Univerzita Jana Amose Komenského 2017) 17.

6 Jan Chmelík, *Extremismus a Jeho Právní a Sociologické Aspekty* (Linde 2001) 11.

7 Danics and Tejchmanová (n 5) 17.

8 Petr Černý, *Politický Extremismus a Právo* (Eurolex Bohemia 2005) 13-4.

9 *ibid* 16.

10 *ibid* 11.

11 Danics and Tejchmanová (n 5) 81.

12 *ibid* 17.

to engage in unlawful or violent actions. Radical environmental movements often employ apocalyptic eco-narratives that portray the current system as inherently destructive to the planet. Such narratives may contribute to a shift from civic protest toward extremism, or even to terrorist forms of resistance.

The connection between extremism and terrorism is frequently highlighted.¹³ During research, we observed that foreign literature and European legislation primarily focus on terrorism, while extremism tends to be addressed only marginally alongside it. The compound term “terrorism and violent extremism” is also often used. This prompted us to explore the relationship between terrorism and extremism more closely.

Terrorism involves, at a minimum, the intimidation or coercion of the public or governments through threats or acts of violence, causing death, serious injury, or taking hostages.¹⁴ However, individual national definitions may vary. Under Slovak legal conditions, there is no formal legal definition of terrorism.

The European Union Terrorism Situation and Trend Report 2022 employs the term “right-wing terrorism,” defined as “the use of terrorist violence by right-wing extremists. Violent right-wing extremist individuals and groups use, incite, threaten, legitimise or support violence and hatred to further their political or ideological goals. They seek to change the entire political, social and economic system on an authoritarian model and, in doing so, reject the democratic order and values as well as fundamental rights (...).”¹⁵

A distinction is made between violent and non-violent extremism. In most cases, the type of violence employed lies at the extreme end of the spectrum and may include terrorism, or in the most severe cases, genocide.¹⁶ As stated in the UN General Assembly’s 2015 Plan of Action to Prevent Violent Extremism, violent extremism is a broader phenomenon than terrorism and is not confined to any specific region, nationality, ideology, or belief system.¹⁷ Violent extremism that may lead to terrorism poses a serious threat to international peace and security.¹⁸ The United Nations frequently uses the term “violent extremism that may

13 Černý (n 8) 13.

14 ‘OHCHR and Terrorism and Violent Extremism’ (*United Nations Human Rights*, 2025) <<https://www.ohchr.org/en/terrorism>> accessed 29 June 2025.

15 Europol (n 2) 45.

16 Mathias Bak, Kristoffer Nilas Tarp and Christina Schori Liang, *Defining the Concept of “Violent Extremism”: Delineating the Attributes and Phenomenon of Violent Extremism* (Geneva Paper 24/19, Geneva Centre for Security Policy 2019).

17 ‘About Protecting Human Rights While Countering Terrorism and Preventing Violent Extremism: OHCHR and Terrorism and Violent Extremism’ (*United Nations Human Rights*, 2025) <<https://www.ohchr.org/en/terrorism/about-protecting-human-rights-while-countering-terrorism-and-preventing-violent-extremism>> accessed 29 June 2025.

18 ‘Preventing Violent Extremism Conducive to Terrorism’ (*United Nations, Office on Drugs and Crime*, 2025) <<https://www.unodc.org/unodc/en/terrorism/expertise/preventing-violent-extremism-conducive-to-terrorism.html>> accessed 29 June 2025.

lead to terrorism,” yet it does not provide a definition of this term nor evidence to substantiate this potential causal relationship.¹⁹

It has been noted that the emergence of the term “violent extremism” in public discourse is closely linked to terrorism and efforts to combat it.²⁰ The phrase “countering violent extremism” began to be used around 2005, when the United States moved away from the terminology of the “global war on terror.” The intention was to emphasise a shift toward solutions that were more diplomatic, economic, and political in nature, rather than purely military.²¹

In his article *Countering Violent Extremism: A Promising Response to Terrorism*, Schmid notes that the term “extremists” includes not only terrorists but also some of their radical—often (at least for now) non-violent—supporters who provide assistance and may pose a threat to democracy.²²

Although a definitive causal link between extremism and terrorism has not been definitively established, there are indications that the conceptual foundations for such a connection are gradually being laid.²³ The adoption of an extremist ideology increases the likelihood that an individual will seek to put this ideology into practice, potentially through the use of violence, and potentially—at the final stages of radicalisation—by resorting to terrorist means. We therefore hold the view that while extremism *may* evolve into terrorism, it does not necessarily do so.

Proponents of the concept of *militant democracy* and its expansion argue that acts of terrorism undermine not only public security but also fundamental democratic values and the rule of law.²⁴ Those who oppose incorporating counter-terrorism measures into the framework of militant democracy contend that “terrorists do not aim to destroy democracy by democratic means.”²⁵

Černý outlines the following distinctions between extremism and terrorism:

- Violence in any form, including terrorism, is considered an extremist method for achieving a goal;²⁶
- While extremism is primarily focused on ideological and programmatic aims, terrorism can be regarded more as a method of pursuing those aims;²⁷

19 Carmen Rocío García Ruiz and Nicolás García Rivas, *Extremismo Violento y Libertad de Expresión* (Iustel 2020) 36-7.

20 *ibid* 17.

21 *ibid*.

22 Alex P Schmid, ‘Countering Violent Extremism: a Promising Response to Terrorism’ (*ICCT International Centre for Counter-Terrorism*, 12 June 2012) <<https://www.icct.nl/publication/countering-violent-extremism-promising-response-terrorism>> accessed 29 June 2025.

23 García Ruiz and García Rivas (n 19) 32.

24 Danics and Tejchmanová (n 5) 164.

25 *ibid* 166.

26 Černý (n 8) 14.

27 *ibid* 46.

- Unlike extremism, terrorism (or terror) has been incorporated into the terminology of the (Czech) legal system;²⁸
- Whereas terrorism falls within the scope of criminal law, political extremism should also fall within the scope of constitutional and administrative law.²⁹

If extremism were to be understood solely as an ideology or as a set of goals that may be pursued through terrorism, then it would not be possible for the Slovak Criminal Code to include crimes classified as crimes of extremism. Ideas or beliefs alone cannot be criminalised; some form of conduct must occur in order for an act to fall within the scope of criminal liability for extremism. Such conduct may be either violent or non-violent in nature. Therefore, Černý's position does not fully correspond to the Slovak Criminal Code, as Slovak legislation explicitly recognises crimes of extremism and, in this regard, constitutes an exception compared with the legal frameworks of many other states. Under Slovak law, extremism thus also falls within the ambit of criminal law enforcement.

To conclude this section, it may be observed that, unlike Slovak legal scholarship, foreign literature and legislation primarily focus on terrorism, while extremism is often addressed only marginally. Even Slovak academic writing tends to mention extremism alongside terrorism, yet pays little attention to the conceptual distinction or connection between the two. Both extremism and terrorism pose threats to life, public safety, and ultimately, to the democratic functioning of society.

The fundamental difference, as we perceive it, lies in the use of violence—extremists do not necessarily resort to violent methods. Nevertheless, non-violent extremism still warrants a state response, as even a simple social media comment has the potential to radicalise, incite hatred, or influence others to commit crimes, thereby transferring online hate into real-world consequences. While extremism is sometimes regarded as an unavoidable part of democratic discourse, terrorism—owing to its inherently violent nature—clearly falls outside the acceptable boundaries of democratic society.

4 THE CONCEPT OF ECOLOGICAL EXTREMISM

Ecological extremism—and the legislative response it requires—undoubtedly presents a significant challenge for lawmakers in the coming years, not only at the national level but also at the supranational and international levels. It represents a relatively new yet rapidly evolving form of extremism, frequently classified as a variant of left-wing extremism. Its growing appeal lies in the fact that ecology as such does not, in principle, represent an anti-democratic idea.

28 *ibid* 47.

29 *ibid* 48.

Ecological extremism arises as a reaction to environmental degradation, the climate crisis, and the perception that “legal tools for addressing environmentally harmful activities are severely limited, and even when utilised, their results are not observable in the short term – if at all.”³⁰

Across Europe, including the Slovak Republic, groups such as the Animal Liberation Front, known for radical animal rights activism, are active. In recent years, there has been a noticeable increase in climate activist incidents across Europe and beyond, including the defacement of artworks, the blocking of roads, and the sabotage of power plants. Such conduct undoubtedly calls for a legislative response.

Currently, there is no available data concerning the number, organisation, or structure of ecological extremists operating within the territory of the Slovak Republic.³¹ However, it is important to mention the case of the so-called “first Slovak terrorist,” who, on 28 December 2011, placed a homemade explosive device in a rubbish bin near a McDonald’s restaurant on Protifašistických bojovníkov Street in Košice. This and other acts were committed with the declared aim of protecting the lives of dogs.³²

In the past five years, there has been no proceeding related to ecological extremism or terrorism in the Slovak Republic that has resulted in a final conviction.³³ However, it may reasonably be anticipated that such conduct will increase in the future—both as a consequence of continuing global warming and environmental pollution, and because these trends are gradually approaching the Slovak borders.

Further research into ecological extremism must begin with a conceptual clarification of the term itself, as well as related terms such as *ecoterrorism*, *eco-fascism*, and opposing concepts such as *environmental terrorism* and *ecocide*. The examination of ecological extremism necessarily involves a search for a legal definition—which, as we presume, does not yet exist. Accordingly, addressing the conceptual foundations of ecological extremism constitutes a necessary first step in this research.

Although some authors categorise ecological extremism as a form of left-wing extremism—primarily due to its anti-capitalist rhetoric, opposition to corporate interests, and calls for systemic change—others highlight its historical association with ultra-right ideologies. In interwar Germany, for instance, environmental narratives were intertwined with nationalist

30 Diana Repiščáková, ‘Žena vo Vojne’ (Medzinárodné a Európske Právo v Kinematografii II: XIII ročník študentského sympózia o medzinárodnom a európskom práve, Právnická fakulta Univerzity Pavla Josefa Šafárika v Košiciach, 6 marca 2020) 82.

31 Vladimír Lichner and others, *Extrémizmus a Radikalizácia v Sociálnych Kontextoch* (Šafárik Press 2018) 72.

32 Róbert Bejda, ‘Za výbuch pri McDonalde ho súdili ako prvého slovenského teroristu. Žiada prepustenie’ *Korzar* (Kosice, 2 July 2021) <<https://kosice.korzar.sme.sk/c/22693961/za-vybuch-pri-mcdonalde-ho-sudili-ako-prveho-slovenskeho-teroristu-ziada-prepustenie.html>> accessed 29 June 2025.

33 Lenka Letková, *Trestné Činy Extrémizmu z Pohľadu Štatistiky a Rozhodovacej Praxe od Roku 2017* (CH Beck 2023) 13.

and racist ideologies, a phenomenon now referred to as *eco-fascism*.³⁴ From a legal and criminological perspective, ecological extremism should be assessed on a case-by-case basis, considering the ideological framework, targets, and methods of action, rather than presuming a fixed placement on the political spectrum.

A relatively recent phenomenon is *militant environmentalism*, commonly referred to as *ecoterrorism*, the most extreme form of which is known as *eco-fascism*. The term *ecological extremism* is often used interchangeably with *ecoterrorism*; however, from a legal and criminological standpoint, terrorism is more accurately understood as a method of advancing certain aims, whereas extremism is seen as an ideological antithesis to democracy.³⁵ An example of ecoterrorism would be the arson of an oil refinery or the bombing of an extraction facility with the intention of disrupting its operations.

It is also essential to distinguish *ecoterrorism* from *environmental terrorism*. While ecoterrorism consists of attacks carried out “in the name of” the environment—that is, with the aim of protecting it—environmental terrorism involves attacks directed against the environment. In this context, it is also necessary to differentiate environmental crimes (i.e. crimes targeting the environment, such as illegal logging, pollution, or poaching), in which the protected legal interest is the environment itself, from the concept of an ecological motive, where the perpetrator commits another crime (such as vandalism or sabotage) with the declared aim of protecting nature, albeit through radical means.

Within the structures of the International Criminal Court (ICC), discussions have already begun regarding the possible application of existing legal definitions of crimes under international law to this category of attacks. However, most of these definitions are markedly anthropocentric in nature, or face other legal and conceptual obstacles, raising questions about whether the current legal framework is sufficient to enable the prosecution of individuals responsible for severe environmental harm before the ICC. As a result, growing attention is being given to the proposal for a new crime under international law—the crime of ecocide.³⁶

It is likewise necessary to differentiate *ecological extremism* from *ecological activism*, which is, in itself, a lawful activity. Ecological activism refers to efforts aimed at drawing attention to current environmental issues and generally carries a positive connotation. Environmental activists typically exercise their rights to assembly and association in pursuit of their objectives. For example, in Germany, members of Letzte Generation have been charged with forming a criminal organisation and obstructing the operation of critical infrastructure.³⁷

34 Danics and Tejchmanová (n 5) 73.

35 Černý (n 8) 40.

36 See more: Juraj Panigaj and Eva Berníková, ‘Ecocide: A New Crime under International Law?’ (2023) 13(1) Juridical Tribune 5. doi:10.24818/TBJ/2023/13/1.01.

37 Damien Gayle, ‘Alarm as German Climate Activists Charged with “Forming a Criminal Organization”’ *The Guardian* (London, 23 May 2024) <https://www.theguardian.com/environment/article/2024/may/23/alarm-as-german-climate-activists-charged-with-forming-a-criminal-organisation?utm_source=chatgpt.com> accessed 29 June 2025.

Nevertheless, even during peaceful environmental protests, unlawful conduct may occur—particularly where the legal elements of specific crimes or misdemeanours are met.

For the purposes of this article, as well as for future research in this field, ecological extremism shall be understood as a form of ecologically motivated conduct that exceeds the boundaries of lawful activism but does not necessarily meet the criteria for terrorism. What primarily distinguishes it from ecological activism is the presence of a radicalised ideology, the use of unlawful methods, and the rejection of institutional mechanisms for environmental protection.

To provide a clearer illustration and facilitate the distinction between concepts related to ecological extremism, the following table is presented:

Lawful Conduct	Unlawful Conduct				
	In the Name of the Environment			Against the Environment	
Ecological Activism	Ecological Extremism	Ecoterrorism	Eco-fascism	Environmental Terrorism	Ecocide

Supporters of ecological extremism primarily target objects, and more recently, have attacked, for example, works of art. Elements of extremism can be found in these actions, although it is questionable whether they could be subsumed under crimes of extremism.³⁸ However, this does not exclude the possibility that such actions may constitute elements of other crimes or misdemeanours. According to Letková, the actions of ecological extremists may, in certain situations, exhibit signs of radicalisation,³⁹ a view fully supported by existing research.

5 CRIMINAL LAW QUALIFICATION OF ECOLOGICAL EXTREMISM

When comparing the definition of extremism (on which there is no consensus within the academic community) and crimes of extremism (which are clearly defined in the Slovak Criminal Code), it can be concluded that the crimes of extremism do not encompass a significant portion of conduct that is considered extremism. However, it cannot be excluded that such actions could be classified under other crimes. Therefore, it is essential to acknowledge that extremism itself cannot be prosecuted in Slovakia.⁴⁰ Only those extremist acts that fulfil the elements of one of the crimes of extremism, or other crimes,

38 Vladimír Lichner, *Analýza Radikálnych a Extrémistických Skupín, Hnutí, Siekt a Kultov a Ich Pošobenie v Slovenskej Republike* (Šafárik Press 2020) 59.

39 Letková (n 33) 13.

40 *ibid* 4.

can be prosecuted. Not every form of extremism can be subsumed under the crimes of extremism. Thus, the concept of extremism is (substantially) broader than the definition of crimes of extremism.

Although this article primarily focuses on the Slovak legal framework, ecological extremism cannot be studied in isolation from the broader European and international contexts. At the EU level, ecological extremism has not yet been codified as a separate category of crime. However, it may fall within the wider framework of counter-terrorism and extremism policies, particularly the EU Directive 2017/541 on Combating Terrorism, which obliges Member States to criminalise terrorist offences, including those motivated by ideological or political objectives. Reports by Europol, such as the European Union Terrorism Situation and Trend Report 2023, have occasionally identified ecologically motivated attacks as part of the landscape of extremist threats, though they remain marginal compared to other forms of extremism.⁴¹

Internationally, there is no binding convention specifically targeting ecological extremism. Nevertheless, several international legal instruments indirectly cover such conduct. The Council of Europe Convention on the Prevention of Terrorism requires the criminalisation of public provocation to commit terrorist offences, recruitment, and training for terrorism—categories into which ecologically motivated extremist acts may fall if they involve violence or the threat thereof.

In the Slovak legal system, crimes of extremism are listed in Section 140a of the Criminal Code No. 300/2005 Coll.,⁴² while crimes of terrorism are listed in Section 140b of the Criminal Code. Any criminally liable individual may be the perpetrator of these crimes, and their commission requires intent as the form of fault. Legal entities may also be perpetrators of these crimes (see Section 3 of the Slovak Act No. 91/2016 Coll. on Criminal Liability of Legal Entities⁴³).

In the case of crimes of terrorism, the intent or goal is to damage the constitutional order of the Slovak Republic (Section 313, 314 of the Criminal Code), harm the defense capability of the state, disrupt or destroy the fundamental political, economic, or social structure of the state or an international organization, severely intimidate the population, or coerce the government of the state or any other public authority or international organisation to act, omit action, or tolerate certain conduct (Section 419 of the Criminal Code). The perpetrator's motivation in a terrorist attack, as defined in Section 419, is to severely intimidate the population by one of the aforementioned methods, interfere with

41 Europol (n 3).

42 Act No 300/2005 Coll (n 4).

43 Act No 91/2016 Coll on Criminal Liability of Legal Entities and on Amendments to Certain Laws 'O trestnej zodpovednosti právnických osôb a o zmene a doplnení niektorých zákonov' (13 November 2015) <<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2016/91/20241217>> accessed 29 June 2025.

their lives, destabilise or destroy the constitutional, political, economic, or social order of the country or an international organisation, and influence legal and physical persons to act or refrain from certain actions.⁴⁴

The goal of terrorists is the destabilisation and destruction of key political, constitutional, economic, or public institutions and objects within the given state. Danics views terrorism as a clear political threat to the state's system, i.e., a threat to its democratic values and constitutional principles.⁴⁵ The ultimate goal of extremists is, ultimately, the same. While it is stated that terrorism aims to harm the constitutional order of the republic,⁴⁶ we argue that extremism also seeks to harm a democratic state.

Another important characteristic of terrorist acts is the presence of an objective, namely, to influence the actions of governments, international organisations, or other individuals.⁴⁷ Far-right extremist groups have different motives and goals compared to terrorist organisations such as Al-Qaeda, yet they also represent a unique threat to international democracy.⁴⁸

If the focus is on the object protected by law, in the case of crimes of terrorism, the object is the social order in its broadest sense and human life. In the case of crimes of extremism, the object is the protection of fundamental rights and freedoms, equality of people regardless of their national, ethnic, racial, religious, or other affiliation.⁴⁹ Both extremism and terrorism threaten the health and lives of individuals and, ultimately, the democratic functioning of society. Terrorists use extreme violence to achieve their goals, which are primarily the spread of fear and intimidation.⁵⁰ Extremists may or may not use violence.

In the case of ecological extremism, the situation is somewhat different. Ecological activities fundamentally do not represent anti-democratic behaviour. Environmental protection, as such, does not constitute an anti-democratic activity; however, certain radicalised groups may resort to illegal or violent means, thus crossing the line of legitimate activism.

Ecological activities themselves are primarily motivated by the protection of nature and sustainability. When actions cross the line of the law, ecological extremists aim to influence the actions of governments, as well as individuals. Their objectives are ecological, and their primary aim is not to endanger the lives and health of others. Nevertheless, radicalised forms of such activities can, in practice, lead to situations where public safety or the health of the population is genuinely threatened. For example, blocking highways and airports

44 Jozef Čentéš, *Trestný Zákon: Velký Komentár* (Eurokódex 2020) 913.

45 Danics and Teichmanová (n 5) 164-5.

46 Černý (n 8) 47.

47 Tomáš Strémy, *Trestný Zákon: Komentár* (Wolters Kluwer 2022) 1304.

48 Imran Awan, 'Extremism, Radicalisation and Terrorism' in Imran Awan and Brian Blakemore (eds), *Extremism, Counter-Terrorism and Policing* (Routledge 2016) 10.

49 Eduard Burda and others, *Trestný Zákon*, vol 2 (CH Beck 2011).

50 Strémy (n 47) 1304.

(such as the case of the Letzte Generation movement in Germany), glueing themselves to runways, or attacking oil rigs or laboratories (as seen with the Earth Liberation Front and Animal Liberation Front cases).

As is typical for extremists, their common "enemy" consists of those who damage the environment, as well as those who, while not explicitly harming it, do not make sufficient efforts to protect it (governments or transnational institutions). The fundamental difference compared to other forms of extremism is that ecological extremism is generally non-violent towards people but uses violence against objects—for example, blocking roads, sabotaging mining equipment, and damaging infrastructure.

Elements of intimidation of the population can also be identified in ecological extremists' activities, through the spreading of catastrophic narratives about inevitable ecological collapses or climate apocalypse. These narratives serve both to mobilise sympathisers and to exert psychological pressure on society and political representatives, with the aim of accelerating the adoption of radical ecological measures.

Ecological extremism does not aim to overthrow the political system; its goal is to force the state or society to implement immediate ecological changes, not to alter the political regime. It is conceivable that, in extreme cases, the goal could involve changes to the constitutional order and the democratic functioning of society, but such cases would fall under the category of ecoterrorism. Ecological extremism does not reject democracy as a form of government, but rather radicalises protest methods when legal processes are perceived as too slow or ineffective. In the literature, it is therefore often referred to as disruptive or radicalised activism, rather than as an anti-democratic ideology.⁵¹

It is conceivable that eco-terrorism could fulfil the elements of crimes of terrorism under Section 140b of the Criminal Code. However, as mentioned above, the actions in the case of ecoterrorism are motivated by ecological reasons. For example, in a terrorist attack as defined in Section 419, the perpetrator's intent is clearly defined,⁵² which may not always be the case in ecoterrorism.

In the case of ecologically motivated criminal conduct, crimes such as damage to property under Section 245 of the Criminal Code, general endangerment under Section 284, or sabotage under Section 317 should also be considered. However, in the case of sabotage, there must be a clearly defined intent, namely to damage the constitutional order or the defence capability of the Slovak Republic, which is not the primary intent of eco-activists.

51 Michel Forst, *State Repression of Environmental Protest and civil Disobedience: A Major Threat to Human Rights and Democracy* (UNECE 2024).

52 The intention to damage the constitutional order or the defence of the Slovak Republic, or to disrupt or destroy the fundamental political, economic or social structure of a State or an international organisation.

The situation becomes more complex when it comes to ecological extremism. Ecological extremism is unlikely to fall under the crimes of extremism. The crimes of extremism under Section 140a of the Criminal Code include the following:

- founding, supporting, and promoting a movement aimed at suppressing fundamental rights and freedoms (Section 421);
- the expression of sympathy for a movement aimed at suppressing fundamental rights and freedoms (Section 422);
- the production of extremist material (Section 422a);
- the dissemination of extremist material (Section 422b);
- the possession of extremist material (Section 422c);
- Holocaust denial and the approval of crimes committed by political regimes and crimes against humanity (Section 422d);
- the defamation of nations, races, and beliefs (Section 423);
- incitement to national, racial, and ethnic hatred (Section 424);
- apartheid and discrimination against a group of people (Section 424a); and
- the commission of a crime with a specific motive (Section 140(e)).

Ecological extremism is unlikely to fall under any of the listed crimes of extremism. However, the exception may be the crime committed for a specific hate motive, as a crime committed for an ecological motive could conceptually be included among the crimes of extremism. However, such a specific motive is not yet recognised in the Slovak Criminal Code. The motive of nature protection itself does not change the legal qualification, but may be relevant when assessing the nature of the crime and determining the sentence. *De lege ferenda*, the ecological motive could be incorporated as a privileged element of a crime, potentially lowering the applicable sentence, or explicitly recognised as a mitigating circumstance.

Why should the ecological motive be considered? The proposal to recognise an ecological motive as a privileged element of a crime or as a mitigating circumstance rests on both legal and philosophical principles. From a theoretical perspective, modern criminal law acknowledges that the offender's motive may influence the degree of culpability and the proportionality of punishment. In line with the principle of justice and humanity in sentencing, motives driven by altruistic or socially beneficial considerations may be distinguished from purely selfish or profit-oriented motives.⁵³ Ecological ethics further reinforce this argument, as actions motivated by a desire to protect the natural environment reflect an orientation toward the common good.

53 Carissa Byrne Hessick, 'Motive's Role in Criminal Punishment' (2006) 80(1) Southern California Law Review 89.

Comparative perspectives provide valuable analogies. In some jurisdictions, certain crimes committed out of compassion are treated differently.⁵⁴ These examples demonstrate that the law is capable of differentiating between motives, acknowledging that the moral gravity of a crime is not uniform but depends on the underlying purpose of the act. Such analogies support the view that ecological motives could, under carefully defined conditions, be recognised as mitigating.

Nevertheless, the proposal is not without risks. One concern is the possibility of abuse, where offenders might justify unlawful conduct by invoking purported ecological ideals. Another is the risk of trivialising illegal actions, thereby undermining the rule of law and eroding public trust in the consistency of criminal justice. These risks can, however, be mitigated through carefully crafted safeguards. Recognition of the ecological motive as a mitigating circumstance should be limited to non-violent offences and applied only where the ecological motive is clear, genuine, and demonstrable. Judicial discretion would play a central role in assessing whether the ecological motive is both sincere and proportionate to the unlawful means employed.

As mentioned above, in the past five years, there has been no proceeding related to ecological extremism or terrorism in the Slovak Republic that has resulted in a final conviction. The absence of Slovak case law on ecological extremism or terrorism-related offences with an ecological motive creates a significant degree of uncertainty for practitioners. Without judicial interpretation, practitioners lack guidance on how to subsume ecologically motivated conduct under the existing provisions of the Criminal Code. This legal vacuum may lead to inconsistent classification without reference to the ecological motive. From a *de lege lata* perspective, Slovak courts would likely rely on analogies with other forms of extremism when faced with an ecological motive. Ecological motives, however, are often intertwined with altruistic or ethical considerations, distinguishing them from the hate-based or profit-driven motives typically present in other extremist contexts.

Comparative perspectives from jurisdictions such as Germany or the United Kingdom, where climate activism has already led to prosecutions, could undoubtedly enrich this discussion. However, such an analysis exceeds the scope of the present article. The primary aim here is to conceptualise ecological extremism as a legal category and provide a doctrinal foundation for further research. A systematic comparative study of how other legal systems classify and prosecute ecologically motivated conduct remains an important avenue for future scholarship.

Finally, ecological extremism raises important human rights questions, particularly regarding the balance between repressing radical illegal acts and safeguarding

54 For instance see: Chrystala Fakonti, 'Motivated by Compassion: Reviewing the Proposed Public Interest Guidance for Prosecuting Mercy Killings' (2023) 89(2) *The Journal of Criminal Law* 91. doi:10.1177/00220183231191477.

legitimate protest. A full analysis of this dimension exceeds the scope of the present article but remains a crucial subject for future research at the intersection of criminal law, democracy, and civic activism.

6 CONCLUSIONS AND RECOMMENDATIONS

In order to address the concept of ecological extremism, we first considered it necessary to deal with the concept of extremism itself. However, extremism cannot be examined in isolation, and it was essential to focus on its international and European legal contexts, as well as on closely related concepts such as radicalisation and terrorism. Unlike Slovak literature and legislation, foreign literature and legislation primarily focus on terrorism, with extremism receiving only marginal attention alongside terrorism. Slovak literature also often discusses terrorism alongside extremism, but it does not pay attention to the differences or connections between these concepts. Both extremism and terrorism pose a threat to the health and lives of individuals, and ultimately, to the democratic functioning of society.

The issue of ecological extremism has not received sufficient attention from a legal perspective, neither at the national nor at the transnational level. For further study, it was first necessary to address the concept of ecological extremism itself, along with related terms such as ecoterrorism, eco-fascism, as well as opposites like environmental terrorism or ecocide. For the purposes of further research, ecological extremism should be understood as a form of ecologically motivated conduct that exceeds the boundaries of legal activism, but does not always meet the characteristics of terrorism. It is primarily distinguished from ecological activism by a radicalised ideology, the use of illegal methods, and the rejection of institutional forms of environmental protection. To illustrate and facilitate the distinction of terms related to ecological extremism, a clearly arranged table has been presented.

Regarding the criminal law qualification of ecological extremism, it appears unlikely it would fall under any of the crimes of extremism under the Slovak Criminal Code. However, any crime committed for an ecological motive could theoretically be included among crimes of extremism. Such a specific motive, however, is not yet recognised in the Criminal Code. The motive of nature protection itself does not change the legal qualification, but it could be relevant in assessing the nature of the crime and determining the sentence. *De lege ferenda*, the ecological motive could be part of the privileged elements of a crime, thus lowering the applicable sentence, or explicitly recognised as a mitigating circumstance.

The *de lege ferenda* proposal to recognise the ecological motive as a mitigating circumstance must, however, be approached with caution. While such recognition may reflect the altruistic dimension of certain ecologically motivated acts, it also carries risks of abuse and inconsistency. Any policy development in this direction would therefore require narrowly defined safeguards to ensure proportionality, legal certainty, and compatibility with broader European criminal policy.

Although ecologically motivated crimes are generally not specifically codified in legal systems as a separate crime, in practice, the criminal law response relies on general crimes such as damage to property, sabotage, or general endangerment. In exceptional cases, ecologically motivated violent actions may be subsumed under the crimes of terrorism if the elements of intimidating the population or coercing the state are fulfilled. From a *de lege lata* perspective, the current framework appears adequate. From a *de lege ferenda* perspective, however, explicit codification of ecological extremism could enhance legal certainty, signal the seriousness of this phenomenon, and provide clearer guidance for practitioners.

REFERENCES

1. Awan I, 'Extremism, Radicalisation and Terrorism' in Awan I and Blakemore B (eds), *Extremism, Counter-Terrorism and Policing* (Routledge 2016) 10.
2. Bak M, Tarp KN and Liang CS, *Defining the Concept of "Violent Extremism": Delineating the Attributes and Phenomenon of Violent Extremism* (Geneva Paper 24/19, Geneva Centre for Security Policy 2019).
3. Burda E and others, *Trestný Zákon*, vol 2 (CH Beck 2011).
4. Champion K, 'Defining Ecofascism: Historical Foundations and Contemporary Interpretations in the Extreme Right' (2021) 35(4) *Terrorism and Political Violence* 826. doi:10.1080/09546553.2021.1987895
5. Čentěš J, *Trestný Zákon: Velký Komentár* (Eurokódex 2020)
6. Černý P, *Politický Extremismus a Právo* (Eurolex Bohemia 2005)
7. Chmelík J, *Extremismus a Jeho Právní a Sociologické Aspekty* (Linde 2001)
8. Danics Š and Tejchmanová L, *Extremismus, Radikalismus, Populismus a Euroskepticismus* (Univerzita Jana Amose Komenského 2017)
9. Fakonti C, 'Motivated by Compassion: Reviewing the Proposed Public Interest Guidance for Prosecuting Mercy Killings' (2023) 89(2) *The Journal of Criminal Law* 91. doi:10.1177/00220183231191477
10. Forst M, *State Repression of Environmental Protest and civil Disobedience: A Major Threat to Human Rights and Democracy* (UNECE 2024)
11. García Ruiz CR and García Rivas N, *Extremismo Violento y Libertad de Expresión* (Iustel 2020)
12. Hessick CB, 'Motive's Role in Criminal Punishment' (2006) 80(1) *Southern California Law Review* 89.
13. Hughes B, Jones D and Amarasingam A, 'Ecofascism: An Examination of the Far-Right/Ecology Nexus in the Online Space' (2022) 34(5) *Terrorism and Political Violence* 997. doi:10.1080/09546553.2022.2069932

14. Letková L, *Trestné Činy Extrémizmu z Pohľadu Štatistiky a Rozhodovacej Praxe od Roku 2017* (CH Beck 2023)
15. Lichner V, *Analýza Radikálnych a Extrémistických Skupín, Hnutí, Siekt a Kultov a Ich Pošobenie v Slovenskej Republike* (Šafárik Press 2020)
16. Lichner V and others, *Extrémizmus a Radikalizácia v Sociálnych Kontextoch* (Šafárik Press 2018)
17. Macklin G, 'The Extreme Right, Climate Change and Terrorism' (2022) 34(5) *Terrorism and Political Violence* 979. doi:10.1080/09546553.2022.2069928
18. Panigaj J and Berníková E, 'Ecocide: A New Crime under International Law?' (2023) 13(1) *Juridical Tribune* 5. doi:10.24818/TBJ/2023/13/1.01
19. Repiščáková D, 'Žena vo Vojne' (Medzinárodné a európske právo v kinematografii II: XIII ročník študentského sympózia o medzinárodnom a európskom práve, Právnická fakulta Univerzity Pavla Josefa Šafárika v Košiciach, 6 marca 2020) 82.
20. Schmid AP, 'Countering Violent Extremism: a Promising Response to Terrorism' (ICCT International Centre for Counter-Terrorism, 12 June 2012) <<https://www.icct.nl/publication/countering-violent-extremism-promising-response-terrorism>> accessed 29 June 2025.
21. Shanaah S, Fritsche I and Osmundsen M, 'Support for Pro-Climate and Ecofascist Extremism: Correlates and Intersections' (2023) 20(1) *Democracy and Security* 46. doi:10.1080/17419166.2023.2220111
22. Strémy T, *Trestný Zákon: Komentár* (Wolters Kluwer 2022)

AUTHORS INFORMATION

Diana Repiščáková

JUDr., PhD., Department of Constitutional Law and Administrative Law, University of Pavol Jozef Šafárik in Košice, Faculty of Law, Košice, Slovakia

diana.repiscakova@upjs.sk

<https://orcid.org/0009-0003-3859-2064>

Corresponding author, solely responsible for the manuscript preparing.

Competing interests: No competing interests were disclosed.

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

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to my supervisor doc. JUDr. Radomír Jakab, PhD., university profesor, for his insightful guidance, valuable feedback, and continuous encouragement throughout the preparation of this article. I am also grateful to my alma mater Univerzita Pavla Jozefa Šafárika v Košiciach, for providing a supportive academic environment and for the financial support that has made my research activities possible.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Diana Repišćáková. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Assistant Editor – Mag. Viktoriia Ivanova. **English Editor** – Julie Bold.
Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Repišćáková D, 'Ecological Extremism in the Slovak Republic: Conceptual and Legal Foundations' (2025) 8(4) Access to Justice in Eastern Europe 91-113 <<https://doi.org/10.33327/AJEE-18-8.4-a000134>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000134>

Summary: 1. Introduction. – 2. Methodology. – 3. The Conceptual Relationship Between Extremism and Terrorism. – 4. The Concept of Ecological Extremism. – 5. Criminal Law Qualification of Ecological Extremism – 6. Conclusions.

Keywords: *extremism; terrorism; ecological extremism; ecoterrorism; ecological motive; ecologically motivated crimes.*

DETAILS FOR PUBLICATION

Date of submission: 10 Jul 2025

Date of acceptance: 29 Sep 2025

Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 2 round with major revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

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

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЕКОЛОГІЧНИЙ ЕКСТРЕМІЗМ У СЛОВАЦЬКІЙ РЕСПУБЛІЦІ: КОНЦЕПТУАЛЬНІ ТА ПРАВОВІ ЗАСАДИ

Діана Репіцакова

АНОТАЦІЯ

Вступ. В останні роки кліматичні зміни та погіршення стану довкілля спричинили появу нових форм громадянського активізму, що спричиняє тиск на уряди та корпорації, щоб спонукати їх до вжиття невідкладних заходів для захисту довкілля. Хоча більшість екологічних рухів діє в межах закону та демократичних принципів, меншість активістів вдається до більш радикальних та деструктивних методів, якщо вони вважають наявні правові та політичні процеси надто повільними або неефективними. Це явище, яке зазвичай називають екологічним екстремізмом, як правило, не має на меті повалення демократичного уряду, а скоріше прагне прискорити

зміни в екологічній політиці через акти громадянської непокори, а іноді й незаконні прямі дії. Незважаючи на його актуальність, що зростає за останній час, правові аспекти та межі екологічного екстремізму залишаються недостатньо дослідженими, особливо в контексті Центральної та Східної Європи.

Методи. Автор використовує традиційні методи дослідження у правовій науці (юридичного дослідження), поєднуючи загальнонаукові методи з методами, характерними для галузі юридичної науки. Серед загальнонаукових методів, застосованих у цій статті, насамперед є логічні методи, а саме методи аналізу, синтезу та опису. Метод аналізу був використаний стосовно відповідних правових положень, здебільшого щодо статей 140, 140а та 140б Кримінального кодексу Словаччини, а також стосовно доктринальних джерел (різні юридичні коментарі до Кримінального кодексу та монографії, дослідження, наукові статті тощо) та відповідних звітів. Метод синтезу тісно пов'язаний з методом аналізу і доповнює аналітичний підхід. Описовий метод був використаний для визначення та уточнення поняття екологічного екстремізму. Що стосується спеціальних методів юридичної науки, то переважно використовувався порівняльний метод. Цей метод сприяв дослідженню взаємозв'язку між поняттями екстремізму та тероризму, а також дослідженню поняття екологічного екстремізму та пов'язаних з ним термінів.

Результати та висновки. Для подальшого дослідження спочатку необхідно було розглянути саме поняття «екологічного екстремізму» та пов'язані з ним поняття, такі як екотероризм, екофашизм, а також протилежні за значенням, такі як екологічний тероризм та екоцид. З огляду на цілі цієї статті зроблено висновок, що екологічний екстремізм слід розуміти як форму екологічно мотивованої поведінки, яка виходить за межі законного активізму, але не обов'язково відповідає критеріям тероризму. Екологічний екстремізм відрізняється від екологічного активізму насамперед своєю радикалізованою ідеологією, використанням незаконних методів та відмовою від інституційних форм охорони навколишнього середовища. Для ілюстрації та пояснення відмінностей між поняттями, пов'язаними з екологічним екстремізмом, було представлено оглядову таблицю.

Що стосується кримінально-правової класифікації екологічного екстремізму, було зроблено висновок, що важко уявити, щоб екологічний екстремізм підпадав під дію злочинів, класифікованих як екстремізм згідно зі Словачьким кримінальним кодексом. Однак можна припустити, що будь-який злочин, вчинений з екологічною мотивацією, може бути включений до злочинів екстремізму. Однак на цей момент кримінальне право Словаччини не визнає таку конкретну мотивацію. Екологічний мотив сам собою не змінює юридичної кваліфікації діяння, але може мати значення під час оцінки характеру злочину та визначення покарання. *De lege ferenda*, екологічний мотив може бути частиною привілейованих елементів злочину, що знижує міру покарання, або може бути прямо визнаний пом'якшувальною обставиною.

Ключові слова. Екстремізм; тероризм; екологічний екстремізм; екотероризм; екологічний мотив; злочини на екологічному ґрунті.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000123>

Date of submission: 23 Jan 2025

Date of acceptance: 20 May 2025

Last Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Shejnaze Gagica, Berat Dërmaku and Dukagjin Leka

Research Article

MARRIAGE BETWEEN THE SAME SEXES IN THE REPUBLIC OF KOSOVO: COMPARATIVE OVERVIEW

Shejnaze Gagica, Berat Dërmaku and Dukagjin Leka*

ABSTRACT

Background: This article examines the constitutional guarantees regarding the LGBT community in Kosovo and the protection offered by international legal instruments, particularly those of the European Union. It explores the principle of equality and non-discrimination based on sexual orientation, highlighting the legal and social challenges that hinder the full recognition of the rights of the LGBT community.

Methods: This study employs a legal doctrinal research approach, analysing primary legal sources, including the Constitution of Kosovo, the Law on Family, and relevant international conventions such as the European Convention on Human Rights. A comparative legal analysis is also conducted to evaluate Kosovo's legal framework in relation to European Union standards. In addition, a socio-legal empirical component is integrated, drawing on survey data from 2015 and 2022 to measure social attitudes towards same-sex marriage and LGBT rights. This mixed-method approach allows for a comprehensive understanding of both legal norms and their practical impact on social acceptance.

Results and Conclusions: *The research reveals a persistent gap between constitutional provisions that guarantee equality and legal norms that explicitly prohibit same-sex marriages. Survey data indicate a decline in social acceptance of same-sex marriage over the years, with increasing homophobia and resistance to legal changes. However, recent court decisions, such as those recognising gender identity within the right to privacy, indicate progress in the judicial sphere.*

Examining the internal legal acts of the Republic of Kosovo alongside those of the European Union highlights the interaction between constitutional guarantees and the creation of social norms as well as their broader impact on society. A key question arises: to what extent must a legal norm fit into society? Public acceptance, not only in Kosovo but globally, remains limited, particularly with respect to norms affecting the LGBT community. It requires a significant amount of work, especially in drafting norms related to this community.

While Kosovo's legal framework complies with international human rights standards in theory, social attitudes and specific legal provisions pose significant barriers to the recognition of same-sex marriage. Overcoming these gaps requires concerted efforts by policymakers, civil society, and international organisations to promote inclusiveness and reform of restrictive legal norms. The paper examines the interconnectedness of LGBT civil and political rights, prejudice, discrimination, homophobia, and LGBT health disparities. In addition, it also considers the societal consequences of the LGBT community's exclusion, emphasising how legal recognition and social acceptance are mutually reinforcing processes.

1 INTRODUCTION

Kosovo is still a state dependent on its past. Despite being a new state, having separated from Yugoslavia more than three decades ago and from Serbia for over two decades, it is still undergoing a transition.¹ Kosovo is a former communist country in transition. The democratisation of Eastern European countries has been seen as a significant victory for democracy as a form of government.

Within the framework of protecting human rights and freedoms, Kosovo has incorporated all international acts related to those freedoms. Article 22 of the Constitution of Kosovo lists these international instruments.² Fundamental freedoms and rights, including marriage as one of the fundamental freedoms, are governed by the second chapter of the Constitution of the Republic of Kosovo.

1 Enver Hasani, *Tema të Zgjedhura Nga e Drejta Kushtetuese* (Jalifat Publishing, Universiteti i Prishtinës "Hasan Prishtina" 2016) 300.

2 Constitution of the Republik of Kosovo No K-09042008 of 9 April 2008 (amendment 2020) <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>> accessed 15 January 2025.

The Universal Declaration of Human Rights guarantees that "all" people enjoy freedom and equal rights.³ However, not all individuals benefit from these rights due to discrimination against various groups, including members of the LGBT Community.

Today, being part of this community based on sexual orientation or gender identity remains very difficult, especially in South-Eastern Europe. This is not primarily due to the mentality of the people, but rather because few individuals openly express their sexual identity.

In Kosovo, normative acts, particularly those concerning fundamental rights, strongly affirm that these rights are essential: they are inalienable, indivisible, and inviolable, forming the foundation of Kosovo's legal order.

2 METHODOLOGY

Within the framework of this research, a quantitative method was employed, utilising a citizen questionnaire (empirical part), followed by a legal doctrinal review, comparative legal analysis, analysis of court cases, and a review of legislation. To fulfil the research structure, in addition to conducting the empirical part (results obtained from the questionnaire) and the theoretical part, the analytical method (analysis) and comparative method were also used.

Moreover, the theoretical part was integrated with the quantitative method through analysis and comparison. The questionnaire contains 15 questions, of which 5 are technical (age, sex, ethnicity, nationality, level of education), while the remaining 10 pertain to the topic under discussion. Respondents answered by choosing one option or in some cases, two options.

A total of 225 respondents in 2015, and another 225 respondents in 2022, with demographic variation in terms of statistics, education, age and gender. The questionnaire was physically conducted with citizens, and the results were expressed as percentages alongside graphical representations. The questionnaire was designed to reveal views and gather information relevant to the topic.

3 SAME-SEX MARRIAGE ACCORDING TO THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

In legal science, there are two groups of authors regarding the definition of marriage. The first group defines marriage as "a legal-civil contract, with which a man and a woman decide

3 Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948 UNGA Res 217 A(III)) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 15 January 2025.

to live together for mutual assistance between them.”⁴ The second group defines marriage as a marriage between a man and a woman who decide on a common life sanctioned by law and which they cannot resolve on their own.⁵

The core legal components of marriage may be summarised as follows:

- Marriage is cohabitation between two people of different sexes.
- Marriage is a continuous living union.
- Marriage is an institution regulated by law.
- Marriage is a free union.⁶

According to the first component, marriage as a living community between two people of different sexes means that it is a heterosexual union. Cohabitation of two people of the same sex is not considered marriage. This definition derives from the purpose of marriage, which has remained consistent for centuries despite some recent alternative definitions. One of the natural purposes of marriage is the intimate relationship between spouses and the birth of children. Based on this purpose, same-sex marriages, universally known, cannot produce children except by adoption. Therefore, the fundamental condition for creating a family and having children is the relationship between a man and a woman. The difference between the sexes is a natural element that distinguishes marriage from other forms of human union.

The Constitution of the Republic of Kosovo is progressive in recognising fundamental human rights. The second chapter of the Constitution has foreseen a large number of fundamental freedoms and rights. Article 21 provides general principles for these rights, guaranteeing their implementation and affirming that they are “indivisible, inalienable, and inviolable.”⁷

This article also indicates that these rights apply to legal entities insofar as they are applicable, and that everyone is obliged to respect them. Article 22 reflects Kosovo's openness by allowing the direct implementation of international agreements and instruments, listing eight (8) international acts, including the Universal Declaration of Human Rights, the European Convention for the Protection of Fundamental Human Rights and Freedoms and its Protocols, the International Convention on Civil and Political Rights and its Protocols, the Framework Convention of the Council of Europe for the Protection of National Minorities, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against

4 Haxhi Gashi, Abdulla Aliu and Adem Vokshi, *Komentar Ligji nr 2004/32 për Familjen i Kosovës* (GIZ 2012) 51.

5 *ibid* 51-2.

6 Gani Oruçi, *E drejta Familjare (Ligjërata të autorizuar)* (Universitetit të Prishtinës “Hasan Prishtina” 1994) 37.

7 Constitution of the Republic of Kosovo (n 2) art 21.

Women, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.⁸

Article 7 of the Constitution states that “The constitutional order of the Republic of Kosovo is based on the principle of... Equality, respect for freedoms and human rights, non-discrimination... etc.”⁹ These provisions identify non-discrimination, the rule of law, equality, and respect for freedoms and rights as fundamental constitutional values.

One of the institutions protected by the Constitution is marriage and the family. The right to marriage and family is an act and a relationship between two people by mutual will. Marriage as a legal transaction requires the free will of two people of different sexes declaring their intention to take each other as husband and wife. At the same time, marriage as a relationship is a legal bond that can last until the death of one spouse, unless dissolved by divorce.¹⁰

The family unit comprises spouses and their immediate family, which encompasses the spouses' children and parents. The Constitution does not explicitly specify or restrict the gender of spouses, but allows this issue to be addressed through legislation. Article 14, paragraphs 1 and 2 of the relevant law clearly define who has the right to marry.

This law implies that marriage between persons of the same sex is not recognised as the creation of a family, and such unions are prohibited and sanctioned by law. The new Draft Civil Code of Kosovo similarly does not permit same-sex marriage.¹¹ Like the 2006 Law on the Family, the draft code restricts marriage to persons of opposite sexes.

According to Article 1164 of the Draft Civil Code, cohabitation of a man and a woman is a de facto relationship between an adult unmarried man and an adult unmarried woman who openly live together, characterised by joint life and work that presents a character of stability and continuity. This form of cohabitation grants rights and obligations equal to those of married spouses, including care, mutual financial support, and property rights as specified in this Code.

Paragraph 1 of Article 14 of the Law on the Family of Kosovo determines that marriage, apart from being a legally registered union, must be between two persons of different sexes.¹² According to the Law, marriage concerns only persons of opposite sexes and serves to fulfil natural (birth of children), sexual, economic, and cultural needs.¹³

8 *ibid*, art 22.

9 *ibid*, art 7.

10 Francesco Galgano, *E drejta Private* (Fondacioni SOROS, Shtëpia Botuese Luarasi 2006) 778.

11 Draft Civil Code of the Republic of Kosovo (*Ministry of Justice*, 2018) <<https://md.rks-gov.net/en/legislation/civil-code/>> accessed 15 January 2025.

12 Law of the Republic of Kosovo No 2004/32 ‘Family Law of Kosovo’ [2006] Official Gazette 4/1.

13 Gashi, Aliu and Vokshi (n 4) 51.

Until recently, marriage has been widely classified as a contract between two spouses of different sexes, a definition still maintained in many countries. Article 37, paragraph 1 of the Constitution of the Republic of Kosovo states: “Based on free consent, everyone enjoys the right to marry and the right to create a family by law.”¹⁴ This definition can be divided into three parts.

First, the phrase “Everyone enjoys the right to marry” does not specify the sex of the spouses, thus leaving room for interpretation.¹⁵ Second, “the right to create a family” requires a definition of family and its members.¹⁶ The family is formed by the persons who live together and their children, who constitute the family in the narrow sense. It is recognised that same-sex marriage does not biologically result in children, except through adoption. Third, the Constitution does not detail how marriage is conducted but indicates that it is regulated by law. The family “enjoys special protection of the state, in the manner regulated by law.”¹⁷

Article 14 of the Law on the Family of Kosovo, Law No. 2004/32, which entered into force on 16 February 2006, issued by the temporary institutions of self-government in Kosovo, de facto prohibits such marriage. It defines marriage as “a community legally registered between two persons of different sexes, through which they freely decide to live together to create a family.”¹⁸ This definition differs from the Constitutional definition, despite the Law predating the Constitution. Paragraph 2 of Article 14 specifies the sexes of those eligible to marry: “Man and woman have the right to marry and form a family without any restrictions based on race, nationality or religion, and they are equal during the marriage, a continuation of the marriage and its dissolution.”¹⁹

The Constitution of Kosovo, by not explicitly prohibiting marriage between two of the same sex, de facto applies the principle “What is not prohibited is permitted”. However, *de jure*, the Law prohibits such marriages. This raises the question of why, even twelve years after Kosovo declared independence and fourteen years after the issuance of the Law in question, no amendments have been made to address this issue.

Consideration of amendments to the Law has been ongoing for several years. However, on 11 March 2015, the Commission for Drafting the Civil Code (State Commission) was established by Decision No. 09/18, supported by the EU project *Support in the drafting of the Civil Code and the regulation of Property Matters*, which commenced on 1 July 2014 and

14 Constitution of the Republik of Kosovo (n 2) art 37.

15 Enver Hasani and Ivan Čukalović (eds), *Komentar: Kushtetuta e Republikës së Kosovës*, vol 1 (GIZ 2013) 129-30.

16 *ibid.*

17 *ibid.*

18 Law of the Republic of Kosovo No 2004/32 (n 12) art 14(1).

19 *ibid.*, art 14(2).

spanned 24 months. The Commission initiated the codification of civil law,²⁰ issuing several draft frameworks for the Civil Code, in which, in addition to the working group, four thematic subgroups were established to support this process:

- Thematic subgroup for the drafting of the General Part and the Law of Obligations;
- Thematic subgroup for the drafting of Property Law and other real rights;
- Thematic subgroup for the drafting of Family Law and Inheritance Law; AND
- Thematic subgroup for the drafting of Private International Law.²¹

In the area of family law, no amendments have been made to the definitions concerning marriage and family as legal institutions. Article 1138 of the Draft Civil Code defines marriage as “a legally registered union between two spouses of different sexes, through which they freely decide to live together as husband and wife. Marriage is a continuous life union of a man and a woman, legally regulated. Marriage is related to the consent of the husband and wife and their signature in front of the registrar.”

Furthermore, the article explicitly states that marriage can only be contracted between spouses of opposite sexes. Paragraph 3 further stipulates: “Men and women have the right to marry and form a family without any restrictions based on race, nationality or religion, as well as they are equal during the marriage, continuation of the marriage and its dissolution.”²²

The 2004 *Progress Report* published by the European Commission also addresses the LGBT community.²³ While the Constitution and laws are largely in line with international and European standards, in practice, lesbian, gay, bisexual, trans, non-binary, intersex, and queer (LGBTIQ) persons continue to face discrimination and have limited access to essential services, including healthcare, psychosocial, and legal support. Kosovo has yet to adopt a strategy or action plan on the rights of LGBTIQ persons, and no awareness-raising campaigns have been conducted.

Despite public governmental support for events such as Pride Week and the Pride Parade, institutional response to online hate speech and homophobia remains inconsistent. The pending adoption of the Civil Code, which could potentially enable legislation on same-sex unions, has not progressed. Parliamentary debates on this issue have triggered discriminatory language and hate speech. Additionally, no progress has been made in establishing a planned shelter for LGBTIQ victims of domestic violence. Additionally, the

20 ‘Civil Code’ (Ministry of Justice, 2018) <<https://md.rks-gov.net/en/legislation/civil-code/>> accessed 17 January 2025.

21 *ibid.*

22 *ibid*; Draft Civil Code of the Republic of Kosovo (Ministry of Justice, 2018) <https://kuvendikosoves.org/Uploads/Data/Documents/ProjektkodiciviliRepubliesseKosove_khgaTYWYf9.pdf> accessed 17 January 2025.

23 European Commission, Commission Staff Working Document: Kosovo* 2024 Report (SWD(2024) 692 final, 30 October 2024) 37 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52024SC0692>> accessed 17 January 2025.

Law on Civil Status, which would allow for legal gender recognition, remains under consideration but has yet to be adopted.

The Constitution and laws guarantee freedom of assembly and association, and their implementation is generally satisfactory. The LGBTIQ Pride Parade held in Pristina in June 2024 occurred without any reported incidents.²⁴ The Law on Freedom of Association, along with its implementing legislation, largely complies with international human rights standards. Recent amendments to this law established a new Appeals Commission to review decisions related to the freedom of association for non-governmental organisations. Ensure the independence of this Appeals Commission from executive influence remains a crucial concern.

4 THE READINESS OF SOCIETY TO ACCEPT SUCH MARRIAGES AND MEMBERS OF THE LGBT COMMUNITY

The primary function of a legal norm is to guide and organise society. Legal norms are established through various processes, with one of their fundamental objectives being the regulation of individual conduct. Consequently, legal norms are intended to apply universally, requiring adherence from all members of society. However, challenges arise when a majority of the population does not accept a particular norm.

In May 2015, an informal group of law students from the University of Pristina, *Hasan Prishtina, Gjilan Branch*, conducted a survey of different categories of society. The survey included 225 respondents, including primary school teachers, civil servants, pensioners, athletes, intellectuals, high school professors, students, Kosovo police officers, businessmen, journalists, university professors, religious communities (Muslim, Catholic, Protestant, Orthodox), doctors, court and prosecution officials, advocates and cultural figures. The survey focused on the topic of “*Marriage between two same sexes*.” The author of this article participated in the survey as a leader of a group of fifteen students.

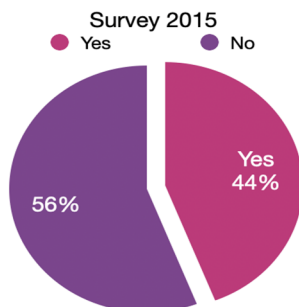
The same survey, targeting identical demographic categories and comprising the same number of respondents, was repeated seven years later in May 2022, also in the city of Gjilan. Participants ranged in age from 18 to 75 years. Gender distribution differed between the two surveys: in 2015, women constituted approximately 65 per cent of respondents and men 35 per cent, whereas in 2022, women accounted for 54 per cent and men 46 per cent.

The surveys conducted in 2015 and 2022 aimed to assess whether Kosovar society is prepared to accept members of the LGBT community. The following section presents graphical representations of selected questions from both surveys:

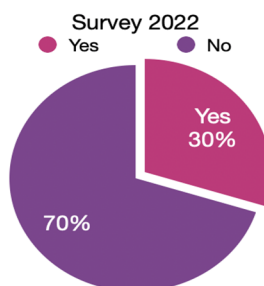
- *Question No. 3 - Do you accept same-sex marriage as something normal?* Questionnaire 2015 = A) 97 Yes B) 123 No; Questionnaire 2022 = a) Yes - 66 B) No - 155

24 *ibid* 34.

3. Do you accept same-sex marriage as something normal?



A) Yes 97
B) No 123

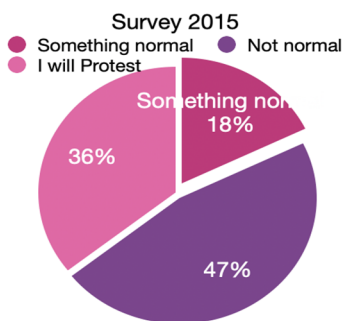


A) Yes 66
B) No 155

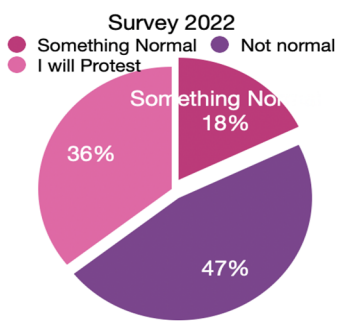
Here, we observe a noticeable change in responses: in 2015, approximately 44 per cent of citizens considered same-sex marriage to be normal, whereas by 2022, this figure had decreased to around 30 per cent.

- **Question No. 4** - If the Assembly of the Republic of Kosovo approves the law allowing same-sex marriages, How would you react? **Questionnaire 2015** = a) Something normal – 36 b) Not normal - 94 c) I will protest – 72 **Questionnaire 2022**= a) Something normal – 36 b) Not normal - 94 c) I will protest – 72

4. If the Assembly of the Republic of Kosovo approves the law allowing same-sex marriages, How would you react?



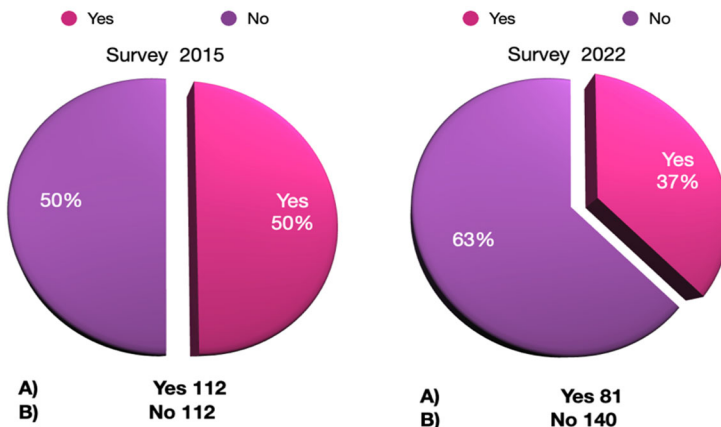
A) Something Normal 36
B) Not normal 94
C) I will Protest



A) Something normal 36
B) Not normal 94
C) I will Protest 72

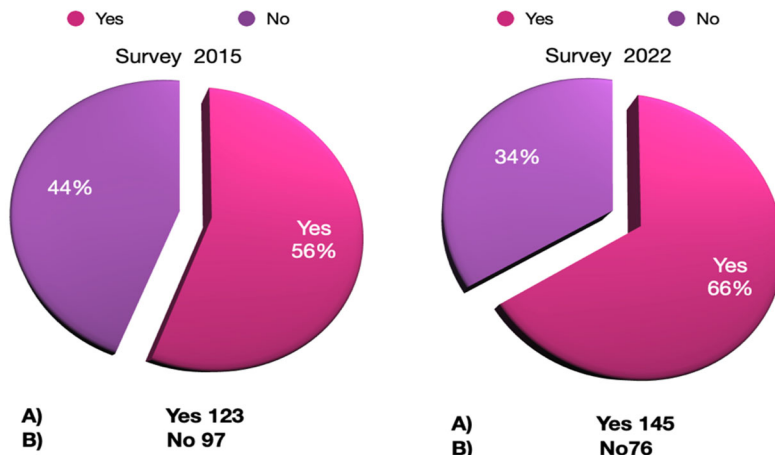
- **Question No. 5** - Should Kosovar society treat people who have such sexual orientation the same as other social communities? **Questionnaire 2015** = A) 112 Yes, B) 112 No, **Questionnaire 2022**= A) 81 Yes, B) 140 No

5 - Should Kosovar society treat people who have such sexual orientation the same as other social communities?



- **Question No. 6** - Do you think such sexual orientation is a mental disorder? **Questionnaire 2015** = A) 97 No, B) 123 Yes, **Questionnaire 2022** = A) 76 No, B) 145 Yes

6 - Do you think such sexual orientation is a mental disorder?



In question 6 of the questionnaire, there was a 10 per cent increase in the number of citizens who consider this sexual orientation to be a mental disorder. These findings indicate that significant doubts persist within society about whether the Constitution permits or prohibits same-sex marriage, while homophobia remains prevalent.

It is estimated that approximately 20 per cent of the global population identifies as homosexual, lesbian, bisexual, or transgender. Members of this community in Kosovo face substantial challenges. Kosovo is the country with the greatest homophobia in the entire Balkan region, according to organisations for the protection of community rights on the International Day against Homophobia.²⁵

A 2016 report by the National Democratic Institute (NDI) published prior to the first Pride in Prishtina in May 2017, revealed that only 3 per cent of respondents would accept a child as a member of the LGBT community, while 97 per cent would refuse to allow them to live at home as members of this community.²⁶

Norms that face strong societal opposition often fail to be fully implemented in practice. Kosovo, despite notable improvements in the implementation of freedoms and human rights, continue to struggle with violations in these areas.

A recent advancement within Kosovo's judicial system reflects progress in this regard. In the case of Judgment AA.nr.244/2019, the Court of Appeal's Administrative Department in Pristina²⁷ rejected a complaint filed by the Ministry of Internal Affairs—Department of Registration and Civil Status—after a party requested a legal change of gender and name from female to male. This ruling is among the first cases where the practice of the European Court of Human Rights is mentioned. However, the court does not say which specific case it is. The court's reasoning states: "Because the right to protect gender identity is protected within the right to privacy according to the judicial practice of the ECtHR. According to the ECtHR, the concept of the right to private life is a broad term and cannot be captured in a narrow definition because it includes the physical and mental integrity of a person. Sometimes it can also include aspects of physical and social identity, elements such as gender identification, name, sexual orientation, and sex life entered the personal sphere protected by Article 8 of the Convention."²⁸

25 Ariana Kasapolli-Selani, 'Kosova, vendi më homofobik në rajon' (*Radio Evropa e Lirë*, 17 May 2017) <<https://www.evropaelire.org/a/28493567.html>> accessed 17 January 2025.

26 *ibid.*

27 Case AA.nr.244/2019 (Court of Appeals of the Republic of Kosovo, 2 August 2019).

28 *ibid.*

5 MARRIAGE BETWEEN THE SAME SEXES AND INTERNATIONAL LAW

Marriage is not trivial. It is directly related to a person as a human being. Marriage has existed and continues to exist in every country, region, social class, race, religion, or secular society. People get married and create their own family life. It is a key to happiness—something that people constantly admire and aspire to. For many, marriage and the creation of a family are their main aspirations; however, in many countries of the world, this right has been denied to members of the homosexual community.

In 2000, at least 47,000 same-sex couples were cohabiting in the Federal Republic of Germany.²⁹ According to a study commissioned by the German Federal Ministry of Justice and conducted by Buba and Vaskovics in 2000, same-sex couples do not differ substantially from opposite-sex couples in their expectations of the partnership, its permanence, willingness to offer mutual support, and responsibility for each other.³⁰

The ECtHR has issued a considerable number of judgments regarding the positive obligation of states to legally recognise the partnership of same-sex couples. The concept of family life has evolved gradually over the Convention's lifetime and continues to evolve to account for social and legal changes. According to Article 12 of the European Convention on Human Rights (ECHR): "Men and women who have reached the age of marriage have the right to marry and create a family according to the national laws that regulate the exercise of this right."³¹ Even here, there is no room for comment as it has been decisively stated which parties constitute a marriage. Thus, the Charter has clarified that a man and a woman can marry if the legal conditions are met.

The right to marry and create a family is essential to family life. Article 16 of the Universal Declaration of Human Rights states that "Men and women of adult age have the right to marry and form a family, without any limitation in terms of race, nationality or religion. They have equal rights both in the case of marriage, during the marriage, and in the case of divorce."³² The second paragraph of this article states that "Marriage must be entered into only with the complete free consent of the persons to be married."³³

Civil marriage is a legal status recognised in all EU countries. A 2019 study provides data pertaining to the issue at hand: 18 European countries consider sexual orientation a criminal offence. These countries are Andorra, Belgium, Denmark, Estonia, France, Iceland, Ireland, Lithuania, Monaco, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain,

29 Case 105 BverfGE 313 (Federal Constitutional Court of the Federal Republic of Germany, 17 July 2002).

30 Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Revised and Expanded, Duke UP 2012) 606, doi:10.2307/j.ctv125jqj0.

31 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 2021).

32 UDHR (n 3) art 16(1).

33 *ibid*, art 16(2).

Sweden, and the United Kingdom.³⁴ More than 18 years after the Netherlands became the first country in the world to legalise same-sex marriage, Northern Ireland has become the last European jurisdiction to allow gays and lesbians to marry. Northern Ireland is the 18th European country to legalise same-sex marriage.³⁵

When it comes to the recognition of same-sex couples, an East–West division can still be observed in Europe. Most countries in Western Europe have expanded the institution of marriage to same-sex couples. On the contrary, among countries of the former Socialist bloc, same-sex marriage is rather the exception. To the present day, only Estonia and Slovenia allow same-sex couples to get married. Some offer a different form of recognition, such as registered partnerships or cohabitation agreements. However, in several Eastern European countries, same-sex couples lack any formal recognition. These countries have become fertile land for the European Court of Human Rights (ECtHR) to explore whether or not providing any legal recognition to same-sex couples can amount to a violation of the European Convention on Human Rights (ECHR). In 2023, the ECtHR rendered five judgments on this issue.³⁶

In these first two decades of the 21st century, many countries have witnessed a remarkable development in terms of legislation, particularly regarding freedoms and human rights, with special attention to family life issues. As mentioned above, the ECtHR has issued a considerable number of decisions on family life between persons of the same sex. One well-known case is *Schalk and Kopf vs. Austria* from 2010.³⁷ Two applicants, a same-sex couple aged 48 and 50 respectively, lived in Vienna. In this decision, among other things, it was stated that same-sex relationships are considered "family life".³⁸

Following *Schalk and Kopf*, the European Court of Human Rights (ECtHR) addressed the right to legal recognition of same-sex couples in three important cases. The first, *Vallianatos and Others v. Greece*,³⁹ concerned a 2006 Greek law that introduced civil unions but limited them to opposite-sex couples. Same-sex couples argued that this exclusion violated Articles 8 and 14 of the European Convention on Human

34 Michael Lipka and David Masci, 'Where Europe Stands on Gay Marriage and Civil Unions' (*Pew Research Center*, 28 October 2019) <<https://www.pewresearch.org/fact-tank/2019/10/28/where-europe-stands-on-gay-marriage-and-civil-unions/>> accessed 17 January 2025.

35 *ibid.*

36 Carlos Santaló Goris, 'The European Court of Human Rights: Advancing Legal Recognition of Same-Sex Couples across Europe?' (*European Institute of Public Administration (EIPA)*, 4 July 2024) <<https://www.eipa.eu/blog/the-european-court-of-human-rights-advancing-legal-recognition-of-same-sex-couples-across-europe/>> accessed 17 January 2025.

37 *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010, final 22/11/2010) <<https://hudoc.echr.coe.int/fre?i=001-99605>> accessed 17 January 2025.

38 Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (2nd edn, Commissioner for Human Rights 2011).

39 *Vallianatos and Others v Greece* App nos 29381/09, 32684/09 (ECtHR, 7 November 2013) <<https://hudoc.echr.coe.int/fre?i=001-128294>> accessed 17 January 2025.

Rights (ECHR). The Court sided with the applicants, stating that the denial of access to civil partnerships was unjustified. It stressed that legal recognition, regardless of its practical implications, has intrinsic value for same-sex couples.

This reasoning was further supported by the European Court of Human Rights' decision in *Oliari and Others v. Italy*.⁴⁰ The case expanded the scope of the Court's jurisprudence. Unlike Greece, Italy did not have a civil union regime—not even for opposite-sex couples. The Court ruled that this violated Article 8 of the ECHR, referring to previous calls by the Italian Constitutional Court for the recognition and public support of same-sex unions. The ECtHR concluded that Italy had failed to fulfil its positive obligation to provide a legal framework for same-sex unions.

In the case of *Orlandi and Others v. Italy*,⁴¹ the Court addressed Italy's refusal to recognise same-sex marriages performed abroad. Although the ECtHR did not find that the right to marry (Article 12) had been violated, it did find a violation of Article 8 due to the failure to recognise these unions. Although Italy had passed laws on civil unions before the judgment, the Court focused on the absence of such legislation at the time of the couple's application.⁴²

The *Fedotova* case⁴³ marked a significant moment in the European Court of Human Rights' (ECtHR) consideration of same-sex couples' rights. Similar to *Oliari*, a group of same-sex couples complained that Russia did not recognise their marriages. However, the ECtHR took a bold step forward by recognising that States Parties have a positive obligation to provide legal recognition and protection to same-sex couples. It held that States are obliged to provide legal recognition to these couples, justifying this position by referring to the growing trend of legal recognition in other European countries.

Despite this progress, *Fedotov* has been criticised. First, the Court did not fully examine whether discrimination against same-sex couples occurred within the meaning of Article 14 of the European Convention on Human Rights. Critics argue that the Court's emphasis on positive obligation resulted in the question of whether unequal treatment of same-sex couples constitutes discrimination not being addressed directly. Second, the ruling did not specify the rights that same-sex couples would enjoy once legally recognised. This ambiguity allows states to grant limited or token recognition without providing full marriage rights.

Overall, the ruling represents an improvement for same-sex couples. However, the lack of clarity on discrimination and rights leaves room for further legal challenges. Future

40 *Oliari and Others v Italy* App nos 18766/11, 36030/11 (ECtHR, 21 July 2015, final 21/10/2015) <<https://hudoc.echr.coe.int/fre?i=001-156265>> accessed 17 January 2025.

41 *Orlandi and Others v Italy* App nos 26431/12, 26742/12, 44057/12, 60088/12 (ECtHR, 14 December 2017, final 14/03/2018) <<https://hudoc.echr.coe.int/eng?i=001-179547>> accessed 17 January 2025.

42 *Goris* (n 36).

43 *Fedotova and Others v Russia* App nos 40792/10, 30538/14, 43439/14 (ECtHR, 13 July 2021) <<https://hudoc.echr.coe.int/eng?i=001-211016>> accessed 17 January 2025.

decisions could provide more clarity on the scope of same-sex couples' rights and potentially resolve the issue of marriage recognition.⁴⁴

In these cases, it was clarified that the European Convention on Human Rights requires some form of legal recognition for same-sex couples; however, the question remained whether this applies to all member states. This issue was later discussed in *Fedotova v. Russia*.

A stable and cohabiting same-sex couple falls within the notion of "family life" as well as "private life" under Article 8 of the ECHR. However, the Convention does not oblige member states to allow same-sex marriage, and Austria's decision to delay the introduction of registered partnerships for same-sex couples did not constitute a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8.⁴⁵

In the chapter titled "Global Equality, Global Counterattack, 2001–2020" of *The International LGBT Rights Movement: A History*, author Laura A. Belmonte describes how advances in LGBTQ+ rights in the early 21st century have spurred both global progress and fierce opposition. She begins by noting that LGBT rights are increasingly institutionalised in international frameworks such as the United Nations and the European Union. The most significant legal victories, such as the legalisation of same-sex marriage in many countries, have been driven by activism, shifts in public opinion, and court decisions based on human rights law.⁴⁶

However, Belmonte notes that these movements have provoked a well-organised backlash, led by religious conservatives, populists, and authoritarian regimes. These actors have portrayed LGBT rights as a threat to traditional values, national identity, and religious freedom. Countries such as Russia and several African and Middle Eastern countries have adopted restrictive legislation, including anti-propaganda laws and criminalisation measures, which directly violate international norms.⁴⁷

The chapter highlights how populist leaders in various regions have used fears of "Western liberalism" to consolidate power and mobilise support, often using anti-LGBT rhetoric as a means of political polarisation.⁴⁸ Belmonte also criticises the limitations of international institutions in addressing such violations, emphasising their dependence on state cooperation and political will.

The author concludes that while the global LGBT movement has achieved remarkable visibility and some lasting reforms, it remains highly contested and vulnerable to political manipulation and ideological backlash.⁴⁹

44 *ibid.*

45 *ibid.*

46 Laura A Belmonte, *The International LGBT Rights Movement: A History* (New Approaches to International History, Bloomsbury 2021) 144–55.

47 *ibid* 150.

48 *ibid* 153.

49 *ibid* 155.

In Germany, on 16 February 2001, after many months of hearings and reports, the law known as the Civil Partnership Act was approved by the Bundestag. The Act aimed to reduce discrimination against same-sex couples by allowing their relationships to be recognised as registered civil partnerships. The case was initiated by the Land Governments of Bavaria and Saxony in the Constitutional Court. According to the first Senate of the German Federal Court, the law in question is in full compliance with the Basic Law.⁵⁰

The Constitutional Court held that the introduction of the legal institution of registered civil partnership for same-sex couples does not violate Article 6.1 of the Basic Law. The special protection of marriage in Article 6.1 of the Basic Law does not prevent the legislature from providing rights and duties for same-sex civil partnerships equal or similar to those of marriage. The institution of marriage is not threatened by any danger from an institution directed at persons who cannot marry each other.⁵¹ Therefore, it does not violate Article 3.1 of the Basic Law that persons of different sexual orientations cohabit with each other, and groups of people related to each other and living together do not have the opportunity to become a registered civil partner.⁵² It must be added that, in Germany, LGBTQ+ people enjoy complete legal equality. Same-sex marriage has been legal since 2017, and transgender people can legally change their gender without undergoing surgery. Due to full legal equality, same-sex couples are entitled to the same tax breaks and social security benefits as heterosexual couples.⁵³

The Constitution of the Republic of Albania, like that of Kosovo, does not decisively state which sexes may enter into marriage. However, it emphasises: "Everyone has the right to marry and have a family."⁵⁴ The second paragraph states: "Marriage and family enjoy the special protection of the state." By contrast, the Constitution of Kosovo states that the issue of marriage is regulated by law: "The marriage and dissolution of marriage are regulated by law."⁵⁵

According to Article 7 of the Family Code of the Republic of Albania: "Marriage can be concluded between a man and a woman who has reached the age of 18."⁵⁶ From all this, it is clear that Albania does not permit marriage between couples of the same sex. Under the Constitution and the law in question, the family enjoys constitutional protection regardless of how it came to be part of the community. In this sense, constitutional protection applies to any family created through the cohabitation or "free union" of two people of different genders.⁵⁷

50 Kommers and Miller (n 30) 606.

51 Case 105 BverfGE 313 (n 29).

52 Kommers and Miller (n 30) 606.

53 'LGBTQ+ in Germany [History, Rights, Marriage]' (*Expatrio*, 12 June 2025) <<https://www.expatrio.com/about-germany/lgbtq-germany-history-rights-marriage>> accessed 14 June 2025.

54 *Kushtetuta e Republikës së Shqipërisë* (Qendra e Botimeve Zyrtare 2000).

55 Constitution of the Republik of Kosovo (n 2) art 37(2).

56 Law of the Republic of Albania No 9062 'Family Code' [2003] Official Journal 49/1907.

57 Luan Omari and Aurela Anastasi, *E drejta Kushtetuese* (Dajti 2000 2017) 164.

In *The Emotions of LGBT Rights and Reform: Remaking the Law*, Senthorun S. Raj offers a rich and emotionally engaging analysis of the LGBT community and its interaction with the law and legal reforms. Raj frames emotions not only as individual or private feelings, but as political and legal forces that shape LGBT identities, rights discourse, and lawmaking. The author criticises mainstream legal narratives that often portray LGBT people as either victims deserving of protection or as threats to normative values. Raj emphasises how such legal constructs are imbued with emotions such as fear, pride, shame, and love, which influence public perception and legal outcomes.⁵⁸ He explains that the law has historically marginalised LGBT individuals by pathologising or criminalising their identities. Yet contemporary reforms, while aiming for inclusion, often impose normative expectations on queer subjects—such as the requirement that they conform to heteronormative standards of love, family, or monogamy to be considered "worthy" of legal protection. This inclusion can therefore become conditional, assimilating LGBT people only if they suppress difference and conform to dominant emotional registers.

For example, while gay marriage reforms are celebrated as emotional victories of love, they often neglect queer people's more radical critiques of legal recognition and justice.⁵⁹ Raj also challenges the notion that legal reforms are neutral, arguing that they are embedded in affective economies that distribute feelings unevenly. The "emotional labour" of queer communities—navigating between visibility and vulnerability—is central to how the law is experienced and contested. He calls for reimagining the law not merely as a site of rights but as a space of affective engagement where queer desires, anxieties, and solidarity can be affirmed without being instrumentalised or sanitised.⁶⁰ In short, Raj's work challenges scholars and legal activists to rethink LGBT rights through a lens that acknowledges the emotional complexities of queer lives and the legal systems that claim to represent them.⁶¹

Another element is that, due to social diversity and differing opinions, many LGBTQ+ people do not openly express their sexual identity in their home countries. A recent study found that 12 per cent of LGBTQ+ employees believed they had been fired or laid off because of their identity. Nearly a third of LGBTQ+ employees (31 per cent) disagreed that they could be themselves at work. Of these, 53 per cent reported experiencing discrimination—such as verbal or physical abuse, or exclusion. The study goes on to show that two in five (39 per cent) still feel the need to hide the fact they are LGBTQ+ at work, and over a third of employees (36 per cent) have heard discriminatory comments made about an LGBTQ+ colleague. More than one in four LGBTQ+ people (26 per cent) experienced negative comments or conduct from customers or clients because of their identity. Furthermore, three

58 Senthorun Sunil Raj, *The Emotions of LGBT Rights and Reforms: Repairing Law* (Edinburgh UP 2025) 1-5.

59 *ibid* 9-11.

60 *ibid* 19.

61 *ibid* 21.

in ten LGBTQ+ employees (31 per cent) would not feel comfortable reporting discrimination if they experienced homophobic or biphobic bullying or harassment.⁶²

This research highlights the persistently high levels of discrimination and fear that LGBTQ+ employees still face, with two in five (39 per cent) still feeling they must hide their identity at work. More than one in four LGBTQ+ people (26 per cent) reported verbally abusive conduct from customers or clients due to their identity. As many organisations scale back their commitments to diversity, equity and inclusion, these statistics are a stark reminder that inclusion remains essential—not only for fairness but also for attracting and retaining the best talent.⁶³

Another study shows that 77 per cent of LGBTQ+ young people have experienced workplace sexual harassment. Unwanted sexual attention and behaviour remain a persistent problem in many workplace cultures, and sexual harassment of LGBTQ employees is often overlooked.⁶⁴

Historically, sexual harassment has been framed in heterosexual terms, in which male bosses target female employees with unwanted sexualised behaviours. This perspective of workplace sexual harassment has been enshrined in film, from the 1980s' *9 to 5* to 2019's *Bombshell*. However, harassment affects LGBTQ+ workers across all employment sectors.⁶⁵

The most common sectors identified were:

1. Accommodation and food service;
2. Retail trade;
3. Administration and support services;
4. Financial and insurance services.⁶⁶

Perpetrators were primarily men, typically older than those they harassed, and often acting alone. In 46 per cent of cases, harassment came from co-workers at the same employment level, while clients or customers were the perpetrators in 31 per cent of cases.⁶⁷

Author Angela Dwyer, examining the historical emergencies of the LGBT community and its relations with the institutions of order, critically examines the historical and

62 'New Research Shows Almost 40% of LGBTQ+ Employees Still Hide their Identity at Work' (*Stonewall*, 31 January 2025) <<https://www.stonewall.org.uk/news/new-research-shows-almost-40-of-lgbtq-employees-still-hide-their-identity-at-work>> accessed 20 March 2025.

63 *ibid.*

64 Luis Hansel, 'New Research: 77% of LGBTQ Young People Have Faced Workplace Sexual Harassment' (*The Conversation*, 2 December 2024) <<https://theconversation.com/new-research-77-of-lgbtq-young-people-have-faced-workplace-sexual-harassment-244735>> accessed 20 March 2025.

65 *ibid.*

66 *ibid.*

67 *ibid.*

contemporary relations between the police on the one hand and the community on the other. She argues that many antagonisms affect relations with the community and their support, including political, legal, cultural, and social factors. Rather than seeing a linear progression from historical oppression to contemporary partnership, Dwyer emphasises how moments of pain and progress appear and reappear in unpredictable ways.⁶⁸

In contrast to more progressive states such as the Republic of Kosovo and Albania, Serbia is considered more radical in terms of the rights of this community. For years, anti-LGBT parades have been held in Serbia. Among them was the most recent parade in September 2022, when thousands of Serbs occupied the squares of Belgrade to protest against the community in question, which was expected to hold its own parade later that month. As reported: “Thousands of religious and right-wing activists marched through Serbia's capital on Sunday, calling on authorities to ban a Gay Pride march planned for next weekend. The protesters - who carried a massive Serbian flag - included groups who also shouted slogans supporting Serbia's long-term ally Russia, as well as nationalist and far-right causes.”⁶⁹

A different perspective is provided by the book *Trauma, Resilience, and Health Promotion in LGBT Patients*, which highlights the unique challenges faced by LGBT people due to systemic discrimination, social stigma, and minority stress. It highlights how these factors contribute to poor health outcomes, substance use, and barriers to health care. The book also highlights the importance of affirmative, inclusive, and trauma-informed care within LGBT communities to promote equity in care. The authors advocate for an intersectional approach to LGBT data, addressing both individual and systems issues to promote knowledge and well-being.⁷⁰

In 2023, the European Parliament published a study titled *LGBT Rights in the European Union*, which revealed Parliament's work on behalf of the community and its broader path of “support” for the LGBTI community. The European Union (EU) legal framework strongly promotes the prohibition of discrimination and the protection of human rights, including those of LGBTI individuals. Despite legal progress, LGBTI people in the EU still face discrimination, verbal abuse and violence. Although EU law recognises sexual orientation as a ground for discrimination, protection in this regard remains limited, particularly in areas such as education, healthcare and social services.

68 Angela Dwyer, ‘Pleasures, Perversities, and Partnerships: The Historical Emergence of LGBT-Police Relationships’ in Dana Peterson and Vanessa R Panfil (eds), *Handbook of LGBT Communities, Crime, and Justice* (Springer 2014) 149, doi:10.1007/978-1-4614-9188-0_8.

69 ‘Thousands March in Belgrade against Planned Gay Pride Parade’ (*Reuters*, 11 September 2022) <<https://www.reuters.com/world/europe/thousands-march-belgrade-against-planned-gay-pride-parade-2022-09-11/>> accessed 17 January 2025.

70 Kristen L Eckstrand and Jennifer Potter (eds), *Trauma, Resilience, and Health Promotion in LGBT Patients: What Every Healthcare Provider Should Know* (Springer 2017) 3-10, 17-20, doi:10.1007/978-3-319-54509-7.

Family and marital status remain under the jurisdiction of national authorities, resulting in inconsistencies among Member States. Some recognise same-sex marriages and partnerships, while others do not—affecting rights such as adoption, assisted reproduction and mobility within the EU. Studies show that discrimination and hate crimes are still widespread, especially against transgender and intersex people.

EU institutions have taken steps through legislation, funding and declarations such as the 2021 LGBTI Freedom Zone. However, progress is hindered by significant differences in national laws. Efforts continue to close loopholes and improve equality for LGBTI people across Europe. The European Parliament's LGBTI Intergroup, along with organisations such as ILGA-Europe, Amnesty and the TGEU, strongly support LGBTI rights, including marriage equality and freedom of movement. However, strong resistance persists in some countries, particularly in matters of marriage and family, often rooted in cultural and religious factors.

EU law does not explicitly prohibit discrimination on the grounds of gender identity or sexual characteristics. Some Member States interpret discrimination against transgender people as a form of sex discrimination, drawing on the case law of the Court of Justice of the EU (CJEU) covering gender reassignment cases. Others treat it as discrimination on the grounds of sexual orientation, while some do not recognise either ground, creating tangible consequences for the legal protection of transgender people.

For intersex people, EU law remains unclear, and there is a lack of relevant CJEU case law. The concept of “sexual characteristics” as a protected characteristic remains underdeveloped in most EU Member States' national laws. Under the Employment Equality Directive, Member States are not obliged to amend civil status laws. However, CJEU case law has established that where a form of union comparable to marriage exists, same-sex partners should not be treated differently in an arbitrary manner.

The European Court of Human Rights (ECtHR) expanded on this in *Fedotova v. Russia* (2023), ruling that a legal framework for the recognition and protection of same-sex couples is necessary.⁷¹

At the EU level, 17 Member States have legalised same-sex marriage, while others allow alternative forms of legal partnership. However, five countries—Bulgaria, Lithuania, Poland, Romania and Slovakia—offer no legal recognition to same-sex couples.

Key directives relevant to LGBTI rights include:

- a) Free Movement Directive: Challenges remain in the recognition of “spouse” and “family members” across all Member States.
- b) Family Reunification Directive: Covers LGBTI third-country nationals.

71 David de Groot, ‘The Rights of LGBTI People in the European Union’ (EPRS, *European Parliament*, 6 June 2024) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2024\)762325](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762325)> accessed 17 January 2025.

- c) Asylum Qualification Directive: Lists sexual orientation and gender identity as grounds for persecution in the country of origin.⁷²

In the *Coman* case (C-673/16), the CJEU ruled that Member States must respect the right of residence of same-sex spouses even if they do not recognise same-sex marriages. In the *V.M.A.* case (C-490/20), the Court requested that the country of origin issue identity documents to a child whose two mothers are legally registered.

The European Commission has adopted a comprehensive strategy to:

- a) Combat discrimination;
- b) Increase the safety of LGBTIQ people;
- c) Build inclusive societies;
- d) Promote the rights of LGBTIQ people worldwide.⁷³

This strategy includes legislative and non-legislative measures, supported by funding through programmes such as CERD, Erasmus+ and the European Instrument for Democracy and Human Rights (EIDHR). The 2023 progress report confirms strong institutional commitment, but also underlines the need to fully implement the proposed measures. The European Parliament remains one of the most active institutions in defending LGBT rights.⁷⁴

6 CONCLUSION

In conclusion, Kosovo's constitutional norms, which guarantee human rights and protection against discrimination, have not been implemented in practice. Research shows that Kosovar society remains largely unprepared for the acceptance of people with different sexual orientations, and homophobia continues to persist. However, there are signs of gradual change, suggesting that same-sex marriages are likely to be adopted in the future—although significant barriers remain. Addressing these challenges requires a multifaceted approach, involving legislative reform, public awareness, judicial training and cultural dialogue.

To bridge the gap between constitutional guarantees and social realities, Kosovo must undertake legislative reforms that harmonise domestic laws with the standards of human rights, including those outlined in the European Convention on Human Rights and the Universal Declaration of Human Rights. Revising the Family Law to explicitly recognise

⁷² *ibid* 7.

⁷³ 'LGBTIQ Equality Strategy 2020-2025' (European Commission, 2025) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en> accessed 17 January 2025.

⁷⁴ European Commission, *Implementation of the 2020-2025 LGBTIQ Equality Strategy: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (Publication Office of the EU 2023).

same-sex marriages would be a major step towards equality and non-discrimination. Given the political sensitivities surrounding this issue, such legislative reforms should be accompanied by strong policymaking.

Public awareness campaigns are essential for promoting inclusion and challenging deep-rooted prejudices. Civil society institutions and the media should collaborate to inform the public about LGBT rights, debunk myths, and combat misinformation that fuels homophobia. Changing public attitudes is a result of successful legal reforms.

Training is another key component of progress. Legal professionals, including lawyers, must be well-versed in human rights and jurisprudence. Strengthening partnerships with foreign organisations can provide technical assistance and advocacy, further strengthening legal protection for the LGBT community.

Engaging with religious and cultural leaders can also help reconcile traditional values with human rights principles. Creating platforms for open dialogue can encourage mutual understanding, reduce resistance to legislative changes, and promote integration of different perspectives. Constructive discourse among different groups can contribute to a shared commitment to human dignity and equality.

Ultimately, Kosovo has the potential to advance LGBT rights by implementing these comprehensive reforms. By aligning its legal framework with external standards, raising public awareness, enhancing judicial capacities, and promoting cultural dialogue, Kosovo can position itself as a regional leader in human rights protection and inclusion.

REFERENCES

1. Belmonte LA, *The International LGBT Rights Movement: A History* (New Approaches to International History, Bloomsbury 2021).
2. de Groot D, 'The Rights of LGBTI People in the European Union' (EPRS, *European Parliament*, 6 June 2024) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2024\)762325](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762325)> accessed 17 January 2025.
3. Dwyer A, 'Pleasures, Perversities, and Partnerships: The Historical Emergence of LGBT-Police Relationships' in Peterson D and Panfil VR (eds), *Handbook of LGBT Communities, Crime, and Justice* (Springer 2014) 149, doi:10.1007/978-1-4614-9188-0_8.
4. Eckstrand KL and Potter J (eds), *Trauma, Resilience, and Health Promotion in LGBT Patients: What Every Healthcare Provider Should Know* (Springer 2017) doi:10.1007/978-3-319-54509-7.
5. Galgano F, *E drejta Private* (Fondacioni SOROS, Shtëpia Botuese Luarasi 2006).
6. Gashi H, Aliu A and Vokshi A, *Komentar Ligji nr 2004/32 për Familjen i Kosovës* (GIZ 2012).

7. Hasani E, *Tema të Zgjedhura Nga e Drejta Kushtetuese* (Jalifat Publishing, Universiteti i Prishtinës “Hasan Prishtina” 2016).
8. Hasani E and Čukalović I (eds), *Komentar: Kushtetuta e Republikës së Kosovës*, vol 1 (GIZ 2013).
9. Kommers DP and Miller RA, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Revised and Expanded, Duke UP 2012) doi:10.2307/j.ctv125jqj0.
10. Lipka M and Masci D, ‘Where Europe Stands on Gay Marriage and Civil Unions’ (*Pew Research Center*, 28 October 2019) <<https://www.pewresearch.org/fact-tank/2019/10/28/where-europe-stands-on-gay-marriage-and-civil-unions/>> accessed 17 January 2025.
11. Omari L and Anastasi A, *E drejta Kushtetuese* (Dajti 2000 2017).
12. Oruçi G, *E drejta Familjare (Ligjërata të autorizuar)* (Universitetit të Prishtinës “Hasan Prishtina” 1994).
13. Raj SS, *The Emotions of LGBT Rights and Reforms: Repairing Law* (Edinburgh UP 2025).
14. Santaló Goris C, ‘The European Court of Human Rights: Advancing Legal Recognition of Same-Sex Couples across Europe?’ (*European Institute of Public Administration (EIPA)*, 4 July 2024) <<https://www.eipa.eu/blog/the-european-court-of-human-rights-advancing-legal-recognition-of-same-sex-couples-across-europe/>> accessed 17 January 2025.

AUTHORS INFORMATION

Shejnaze Gagica

PhD, Faculty of Economics, University “Kadri Zeka” Gjilan, Republic of Kosovo.

shejnaze.gagica@uni-gjilan.net

<https://orcid.org/0009-0009-9824-6706>

Co-author, responsible for Conceptualization, Formal Analysis, Funding acquisition, Investigation, Resources, Software, Validation, Writing – original draft, Writing – review & editing.

Berat Dërmaku*

PhD Candidate, Faculty of Law, University “Kadri Zeka” Gjilan, Republic of Kosovo.

berat.dermaku@uni-gjilan.net

<https://orcid.org/0000-0002-1744-5327>

Corresponding author, responsible for Data curation, Funding acquisition, Project administration, Visualization, Writing – original draft, Writing – review & editing.

Dukagjin Leka

Professor, Dr. Asoc., Faculty of Law, University "Kadri Zeka" Gjilan, Republic of Kosovo.

dukagjin.leka@uni-gjilan.net

<https://orcid.org/0000-0002-4228-4828>

Co-author, responsible for Funding acquisition, Methodology, Supervision, Writing – original draft.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Shejnaze Gagica, Berat Dërmaku, Dukagjin Leka. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. English Editor – Julie Bold.

Section Editor – Dr. Eniana Qarri. **Ukrainian language editor:** Mag. Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Gagica S, Dërmaku D and Leka D, 'Marriage Between the Same Sexes in the Republic of Kosovo: Comparative Overview' (2025) 8(4) Access to Justice in Eastern Europe 114-39 <<https://doi.org/10.33327/AJEE-18-8.4-a000123>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000123>

Summary: 1. Introduction. – 2. Methodology. – 3. Same-Sex Marriage According to the Constitution of the Republic of Kosovo. – 4. The Readiness of Society to Accept Such Marriages and Members of The LGBT Community as Part of It. – 5. Marriage Between the Same Sexes and International Law. – 6. Conclusion.

Keywords: *LGBT Community, Discrimination, Same-Sex Marriage, Civil Rights, Political Rights, Homophobia.*

DETAILS FOR PUBLICATION

Date of submission: 23 Jan 2025

Date of acceptance: 20 May 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with major revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ШЛЮБ МІЖ ОСОБАМИ ОДНІЄЇ СТАТІ В РЕСПУБЛІЦІ КОСОВО: ПОРІВНЯЛЬНИЙ ОГЛЯД

Шейназе Гагіца, Берат Дермаку* та Дукаджін Лека

АНОТАЦІЯ

Вступ. У цій статті розглядаються конституційні гарантії щодо ЛГБТ-спільноти в Косові та захист, який надають міжнародно-правові інструменти, зокрема інструменти Європейського Союзу. Також за допомогою висвітлення правових та соціальних проблем, які перешкоджають повному визнанню прав ЛГБТ-спільноти, досліджується принцип рівності та недискримінації за сексуальною орієнтацією.

Методи. У цьому дослідженні використовується доктринальний дослідницький підхід, здійснено аналіз первинних правових джерел, зокрема Конституції Косова, Закону про сім'ю та відповідних міжнародних конвенцій, таких як Європейська конвенція з прав людини. Також проводиться порівняльно-правовий аналіз для оцінки законодавства Косова стосовно стандартів Європейського Союзу. Крім того, інтегровано соціально-правовий емпіричний компонент, що ґрунтується на даних опитувань 2015 та 2022 років для вимірювання суспільного ставлення до одностатевих шлюбів та прав ЛГБТ. Такий змішаний методологічний підхід дозволяє отримати всебічне розуміння як правових норм, так і їхнього практичного впливу на соціальне сприйняття.

Результати та висновки. У результаті дослідження було виявлено сталий розрив між конституційними положеннями, що гарантують рівність, та правовими нормами, які прямо забороняють одностатеві шлюби. Дані опитування свідчать про зниження соціального сприйняття одностатевих шлюбів протягом багатьох років, зі зростанням гомофобії та опору правовим змінам. Однак нещодавні судові рішення, такі як ті, що визнають гендерну ідентичність згідно з правом на приватність, свідчать про прогрес у судовій сфері.

Вивчення внутрішніх правових актів Республіки Косово разом з актами Європейського Союзу підкреслює взаємодію між конституційними гарантіями та створенням соціальних норм, а також їх ширший вплив на суспільство. Виникає ключове питання: якою мірою правова норма повинна вписуватися в суспільство? Суспільне сприйняття, не лише в Косові, а й у світі, залишається обмеженим, особливо щодо норм, що стосуються ЛГБТ-спільноти. Це вимагає значної роботи, особливо під час розробки норм, що стосуються цієї спільноти.

Хоча законодавство Косова теоретично відповідає міжнародним стандартам у сфері прав людини, соціальні установки та конкретні правові положення створюють значні перешкоди для визнання одностатевих шлюбів. Подолання цих розривів вимагає узгоджених зусиль політиків, громадянського суспільства та міжнародних організацій для сприяння інклюзивності та реформування обмежувальних правових норм. У статті досліджується взаємозв'язок громадянських та політичних прав ЛГБТ, а також упередження, дискримінація, гомофобія та нерівність ЛГБТ у сфері охорони здоров'я. Крім того, у ній також розглядаються суспільні наслідки виключення ЛГБТ-спільноти, підкреслюється, що юридичне визнання та соціальне прийняття є процесами, що взаємно підсилюють один одного.

Ключові слова: ЛГБТ-спільнота, дискримінація, одностатеві шлюби, громадянські права, політичні права, гомофобія.

Research Article

TRANSGENDER RIGHTS
UNDER INTERNATIONAL HUMAN RIGHTS
LAW AND THE INCORPORATION PROCESS
IN VIETNAM:
BARRIERS, CHALLENGES
AND PATHS FORWARD

Van Hoi Nguyen, Toan Thang Nguyen, Thi Hoai Thuong Mac
and Thi Hong Yen Nguyen*

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000140>

Date of submission: 29 Sep 2025

Date of acceptance: 23 Oct 2025

Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Van Hoi Nguyen,
Toan Thang Nguyen, Thi Hoai Thuong Mac
and Thi Hong Yen Nguyen

ABSTRACT

Background: On 24 November 2015, during its 13th term, the National Assembly adopted the 2015 Civil Code, which introduced fundamental amendments concerning individual personal rights. Among the provisions that drew significant domestic and international attention was Article 37, which legalised gender transition procedures. This development marked a breakthrough in the recognition and protection of personal rights, particularly human rights, and positioned Vietnam as the 62nd country worldwide and the 11th in Asia to permit individuals to change their gender. Nonetheless, as gender transition remains a relatively new legal regulation, placed in the context of Vietnam, the recognition and implementation of this right for individuals still face numerous obstacles and challenges.

Methods: *The article employs a combination of different legal research methods, including analysis, historical inquiry, synthesis, evaluation, and comparative study. In addition, through the analytical-comparative method, the article situates the discussion within the framework of international standards, thereby providing an objective assessment of the compatibility of Vietnam's legislation with international norms. On this basis, the article lays the groundwork for proposals to enhance the domestic legal framework and outline a roadmap towards the full recognition of this right in the near future.*

Results and Conclusions: *The objective of this article is to clarify the legal and practical issues, as well as the perspectives and challenges that Vietnam is currently facing in the process of recognising and implementing individuals' right to gender transition. Based on this analysis, the article proposes several solutions for Vietnam in the near future. To achieve this objective, the article is structured around main parts: (i) the right to gender reassignment under international law and global trends; (ii) views and public opinions on recognizing transgender rights in Vietnam; (iii) Vietnam's efforts in establishing a legal framework to ensure transgender rights; and (iv) the challenges in recognizing transgender rights and implementing relevant laws in Vietnam.*

1 INTRODUCTION

Vietnam—a country located in Southeast Asia – was heavily influenced by the tradition and ideology of Confucianism, which became the 62nd country globally to recognise the legality of transgenderism. The regulation of the rights of transgender people in the Vietnam Civil Code¹ 2015 marked a significant step forward in legislative thinking. It showed an effort to realise fundamental human rights in both legal and practical aspects.

In the Universal Periodic Review (UPR) of the United Nations Human Rights Council (UNHRC) in 2016, Vietnam accepted the recommendation to consider "enacting anti-discrimination laws to ensure equal rights of all citizens, regardless of sexual orientation and gender identity."² To fulfil this commitment, Vietnam has taken crucial legal steps in protecting the rights of the LGBT community over the past five years. The 2014 Law on Marriage and Family removed the provision "prohibiting marriage between people of the same sex".³ The 2015 Criminal Code (amended in 2017) extended its protection to gay, bisexual and transgender women by acknowledging that transgender men and

1 Law of Vietnam No 91/2015/QH13 'Civil Code' (24 November 2015) <<https://vanban.chinhphu.vn/?pageid=27160&doid=183188&classid=1&typegroupid=3>> accessed 4 November 2025. [in Vietnamese]

2 'Universal Periodic Review – Viet Nam' (United Nations Human Rights Council, 2025) <<https://www.ohchr.org/en/hr-bodies/upr/vn-index>> accessed 4 November 2025.

3 Law of Vietnam No 52/2014/QH13 'On Marriage and Family' (19 June 2014) <<https://vanban.chinhphu.vn/default.aspx?pageid=27160&doid=175351>> accessed 4 November 2025. [in Vietnamese]

transgender women can be victims of rape.⁴ More importantly, the 2015 Civil Code, which took effect in January 2017, legally recognised transgender individuals in Article 37 for the first time as follows:

“Gender reassignment shall be carried out in accordance with the provisions of law. Individuals who have undergone gender reassignment have the right and obligation to register changes to their civil status in accordance with the law on civil status, and are entitled to personal rights consistent with their reassigned gender as provided in this Code and other relevant laws.”⁵

The gender of each individual is determined from the moment they are born and persists throughout their life. It is a long-standing concept that is deeply ingrained in the minds of most Vietnamese people. Therefore, it is difficult to accept that children born as male or female are of a different gender than their actual gender. Although society is increasingly open and visible, many people still strongly condemn and discriminate against transgender people. This refusal to recognise the rights of transgender individuals has caused many inadequacies in practice. Many people have undergone transgender surgery through illegal surgery in foreign countries, and face many difficulties when returning home without ID cards or with ID cards that do not match their external appearance. This makes them almost “outlaws” and subjects them to many disadvantages in health, employment, daily living, and social security; even in many cases, they are violated but not adequately protected.⁶

In Vietnam, there is currently no official data on the number of transgender people, but according to the statistics of the Institute for Social, Economic and Environmental Research (ISEE), the general estimate is for a rate of 0.5 - 1% (standard rate in the world), Vietnam has about half a million people who self-identify that their gender is not the same as the one they were born with.⁷ However, the country has not yet developed a specific law for transgender individuals, so its implementation has no clear legal basis. From a research perspective, as the right to gender transition has not yet been clearly or comprehensively regulated in Vietnam’s legal system, existing studies remain limited. Most have focused on analysing legal provisions or discussing the evolution of related regulations, rather than examining public attitudes toward this right. Analysing opinions from various social groups regarding its recognition and implementation is essential, as such insights provide

4 Law of Vietnam No 100/2015/QH13 ‘Criminal Code’ (27 November 2015) <<https://vanban.chinhphu.vn/?pageid=27160&docid=183216&classid=1&typegroupid=3>> accessed 4 November 2025. [in Vietnamese]

5 Law of Vietnam No 91/2015/QH13 (n 1) art 37.

6 Thi Hong Nhung Van, ‘On the Right to Gender Reassignment from the Perspective of Individual Personal Rights’ [2021, 20 August] Tạp chí Tòa án nhân dân điện tử <<https://tapchitoaan.vn/ban-ve-quyen-chuyen-doi-gioi-tinh-duoi-goc-do-quyen-nhan-than-cua-ca-nhan>> accessed 4 November 2025. [in Vietnamese]

7 ibid; ‘Gender Statistics in Vietnam 2022’ (National Statistics Office, 2023) <<https://www.nso.gov.vn/en/default/2024/08/gender-statistics-in-vietnam-2022/>> accessed 4 November 2025.

lawmakers with valuable social foundations for improving the legal framework. Furthermore, identifying existing barriers and proposing feasible solutions will help strengthen the effectiveness of this right's implementation.

From a practical perspective, the article focuses on elucidating the international legal framework and practical experiences that provide the foundational basis for examining the right to gender transition. Building on this foundation, it further analyses Vietnam's practical context, prevailing perspectives, and the challenges the country currently faces in recognising and implementing this right. To achieve this objective, the article is designed to clarify the following issues: (i) the right to gender reassignment under international law and global trends; (ii) views and public opinions on recognizing transgender rights in Vietnam; (iii) Vietnam's efforts in establishing a legal framework to ensure transgender rights; and (iv) the challenges in recognising transgender rights and implementing relevant laws in Vietnam.

2 METHODOLOGY

In this article, the authors employ a combination of different legal research methods, including analysis, historical inquiry, synthesis, evaluation, and comparative study. Given the novelty of the subject matter and the challenges Vietnam faces in gradually implementing this right, the authors employ extensive historical and analytical methods to help readers better understand the social context and prevailing perspectives on this issue. In addition, through the analytical-comparative method, the article situates the discussion within the framework of international standard, thereby providing an objective assessment of the compatibility of Vietnam's legislation with international norms, especially with the international legal instruments as the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the Declaration on Sexual Orientation and Human Rights 2005, etc. Besides, the article analyses and discusses several models of gender transition recognition worldwide, thereby providing a more practical basis and valuable experience for proposing an appropriate recognition model for Vietnam. On this basis, the article lays the groundwork for proposals to enhance the domestic legal framework and establish a roadmap towards the full recognition of this right in the near future.

3 THE RIGHT TO GENDER REASSIGNMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW AND TRENDS OF COUNTRIES

In international human rights law, the legal basis for this right is laid out in the United Nations Charter (1945),⁸ which affirms the equality in dignity and rights of all individuals, without discrimination. UDHR states in Article 1 that “all human beings are born free and equal in dignity and rights”, while Article 2 stipulates that everyone is entitled to fundamental rights and freedoms “without distinction of any kind...”.⁹ Although the UDHR does not directly mention “sexual orientation” or “gender identity”, the principle of equality and non-discrimination has provided an essential legal basis for the protection of the rights of transgender people. Articles 2 and 26 of ICCPR require member states to ensure equality before the law and to protect all individuals against all forms of discrimination, including on grounds related to “sex”.¹⁰ The modern approach interprets “sex” to cover gender identity, thereby creating an international legal basis for the recognition of the right to gender reassignment. At the same time, ICESCR guarantees all individuals equal access to health, education, employment, and social security without discrimination.¹¹ This provision is significant for transgender people, who often encounter barriers to accessing health services (such as hormonal treatment or gender confirmation surgery) as well as other social rights.

The first joint statement mentioning sexual orientation at the Commission on Human Rights (2005), along with the Joint statements of 2006, 2008, and 2011, have emphasised the need to end violence and discrimination based on sexual orientation and gender identity.¹² Notably, the United Nations Human Rights Council has adopted Resolutions on “Human Rights, Sexual Orientation and Gender Identity” (in 2011 and 2014).¹³ For the first

8 Charter of the United Nations (26 June 1945) art 55(c) <<https://www.un.org/en/about-us/un-charter>> accessed 4 November 2025.

9 UNGA Resolution 217 A(III) ‘Universal Declaration of Human Rights’ (10 December 1948) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 4 November 2025.

10 UNGA Resolution 2200A (XXI) ‘International Covenant on Economic, Social and Cultural Rights (ICESCR)’, ‘International Covenant on Civil and Political Rights (ICCPR)’ (16 December 1966) <[https://undocs.org/en/A/RES/2200\(XXI\)](https://undocs.org/en/A/RES/2200(XXI))> accessed 4 November 2025.

11 *ibid*, ICESCR.

12 UNCHR, ‘Joint Statement on Sexual Orientation and Human Rights’ (March 2005) <<https://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement/>> accessed 4 November 2025; UNHRC, ‘Joint Statement on Sexual Orientation and Gender Identity’ (1 December 2006) <<https://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/>> accessed 4 November 2025; UNGA, ‘Joint Statement on Sexual Orientation and Gender Identity’ (18 December 2008) <<https://arc-international.net/global-advocacy/sogi-statements/2008-joint-statement/>> accessed 4 November 2025; UNHRC, ‘Joint Statement on the Rights of LGBT Persons’ (22 March 2011) <<https://2009-2017.state.gov/r/pa/prs/ps/2011/03/158847.htm>> accessed 4 November 2025.

13 UNHRC Resolution 17/19 ‘Human Rights, Sexual Orientation and Gender Identity’ (17 June 2011) <<https://docs.un.org/en/A/HRC/RES/17/19>> accessed 4 November 2025; UNHRC Resolution 27/32 ‘Human Rights, Sexual Orientation and Gender Identity’ (26 September 2014) <<https://docs.un.org/en/A/HRC/RES/27/32>> accessed 4 November 2025.

time, the international community publicly affirmed that acts of discrimination against the LGBT community are violations of human rights. The United Nations High Commissioner for Human Rights has recommended that countries should: (i) support legal recognition of the desired gender of transgender people; (ii) provide identity documents consistent with the new gender and name; and (iii) ensure the right to access health care, education, and employment in a non-discriminatory environment.¹⁴

It can be seen that the right to gender transgender is indirectly but clearly recognised in the international framework on human rights. Although there is no specific international treaty on gender reassignment, the broad interpretation of the provisions on equality and non-discrimination in the core international legal instruments of the United Nations has created a global legal framework with orientation and political-moral binding, promoting countries to recognise and protect this right. Thus, international law not only recognises the right to gender reassignment as a legitimate personal need but also considers it an essential element in ensuring human dignity, equality before the law, and access to basic social services. This requires countries to internalise and promulgate rules and specific administrative procedures to recognise the legal gender of transgender people, thereby ensuring that they are treated equally and respected in social life.

Regarding the model of recognition of gender transition in the world, countries often follow one of the following basic models:

First, the self-determination model allows individuals to freely change their legal gender through administrative procedures, without requiring medical certification or surgery. This model is applied in Ireland, Argentina, Norway, and Malta. This model is considered the most progressive because it is consistent with human rights and personal dignity.¹⁵

Second, the medicalised/conditional model requires individuals to satisfy strict conditions such as a diagnosis of gender disorder, surgery, or sterilisation, or court approval. Japan and South Korea are typical examples, and this model is often criticised as violating human rights.

Third, the hybrid model combines self-identification with some additional conditions, often applying simple administrative mechanisms for adults but requiring consultation or medical supervision for minors. Sweden and Germany have recently adopted this model to strike a balance between personal freedom and state control.¹⁶

14 OHCHR, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2nd edn, UN 2019). doi:10.18356/9789210023542.

15 European Commission, *Legal Gender Recognition in the EU: The Journeys of Trans People towards Full Equality* (European Union 2020). doi:10.2838/085419; Stefano Osella and Ruth Rubio-Marin, 'Gender Recognition at the Crossroads: Four Models and the Compass of Comparative Law' (2023) 21(2) *International Journal of Constitutional Law* 574. doi:10.1093/icon/moad045.

16 'Sweden Passes Law Lowering Age to Legally Change Gender from 18 to 16' *The Guardian* (London, 17 April 2024) <<https://www.theguardian.com/world/2024/apr/17/sweden-passes-law-lowering-age-to-legally-change-gender-from-18-to-16?utm=>> accessed 4 November 2025.

Fourth, in the Middle East and North Africa, most countries lack a clear framework for recognising changing gender identities. The rare cases often require courts or medical boards with strict surgical conditions, heavily influenced by religious norms.¹⁷ In many African countries, transgender people even face laws that criminalise homosexual relations, and a complete lack of legal recognition mechanisms, leading to the exclusion of transgender people from the system that protects fundamental human rights.¹⁸

Lastly, the restrictive/prohibitionist model is a prominent example in several countries. The most prominent one is Russia. In 2023, Russia issued a law that prohibits gender reassignment surgery and medical treatments, prevents gender change on documents, and prohibits transgender people from adopting children, effectively excluding them from the legal system.¹⁹

Globally, there is a clear division between models that recognise the right to gender reassignment, ranging from progressive self-identification-based systems to medicalized or hybrid models, and even systems of absolute restriction. While the general trend is to expand legal recognition, this progression presents numerous cultural, legal, and social challenges. Vietnam is actively developing and strengthening its legal framework on gender reassignment. Reviewing the country's position is therefore essential to identify opportunities, address challenges, and determine appropriate directions for domestic legal reform.

4 VIEWS AND PUBLIC OPINIONS ON RECOGNISING TRANSGENDER RIGHTS IN VIETNAM

Ensuring transgender rights is the foundation for honouring the right to self-determination, allowing people with gender identities other than their current biological sex to live according to the gender they prefer. However, because transgender identity is a legal and

17 Nora Noralla, '2023 Was a Bad Year for LGBTQ+ Rights in the MENA Region' (*The Tahrir Institute for Middle East Policy*, 4 June 2024) <<https://timep.org/2024/06/04/2023-was-a-bad-year-for-lgbtq-rights-in-the-mena-region-2024-is-set-to-be-even-worse/>> accessed 4 November 2025.

18 Mariel Ferragamo and Kali Robinson, 'Africa's Struggle Toward Inclusive LGBTQ+ Laws' (*Council on Foreign Relations*, 20 September 2023) <<https://www.cfr.org/article/africas-struggle-toward-inclusive-lgbtq-laws?utm=>> accessed 4 November 2025; 'Morocco' (*OutRight International*, 2024) <<https://outrightinternational.org/our-work/southwest-asia-and-north-africa/morocco?utm=>> accessed 4 November 2025.

19 'Vladimir Putin Signs Law Banning Gender Changes in Russia' *The Guardian* (London, 24 July 2023) <<https://www.theguardian.com/world/2023/jul/24/vladimir-putin-signs-law-banning-gender-changes-in-russia?utm=>> accessed 4 November 2025; 'Country Policy and Information Note: Russia – Sexual Orientation and Gender Identity and Expression, June 2025' (*Government UK*, 23 July 2025) <<https://www.gov.uk/government/publications/russia-country-policy-and-information-notes/country-policy-and-information-note-sexual-orientation-and-gender-identity-and-expression-june-2025-accessible?utm=>> accessed 4 November 2025.

social issue that is inextricably linked to human rights, the recognition of this right has long sparked heated controversy in countries such as Vietnam.²⁰

In Vietnam, research on transgender people is just beginning and starting cautiously, with many bottlenecks, which significantly limit the social life of transgender people. One of the fundamental reasons for these limitations is that the State does not have enough legal framework for the rights of transgender people. National Assembly (NA) delegate Nguyễn Anh Trí, head of the drafting committee and former director of the Central Haematology and Blood Transfusion Institute, has sought public opinion on the drafted Gender Transition Law. In his opinion, the completion of the law on gender reassignment is consistent with the Party's policies and guidelines, as well as the new situation. He also stated that the law's implementation aims to raise community and societal awareness that gender reassignment is not a disease or mental disorder, but rather a deviation in behaviour, perception, and lifestyle. That it must be respected by law as a category of human rights in a civilised society, and that transgender people should have positive attitudes and behaviours to integrate into society. At the same time, it reflects the magnificent humanitarian principles of the Socialist Republic of Vietnam, including the protection of vulnerable populations and the commitment to leaving no one behind.²¹

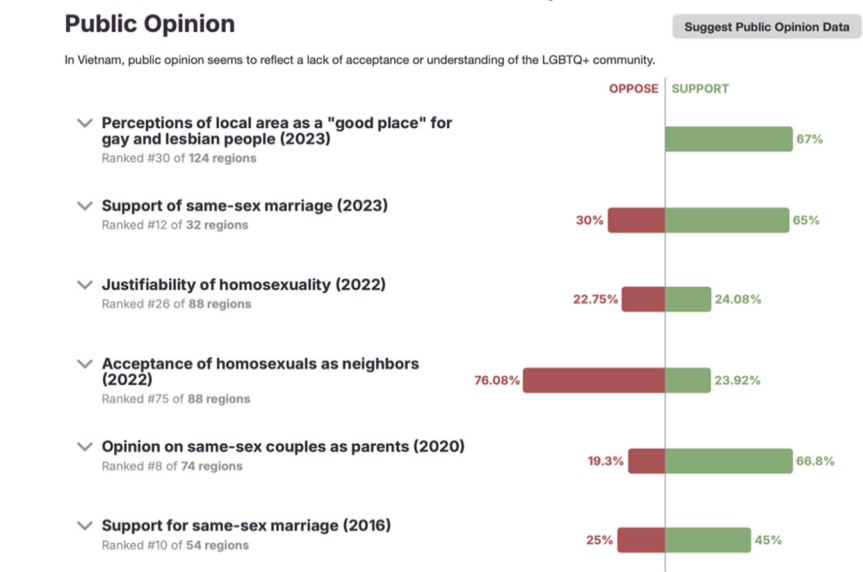


Figure 1. Public Opinion in Vietnam²²

20 Thi Hoai Thuong Mac, 'Recognizing the Issue of Gender Reassignment in International Human Rights Instruments' (2022) 5 Tạp chí nhân quyền Việt Nam 29. [in Vietnamese]

21 Hung Minh, 'Changing Public Awareness, Ensuring Citizens' Right to Gender Reassignment' (*National Assembly of Vietnam: Electronic Information Portal*, 12 May 2023) <<https://quochoi.vn/tintuc/Pages/tin-hoat-dong-cua-quoc-hoi.aspx?ItemID=75738>> accessed 4 November 2025. [in Vietnamese]

22 'LGBT Rights in Vietnam' (*Equaldex*, 2025) <<https://www.equaldex.com/region/vietnam>> accessed 4 November 2025.

The submission of proposals by National Assembly deputies for the development of laws is an exercise of the right to the legislative initiative as prescribed by the Constitution (Article 84), the Law on the Organisation of the National Assembly (Article 29), and the Law on the Promulgation of Legal Documents (Article 33).²³ However, up to now, there are still many conflicting views on transgender people in general and on recognising and ensuring the rights of transgender people in particular in Vietnam.

4.1. Is Transgenderism a Personal Right?

When the Ministry of Health was drafting the Draft Law on Gender Transition, there were many differing views on whether it should be referred to as a "right" or an "event", "transgender" or "gender change".²⁴

The first line of opinion said that transgender is not a need and is not everyone's right, but only for those who satisfy certain conditions as prescribed by law.²⁵ Therefore, using the word "right" to attach to the phrase "transgender" is inappropriate. The title of Article 37 was "right of transgender", meaning everyone could own it, and anyone could perform a gender change.

The second line of opinion asserts that gender change is a fundamental right of an individual under the provisions of the 2015 Civil Code.²⁶ Many Vietnamese researchers agree with this view and gave their agreement based on the following reasons:²⁷

(i) *Gender change is an objective need of transgender people.* It is from these objective needs that fundamental human rights are formed. From a human rights, individuals have the right to life. The right to transgender is a new citizen's right recognised by the 2015 Civil

23 Constitution of the Socialist Republic of Vietnam (28 November 2013) <<https://vanban.chinhphu.vn/?pageid=27160&docid=171264&classid=1&typegroupid=1>> accessed 4 November 2025. [in Vietnamese]; Law of Vietnam No 57/2014/QH13 'On the Organisation of the National Assembly' (20 November 2014) <<https://vanban.chinhphu.vn/default.aspx?pageid=27160&docid=178126>> accessed 4 November 2025. [in Vietnamese]; Law of Vietnam No 64/2025/QH15 'On Promulgation of Legal Documents' (19 February 2025) <<https://vanban.chinhphu.vn/?pageid=27160&docid=213327&classid=1&typegroupid=3>> accessed 4 November 2025. [in Vietnamese]; Minh (n 21).

24 Thi Anh Thu Nguyen, 'Discussing the Right to Gender Reassignment and Some Suggestions for the Draft Law on Gender Reassignment' [2021, 5 January] Tạp chí điện tử Luật sư Việt Nam <<https://lsvn.vn/ban-ve-quyen-chuyen-doi-gioi-tinh-va-mot-so-gop-y-cho-du-thao-luat-chuyen-doi-gioi-tinh-a6673.html>> accessed 4 November 2025. [in Vietnamese]

25 This is the opinion we received through a number of seminars and conferences, including the academic talk "Discussing new contents of the 2015 Civil Code with members of the editorial team" of the Faculty of Civil Law -Hanoi Law University, held on January 4, 5, 2017. These opinions were expressed in direct discussion, so we can only describe this opinion without citing the source.

26 Thi Giang Le, 'The Right to Transgender: Personal Rights in the Civil Code 2015' (2016) 14 Kiểm sát 38. [in Vietnamese]

27 Van (n 6).

Code. This is a human right originating from certain foundations: *First*, individuals have the right to live with their true gender; *second*, an individual's gender is not only determined in civil status documents but also must ensure the biological characteristics of gender (characteristics, positions, roles of men and women in all social relationships); *third*, it is the legal basis for individuals to exercise their statutory rights in accordance with their true gender.²⁸

(ii) *According to the first interpretation*, it is contended that “since being transgender is not a universal need and not everyone has the right to change gender, the term ‘right’ should not be used.” This argument misconstrues the nature of personal rights under the Civil Code. The universality of a right does not depend on its exercise by all individuals but on its legal recognition and protection. For example, Article 36 of the 2015 Civil Code recognises the right to re-determine gender identity for persons born with congenital defects or indeterminate gender. Although not exercisable by everyone, this remains a legally protected personal right.²⁹

(iii) *The failure to attach the word “right” to gender change in Article 37 creates inconsistent terms*. Both the title of Section 2 and the titles of the remaining 14 Articles have the word “right”, so the removal of the word “right” in Article 37 makes it inappropriate to place this article in Section 2.³⁰

Based on the above analysis, the authors believe that it is necessary to attach the word “right” to Article 37, so that the name of this provision should be “right of transgender individuals”. At the same time, through these analyses, it can be seen that, in essence, transgender is one of the objective needs of people. If viewed from a natural perspective, it is one of the fundamental human rights; however, changing one’s gender is a personal right from a legal perspective.

4.2. What are the Conditions for Being Recognised as a Transgender Person?

According to Article 2(2) of the draft of Law on Gender Reassignment (the Draft of 15 January 2018), a transgender person is a person who has received a medical intervention to change his/her sex from male to female or from female to male. At the same time, Chapter II of the Draft specifically notes the conditions for individuals requesting sex change, including (i) having a biologically complete sex drive; (ii) having a psychological examination according to the standard table and being certified by a psychologist and

28 Van Tien Nguyen, ‘The Right to Transgender is Human Right’ *Báo điện tử Pháp Luật thành phố Hồ Chí Minh* (Ho Chi Minh, 4 February 2017) <<https://plo.vn/quyen-chuyen-doi-gioi-tinh-la-quyen-con-nguoi-post423287.html>> accessed 4 November 2025. [in Vietnamese]

29 Van Hoi Nguyen (ed), *Improving the Law on Gender Reassignment in Vietnam* (Công an nhân dân 2020). [in Vietnamese]

30 Le (n 26).

psychiatrist about the desire to have sex other than the completed biological sex and have total active legal capacity; (iii) being 18 years or older; (iv) being single.

Regarding the age of transgender individuals, the Draft recognises that individuals from 16 to under 18 years old, if confirmed by a medical examination and treatment facility, have excessive gender dysphoria, can undergo medical intervention by using sex hormones. This treatment requires the consent of the father, mother or guardian. Those who are eighteen years of age or older may select from the following medical intervention techniques to change their gender: (i) using sex hormones; (ii) undergoing breast and genital surgery; (iii) undergoing complete surgery to remove organs with reproductive functions associated with the old sex; (iiii) combining surgery and sex hormone use; or (iv) other methods that are acceptable for Vietnam and recognised by other countries.

In addition, the Draft also recognises other conditions, such as:

- (i) having received legal advice according to the provisions of this Law;
- (ii) being capable of performing civil acts, as only individuals with civil behavioural capacity have the full awareness to express their voluntary will in requesting medical intervention for gender change;
- (iii) considering the individuals' marital status through two options: Option 1 applies to single persons; Option 2 allows individuals to request medical assistance to change gender without disclosing the requester's marital status. Option 1 is more likely to be approved as allowing a married person to change their gender could result in two people of the same sex having a legally recognised marriage. This goes against the present regulations of the Vietnamese Law on Marriage and Family, which states in Clause 2, Article 8 that "the State does not recognise marriage between people of the same sex"; and
- (iv) not subject to a suspended sentence, non-custodial reform, or additional criminal penalties such as a ban on leaving the place of residence, and having had their criminal record erased.

With the revisions made to the Draft on 5 December 2023, it is now clear that most of the new regulations have a legal or practical basis. Even so, there remain disagreements over the suitability of the Draft from, particularly the provision that surgery on the breasts, genitalia, and other reproductive organs associated with the former sex is not required for those seeking medical intervention to change their gender.

The first view point argues that "*transgender is a surgery to change the external and internal genitalia and treat sex hormone replacement.*"³¹ Thus, transgender is only recognised for those who perform surgery to change the internal and external genitalia. That is, medical intervention to change sex must be carried out holistically. For example, Le Dieu Linh states

31 Minh Tuan Nguyen, *Transgender for People Suffering from Gender Identity* (Vietnam Lawyers' Association, Department of Legal Affairs of the Ministry of Health 2017). [in Vietnamese]

that, “gender change (also known as transgender surgery) is a concept used to refer to medical procedures to change a person's gender, which includes procedures such as surgical genitalia, hormone injections, orthopaedic surgery...”³² Although the author does not explicitly indicate whether genital surgery is comprehensive (both internal and external), the use of the term “reassignment surgery” suggests that no form of medical intervention is excluded from the process of gender transition.

The second view point holds that “*transgender refers to medical procedures used to change a person's gender, which may or may not include transgender surgery.*” According to some Vietnamese researchers, a “transgender person is someone who wishes or has undergone surgery to achieve a match between their genitalia or the actual gender identity in their brain.”³³ Therefore, when a person desires to live by their true gender, they are considered transgender.

Although the Draft dated 5 December 2023 does not mandate breast surgery, genital surgery, or surgery on parts with reproductive functions associated with the sex assigned at birth, public consultation is still ongoing, and it remains unclear whether these requirements will become mandatory. According to the authors, to be recognised as a transgender person, whether an individual has to undergo surgery on the internal and external genitals or not, must be considered from several angles. *First*, the term “gender” refers to the biological characteristics characterising a person (such as chromosomes, gonads, and internal and external genitalia) as male or female.³⁴ These biological characteristics of men and women, which are innate, natural and changeable according to physical laws, are attached to the individual from birth to death.³⁵ Thus, to determine a person's gender, one may have to rely on multiple characteristics, such as chromosomes or genitals. *Second*, the issue must be viewed from the perspective of respecting an individual's right to gender self-determination and their right to bodily integrity. Breast or genital surgery may pose significant health and safety issues for individuals seeking to change their gender. Therefore, forcing those who desire to alter their gender to undergo breast or genital surgery will violate the requirements on the inviolability of life, body, and the right to legal protection of health as outlined in Article 33 of the 2015 Civil Code.³⁶

32 ‘Gender Reassignment Surgery and Important Considerations’ (*Bệnh viện Trường Đại học Y Dược Huế*, 19 May 2023) <https://bvdydhue.vn/modules.php?name=Donvi&file=blog&op=blog_single&id=26> accessed 4 November 2025. [in Vietnamese]

33 Thanh Tu Mai, ‘Transgender People’s Aspiration to be Themselves in Vietnam – Practical and Legal Issues’ (*Thư viện Quốc hội - Văn Phòng Quốc hội*, 2012) <<http://thuvienso.quochoi.vn/handle/11742/54923>> accessed 4 November 2025. [in Vietnamese]

34 Nguyen MT (n 31).

35 Thị Hường Ngô (ed), *Lecture Series on Gender Equality Law* (H Hồng Đức 2013) [in Vietnamese].

36 Thuy Duong Nguyen, ‘Must Have Surgery to be Recognised as Transgender?’ (*Nhquang & Associates*, 4 August 2016) <<https://nhquang.com/vi/phai-qua-phau-thuat-moi-duoc-cong-nhan-la-nguoi-chuyen-gioi/>> accessed 4 November 2025. [in Vietnamese]

4.3. How Many Times Can an Individual Change his/her Gender?

The Draft of 15 January 2018 does not mention the amount of time an individual can change their gender. However, the Draft of 5 December 2023 contained specific provisions on this issue, stating that “citizens perform sex transformation twice in life” is one of the illegal acts. Concurrently, this Draft lists the rule that “citizens only transform gender once in life” as one of its fundamental tenets.³⁷ However, after the Draft was issued for public opinion, differing perspectives emerged on the number of times an individual could change their gender. Specifically, delegate Nguyen Quang Huan (National Assembly delegation of Binh Duong province) stated, “It is the people's right to alter gender. If the law allows someone to change their gender for the first time, there should be no limit on how many times they can do it in the future (...).”³⁸ Contrary to the preceding stance, the majority of viewpoints expressed believe that the Draft's provision prohibiting gender reassignment more than twice in a lifetime is appropriate. Dr Nguyen Huy Quang (former Head of the Legal Department, Ministry of Health) noted: “After completing gender reassignment, the person must change their civil status”. Furthermore, this gender reassignment has a high mortality rate, and people who have had surgery once may have a higher life expectancy than other persons their age. Thus, permitting a second time will have a substantial impact on human health. From there, it will damage the workforce, and if the transgender person's health deteriorates, death will affect the family and society.”³⁹

Although there are differing views on related issues, most members of the Law Committee agreed with National Assembly deputies' proposal to include the Law Project in the 2024 Program. This illustrates a shift in lawmakers' views and thinking regarding introducing the law on gender transition—a change that is both necessary and consistent with the policies and guidelines of the Party and the State of Vietnam aimed at ensuring human rights. It also demonstrates a broader development in social awareness of this issue.

5 VIETNAM'S EFFORTS IN BUILDING A LEGAL BASIS TO ENSURE TRANSGENDER RIGHTS

5.1. Changes in Perception and Ideas Toward Codifying Transgender Rights

Examining the changes in regulations and Drafts related to gender reassignment in Vietnam over different periods shows that Vietnam's efforts to recognise and ensure individuals' the implementation of individuals' right to gender reassignment are as follows.

37 Chung Thanh and others, ‘Should it be Illegal to Change Gender More than Once?’ (*Tuoi Tre Online*, 10 December 2023) <<https://tuoitre.vn/co-nen-cam-chuyen-doi-gioi-tinh-hai-lan-tro-len-20231210083841148.htm>> accessed 4 November 2025. [in Vietnamese]

38 *ibid.*

39 *ibid.*

First, gender reassignment was initially prohibited before being legalised through the enactment of an important law known as the Civil Code. Previously, Vietnamese law prohibited people who had completed their gender from performing gender reassignment surgery as prescribed in Clause 1, Article 4 of Decree No. 88/2008/ND-CP dated 5 August 2008, of the Government on gender reassignment. However, with the efforts of the State and society in propaganda and education, people gradually developed a more objective view and reduced discrimination against transgender individuals. Notably, with Article 37 of the 2015 Civil Code, Vietnam has become the 11th country in Asia to legalise gender reassignment surgery.⁴⁰ *Second*, immediately after legalising gender reassignment, Vietnam took steps to implement the Gender Reassignment Law as quickly as possible. *Third*, the Draft Law on Gender Reassignment aims to concretise Article 37 of the 2015 Civil Code and remove the hurdles that individuals face when seeking to alter their gender. *Fourth*, the Draft Law on Gender Reassignment was developed to clearly demonstrate Vietnam's stance on recognising cases of gender reassignment surgery before this right is legalised.

In addition to efforts to recognise and ensure individuals' right to gender transition, Vietnam is also highly rated in terms of indicators related to recognition and safety for the LGBT+ community. With the promulgation of Article 37 of the 2015 Civil Code, the Government of Vietnam has committed to developing a legal framework that regulates the process of changing one's legal gender marker.⁴¹

5.2. Vietnam's Efforts in Recognising Transgender Rights and Implementing International Commitments

Since becoming a member of many international treaties on human rights, Vietnam has made significant efforts to recognise and protect human rights in general, including the rights of transgender people. The international community has acknowledged Vietnam's notable achievements in this area. Although there are no specific regulations to concretise and guide the implementation of Article 37 of the 2015 Civil Code, the provisions in the Constitution, and other legal documents related to protecting human rights and citizens' rights still provide a legal basis that guarantees the rights of transgender individuals. Specifically, Clause 1, Article 14 of Vietnam's 2013 Constitution notes that "*in the Socialist Republic of Vietnam, human rights and citizens' rights in the political, civic, economic,*

40 Van Kha, 'Gender Reassignment: Is Vietnamese Law Allowed?' *Báo điện tử Dân Trí* (Ho Chi Minh, 23 April 2021) <<https://dantri.com.vn/ban-doc/chuyen-doi-gioi-tinh-phap-luat-viet-nam-co-cho-phap-20210421105057378.htm>> accessed 4 November 2025. [in Vietnamese]

41 Rana Flowers and Ann Măwe, 'It is Time for Vietnam to Walk the Talk on Trans Rights' *Hanoi Times* (Hanoi, 15 March 2021) <<https://hanoitimes.vn/it-is-time-for-vietnam-to-walk-the-talk-on-trans-rights-319508.html>> accessed 4 November 2025.

cultural and social fields are recognised, respected, protected and guaranteed in concordance with the Constitution and the law.”

Although a separate regulation has not yet been promulgated, Vietnam has been striving to clarify its commitment to ensuring the rights of transgender people. Accordingly, Article 3 of the Draft of Law on Gender Reassignment (released on 15 January 2018) sets out several regulations directly guaranteeing the rights of transgender individuals, such as ensuring transgender individuals can live according to their affirmed gender and allowing medical interventions based on the voluntary request of individuals seeking gender change. These contents could become legal principles under transgender law if it is passed.

On 5 February 2016, the Prime Minister issued Decision No. 243/QĐ-TTg on Promulgating the Implementation Plan for the Civil Code, which tasked the Ministry of Health with studying and proposing the development of legal documents related to gender change.⁴² On 12 December 2016, the Ministry of Health of Vietnam convened the first conference to discuss the outline framework and significant issues identified in the draft law. Following this, the Ministry of Health developed a draft law on Gender Reassignment and consulted with relevant agencies, departments, and the public. The draft (released on 15 January 2018) received comments from various agencies, organisations, mass organisations, and individuals in the country, as well as recommendations from the United Nations.⁴³ After the 2018 Draft was not approved, Vietnam continued its effort and released a Draft containing the sex conversion law on 5 December 2023. This version included seven chapters and outlined key topics such as state policies on gender transformation, gender-related rights, and conditions for medical interventions.

The Civil Code 2015 can be said to have significantly enhanced each individual rights, including issues of personal status equality in marriage and employment, while maintaining prudence, conformity with international practice, and respect for national traditions and customs, thereby creating a new step forward in the law-making process and addressing the needs of a segment of citizens in society. Gender reassignment, however, is linked to a range of personal rights issues (gender re-identification, the right to marry, name changes, and a variety of related documents and procedures). Therefore, to effectively implement the right to gender reassignment and avoid difficulties or barriers during the implementation process, a new law must be developed and promulgated, accompanied by detailed regulations outlining the procedures, methods, and circumstances for gender reassignment. Simultaneously, relevant legal procedures must be updated to reflect the new law. As a result,

42 Decision of the Prime Minister of Vietnam No 243/QĐ-TTg ‘On Promulgating the Implementation Plan for Implementing the Civil Code’ (5 February 2016) <<http://vanban.chinhphu.vn/default.aspx?pageid=27160&docid=183419>> accessed 4 November 2025. [in Vietnamese]

43 United Nations Vietnam, ‘UN Recommendations on Viet Nam’s Draft Gender Affirmation Law: Draft Law version from January 2018’ (United Nations Vietnam, 26 November 2019) <<https://vietnam.un.org/en/26018-uns-recommendations-viet-nams-draft-gender-affirmation-law>> accessed 4 November 2025.

the legislation on gender reassignment will inevitably encounter difficulties in its practical implementation, as many administrative procedures will need to be modified.⁴⁴

6 DISCUSSION ON THE CHALLENGES TO THE RECOGNITION OF TRANSGENDER RIGHTS AND THE IMPLEMENTATION OF THE LAWS ON TRANSGENDER IN VIETNAM

6.1. The Impact of Confucian Ideology on Transgender Rights

Originating in ancient China during the Spring and Autumn period and the Warring States (551 BC - 3 BC) of the Zhou dynasty, Confucianism is one of the foremost philosophical schools, founded by Confucius.⁴⁵ Amidst societal upheavals, Confucius delved into socio-political matters, offering insights and solutions to restore societal stability. His teachings later served as governance principles throughout China's feudal era.⁴⁶ According to Confucianism, the "Three Fundamental Bonds" and "the Five Constant Virtues" formed the moral foundation for social and family behaviours, such as the way of governing to "rule the family" and "rule the state." This led to the concept of male chauvinism, where decision-making power was often held by fathers and husbands, giving rise to the saying, "One boy means one, ten girls means none."⁴⁷

Vietnamese history has undergone significant transformations influenced by the infusion of Western liberal ideas and the socialist ideologies of Marx, Engels, and Lenin. As Vietnamese society continues to evolve in an era of globalisation and integration, feminism, liberal concepts, and international human rights standards have been strongly influenced the country's developmental trajectory. These influences have also engendered conflicts within Vietnamese society. Despite ongoing social change, Confucian ideology remains prevalent, impacting notions of gender and gender

44 Thi Ngoc Hai Doan, 'The Right to Change Gender According to the Provisions of Vietnamese Civil Law' (*Bộ Tư pháp*, 12 June 2018) <<http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2325>> accessed 4 November 2025. [in Vietnamese]

45 Katarzyna Anna Nawrot, 'Does Confucianism Promote Cooperation and Integration in East Asia?' (2020) 7 International Communication of Chinese Culture 1. doi:10.1007/s40636-020-00173-2

46 Lauren J Littlejohn, 'Confucianism: How Analects Promoted Patriarchy and Influenced the Subordination of Women in East Asia' (Young Historians Conference 2017) <<http://archives.pdx.edu/ds/psu/19798>> accessed 4 November 2025.

47 Hiroko Sekiguchi, 'The Patriarchal Family Paradigm in Eighth-Century Japan' in Dorothy Ko, JaHyun Kim Haboush and Joan R Piggott (eds), *Women and Confucian Cultures in Premodern China, Korea, and Japan* (University of California Press 2003) 27. doi:10.1525/j.ctt1pp3b9.9; Sirin Sung, 'Women Reconciling Paid and Unpaid Work in a Confucian Welfare State: The Case of South Korea' Queen's University Belfast (2003) 37(4) Social Policy and Administration 342. doi:10.1111/1467-9515.00344.

equality by emphasising the distinction between men and women and reinforcing traditional gender roles. As a result, men are often afforded greater prominence, diminishing the role of women within families and society.⁴⁸

In many parts of Vietnamese society—particularly in rural areas—there is a strong emphasis on traditional gender roles. Men are often viewed as the primary providers for their families, and marriage is seen as a means to have children and carry on the family lineage. As a result, there is a pervasive belief that homosexuality and transgender identity are not only against traditional societal norms but also unnatural.⁴⁹ Sexual relations are generally considered appropriate only when they occur within a loving relationship between a man and a woman. Due to the ancient concept that the result of love is marriage, one of the factors that maintains family happiness is sexual relations and childbearing.⁵⁰

Furthermore, some people still believe that being transgender is a disease and can be transmitted, leading them to stay as far away from transgender people as possible. For many, it is not acceptable for a person to be born with perfect sex as male or female but have the desire to change to get the opposite sex; it is even considered "sick". For the most part, for each individual, gender is a constant, attached factor throughout their life. Therefore, the fact that a person changes their gender contradicts the laws of nature and common morality, making it challenging to receive acceptance and sympathy from society. This concept has influenced and caused significant obstacles to the psychology of society in general and those who desire to change gender in particular, making those who want to change gender not brave enough to carry out their innate transgender identity.⁵¹

Deeply ingrained traditional beliefs have narrowed the perspectives of many individuals—including government officials, policymakers, and lawmakers—within the confines of what is commonly referred to as a "heterosexual society." This framework perpetuates the notion that heterosexuality is the default orientation for everyone and that it holds a position of superiority over all other sexual orientations. Consequently, this prevailing mindset has resulted in discrimination and inequality against individuals who identify with different sexual orientations or gender identities. Societal favouritism towards heterosexual views has

48 Nguyen Toan Thang, Nguyen Thi Hong Yen and La Minh Trang, 'Impacts of Sinosphere on Ensuring Equal Rights of Ethnic Minority Women in Southeast Asian Countries: Barriers, Challenges and Recent Developments' in Thamil Venthan Ananthavinayagan and Amritha Viswanath Shenoy (eds), *The Wretched of the Global South: Critical Approaches to International Human Rights Law* (Springer 2024) 147. doi:10.1007/978-981-99-9275-1_8.

49 Ingrid Grosse, 'Gender Values in Vietnam: Between Confucianism, Communism, and Modernization' (2015) 3(2) *Asian Journal of Peacebuilding* 253.

50 Tien Manh Vu and Hiroyuki Yamada, 'The Impacts of Confucianism on Gender Inequality in Vietnam' (2024) 22(1) *The Journal of Economic Inequality* 165. doi:10.1007/s10888-023-09584-8.

51 Hong Quang Truong, *Rights of Lesbian, Gay, Bisexual, Transgender and Intersex People in Vietnam: From Awareness to Practice* (Nxb Tu Phap 2022). [in Vietnamese]

translated into natural barriers and challenges when it comes to the development and enforcement of laws that protect and uphold the rights of transgender individuals.⁵²

6.2. Social Barriers and Challenges:

Stigma and Discrimination Against Transgender People

Even though society is becoming increasingly open and aware of transgender individuals, many people still strongly condemn and discriminate against them. These individuals oppose recognising the rights of those who wish to change their gender. As a result, societal discrimination against transgender people negatively impacts the practical implementation of laws that protect their rights, as many individuals who wish to change their gender do so covertly, fearing the stigma from their families and society.

In Vietnam, the pressures of close social relationships lead transgender individuals to fear judgment from their neighbours and acquaintances. Consequently, many parents pressure their children not to dress or behave differently to maintain the family's reputation. Furthermore, due to an insufficient understanding of gender, some parents believe that their children are simply following their friends' behaviours or fear that if their child is identified as transgender, they will not have a prosperous future. Consequently, they may resort to harsh methods to "correct" or coerce their children back to their "real" gender, using verbal abuse or even physical force, leading to various forms of violence.⁵³

The stigma and prejudice against transgender individuals have severe consequences, depriving them of the fundamental human right to live their lives safely and freely. This stigma manifests in various forms, including negative attitudes, hostility, prejudice, irrational fear, mistrust, disrespect towards preferred gender identity and pronouns, use of derogatory language and names, as well as instances of bullying, harassment, and even physical violence.⁵⁴ Transgender individuals also encounter discrimination when taking part in social activities.⁵⁵ Discrimination can take many forms, with direct and indirect discrimination being the most prevalent.⁵⁶

52 Nguyen VH (n 29).

53 Anh Tri Nguyen, 'Report No 29/BC-DBQH on the Current Legal and Social Situation Proposed to Develop a Law on Gender Reassignment' (24 April 2023). [in Vietnamese]

54 Hoa Thu Pham and Thi Yen Dong, 'Prejudice, Stigma and Discrimination against Homosexual and Transgender People in Vietnam' (2015) 31(5) VNU Journal of Science: Social Sciences and Humanities <<https://js.vnu.edu.vn/SSH/article/view/262>> accessed 4 November 2025. [in Vietnamese]

55 iSEE, 'iSEE's Perspective on Incidents of Violence, Discrimination and Prejudice Against LGBT People' (iSEE, 26 May 2020) <<https://www.isee.org.vn/goc-nhin/quan-diem-isee-ve-cac-vu-viec-bao-luc-voi-nguoi-lgbt>> accessed 4 November 2025. [in Vietnamese]

56 Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27(3) Oxford Journal of Legal Studies 537.

The impact of stigma and discrimination on transgender individuals is particularly severe in areas such as labour, employment,⁵⁷ and healthcare.⁵⁸ In October 2022, the Ministry of Labour, Invalids, and Social Affairs (now the Ministry of Home Affairs (MOHA)) conducted an online survey with 1,337 respondents to report on Equal Experience and Discrimination against Homosexual, Bisexual, and Transgender People in Vietnam. The survey's summary showed that transgender people frequently encounter more severe circumstances than other communities, like bisexuality and homosexuality, when deciding to come out to their families.⁵⁹ Some of the reported challenges included being banned from external relationships, mistreatment by family members, being forced to get married, facing financial control, pressure from family and lovers, being subjected to medical treatments, physical assault, being encouraged or forced to relocate, confinement at home, and pressure from religious figures. The two most commonly reported experience were "forced to change their appearance and gestures" at 71.8% and "scolded, used words to pressure" at 60.6%.⁶⁰

6.3. Barriers and Challenges in Performing and Enforcing Laws Related to Transgender People

The upcoming deliberation and endorsement of the Law on Gender Reassignment by the National Assembly symbolise a pivotal advancement in acknowledging, guaranteeing, and advancing the rights of transgender individuals as fundamental human rights. However, enacting this law is not a straightforward task. It necessitates the meticulous refinement of related legislation, a process of great importance. Resolving legal dilemmas arising from the exercise of transgender rights presents tangible challenges that demand careful attention.

In marriage and family dynamics, a situation arises when one spouse undergoes a gender transition, prompting consideration of whether the other spouse should also undergo a gender transition. At present, there is no specific legislation addressing this issue. However, the decision to allow or disallow individuals with spouses to undergo gender transitions carries complex implications. If a married individual is permitted to undergo a gender transition, it could result in legally recognised marriages between individuals of the same sex. This conflicts with Clause 2, Article 8 of the 2014 Law on Marriage and Family, which explicitly states that "the state does not recognise marriage between individuals of the same sex". Consequently, existing marriage and family laws do not acknowledge same-sex marriages.

57 Pauline Oosterhoff and Tu-Anh Hoang, "Transgender Employment and Entrepreneurialism in Vietnam" (2018) 26(1) Gender & Development 33. doi:10.1080/13552074.2018.1429102.

58 iSEE, *Research Report on Stigma and Discrimination by Health Workers in Providing Health Services to Men who Have Sex with Men* (iSEE 2011) <<http://csaga.org.vn/song-trong-mot-xa-hoi-di-tinh-cau-chuyen-tu-40-nguoi-nu-yeu-nu-quan-he-voi-cha-me--cht992.html>> accessed 4 November 2025. [in Vietnamese]

59 Nguyen AT (n 53).

60 *ibid.*

Additionally, if gender confirmation surgery is not a requirement for transgender individuals, it may have profound effects on traditional family structures. That could lead to legal marriages transforming into same-sex unions, thus impacting the fundamental function of reproduction within the family unit. As a result, many express concerns that permitting individuals to undergo gender transitions and marry individuals of the same gender could significantly impact the reproductive function of the family, potentially having adverse effects on society's existence and development.⁶¹

On the other hand, denying a married person the right to transition may force the individual to dissolve their marriage. If both spouses agree to the divorce, it can be handled amicably. However, if one party refuses, the individual seeking gender transition must request a divorce according to Article 56 of the Law on Marriage and Family 2014. However, the situation becomes complex when the court must determine the grounds for divorce in cases where the spouse seeking transition has not committed any of the acts specified in Clause 1, Article 56, but simply wishes to be transgender. That may lead to a situation where the transgender person intentionally creates grounds for divorce, which could have unintended consequences.⁶² The consideration of the Draft Law on Gender Reassignment prompts the need to weigh the impact of married couples seeking divorce carefully. The draft's requirement that transgender individuals be single raises potential conflicts and may affect the legitimate rights and interests of many individuals. Legislators must ensure that legal documents harmonise with the rights of those seeking gender reassignment with those of other relevant parties. Additionally, the resolution of this issue may vary across countries depending on their legal recognition of same-sex marriage.⁶³

In the field of labour, it is essential to differentiate between male-to-female transgender individuals. For a male transgender person transitioning to a female, they are entitled to policies applicable to female employees under labour law, as well as any policies for transgender employees. According to the Policy Impact Assessment Report on the Law on Gender Reassignment, dated 12 October 2017, by the Ministry of Health, the Labour Code must include additional provisions for women's employment once this law is enacted. Employers of transgender individuals, as outlined in Chapter XI of the Labour Code, are

61 Vu and Yamada (n 50).

62 UNDP Viet Nam, *International Experiences on Personal and Property Rights of Transgender Persons: Report* (UNDP 2023) <<https://www.undp.org/vietnam/publications/international-experiences-personal-and-property-rights-transgender-persons>> accessed 4 November 2025; Quynh Phuong Pham, *Lesbian, Gay, Bisexual and Transgender People in Vietnam* (Khoa Học Xã Hội 2014). [in Vietnamese]

63 Evan Gerstmann, *Same-Sex Marriage and the Constitution* (CUP 2017); Ministry of Health, 'Report on the Current Situation of Transgender People in Vietnam and Related Legal Systems' (2022) <<https://moh.gov.vn/documents/20182/212437/880B%25C3%25A1o%2520c%25C3%25A1o%2520th%2520c%2520trang%2520ng%2520i%2520chuy%2520n%2520gi%2520i.doc/253afe2c-0b06-46f6-b8ec-81010c742a29>> accessed 4 November 2025. [in Vietnamese]

also required to ensure that male-to-female employees enjoy the same fundamental rights as female employees, as specified in Chapter X of the Labour Code.

Currently, the conditions for recognizing transgender individuals have not been explicitly defined, making it unclear whether genital surgery is required. If genital surgery is not mandatory, a transgender person transitioning from male to female may still give birth. In this case, they are legally considered women raising a child, despite not having been pregnant or giving birth. At this time, the selection and application of policies for female workers must be explicitly considered. For female-to-male individuals, employees will no longer be eligible for the policies applicable to female employees who are unable to complete the registration for a change of civil status. However, due to the influence of female hormones, female-to-male transgender individuals may not have the same physical strength as cisgender men, which can make performing heavy manual labour more difficult. Female-to-male transgender people may experience pressure in terms of employment as societal expectations often place men in roles involving heavy work, economic responsibility, and family leadership. Therefore, to safeguard the rights of transgender people following medical interventions, the Labour Code should include specific regulations on the employment of transgender people and the employer's responsibilities toward transgender workers.

In the context of transgender rights, it is crucial to consider the implications of not mandating internal or external sterilisation for transgender individuals transitioning from female to male. Without such requirements, a transgender man may retain the ability to conceive and carry a child. This raises important questions about how existing policies on female workers would apply to a transgender man who is pregnant or raising a child. Comprehensive regulations are needed to ensure coherence between legal provisions and the lived experiences of transgender individuals. Some experts argue that mandatory sterilisation is necessary to harmonise the legal physical recognition of gender identity across different branches of law.

Gender transgender can also impact criminal liability and prison policies. For example, a female-to-male transgender individual who retains their reproductive organs may become pregnant while serving a sentence. This creates complications in applying policies to pregnant prisoners or in determining responsibility for raising children if the incarcerated individual is identified as male but becomes pregnant. Applying existing policies designed for female prisoners may be inappropriate. Some suggest that laws regulating transgender individuals should mandate genital surgery and sterilization to address such legal complications.

Ensuring the legal recognition and protection of transgender rights requires comprehensive reforms across various facets of the law. However, in practice, lawmakers often lack a thorough understanding of these issues and may fail to adopt a human-rights-based approach. Legal drafting concerning the rights of LGBTI individuals frequently overlooks

the diversity of sexualities and gender identities within society. This knowledge gap is evident in provisions relating to gender equality, highlighting the need for a more inclusive and well-informed approach.

The regulations mentioned above illustrate the goals of gender equality initiatives, which aim to achieve parity between men and women and enable women to develop their skills. However, this approach does not reflect the evolving nature of gender development. While the concept of gender is broad, it is currently limited to the realm of biological sex/gender, failing to encompass the equality of various sexual orientations and gender identities.⁶⁴ The idea of gender equality is centred on achieving equality between men and women and has gained significant momentum in contemporary society. Nevertheless, inherent inequalities persist within political and legal circles in Vietnam, and the prevailing narrow interpretation of gender equality has resulted in ongoing stigmatisation and discrimination against the LGBTI community. The concept of gender equality should therefore be expended to encompass equality not only between genders but also within gender identities and sexual orientations.⁶⁵

6.4. Barriers and Challenges Related to Beliefs and Religions

In many religious traditions, there is a limited recognition of diverse gender identities and sexual orientations, as these belief systems uphold the notion that only men and women were created and granted special privileges by a divine entity. Within this context, fertility beliefs significantly shape attitudes towards gender transition, emphasising the importance of a harmonious union between men and women to sustain and advance the human race.⁶⁶

Vietnam is a diverse, multi-religious country, with major religions including Buddhism, Catholicism, Protestantism, Islam, Cao Dai, and Hoa Hao.⁶⁷ Religious systems play an essential role in shaping perceptions of family dynamics, gender roles, and sexual orientation. For example, Confucianism principles have deeply ingrained the notion of the husband as the primary authority in family decision-making. As a result, wives are expected to adhere to traditional gender expectations, including obedience to their husbands and the responsibility of bearing children to carry on the family lineage. Consequently, non-traditional families and couples who are unable to conceive children may face societal rejection within this cultural context.

64 Hong Quang Truong, 'Law on the Rights of Lesbian, Gay, Bisexual, Transgender and Intersex People in Vietnam: Current Situation and Prospects' (2019) 3 *Đặc san Thông tin Khoa học pháp lý*. [in Vietnamese]

65 Truong (n 51).

66 Huong Dieu, 'A Perspective on Transgender in Belief and Religion' *Báo Pháp luật Việt Nam* (Hanoi, 19 May 2019) <<https://baophapluat.vn/post-307240.html>> accessed 4 November 2025. [in Vietnamese]

67 Thu Hoang and Nhan Ha, 'Ensuring Freedom of Belief and Religion in Vietnam' *Nhan Dan* (Hanoi, 14 March 2023) <<https://nhandan.vn/bao-dam-quyen-tu-do-tin-nguoi-ton-giao-o-viet-nam-post742798.html>> accessed 4 November 2025. [in Vietnamese]

Furthermore, a 2013 study highlighted the substantial impact of ethnic and religious factors on individuals' attitudes toward same-sex marriage. The research revealed that religious doctrine often acts as a formidable barrier to the acceptance of same-sex unions. It also found notable disparities in support for same-sex marriage, with individuals adhering to religious beliefs (except Buddhists) displaying markedly lower levels of acceptance compared to those without religious affiliations.⁶⁸

In summary, although the law in Vietnam includes provisions for transgender individuals and has made significant progress in recognising and protecting their rights as human rights, transgender people in Vietnam still face discrimination from society, family, and friends. They are sometimes subjected to misinformation, unequal treatment, and poverty. Stereotypical and unrealistic messages in the press and some media channels have created and reinforced misconceptions and social stigma.⁶⁹ Therefore, recognising and protecting their rights is an urgent issue that needs to be carefully considered, both in Vietnam and elsewhere, to ensure that transgender people are treated equally and can live authentically as their true selves.

7 CONCLUSION

The movement to legalise transgender rights is a growing global phenomenon. However, this endeavour brings with it a set of complex legal challenges. It is essential to not only to recognise the rights of transgender individuals but also to address the practical issues surrounding the enforcement of transgender legislation and its broader societal impact.

Vietnam has made a significant stride by recognising sex conversion in Article 37 of the Civil Code in 2015, becoming the 62nd country in the world to do so. This decision represents a departure from traditional ideas in the country that have historically posed challenges to the rights of transgender individuals. The lawmaking process in Vietnam requires the government to assess the impacts of proposed policies. In assessing the policy impact of the gender transition law project, Vietnam identified barriers to future law development and enforcement, primarily rooted in traditional cultural factors. As legal regulations emerge, they gradually shape and regulate changes in conventional cultural practices. Article 5 of the 2015 Civil Code stipulates that customs are to be followed only in the absence of legal regulations and cannot contradict Article 3 of the Civil Code, which outlines the fundamental principles of civil law. To advance the rights of transgender individuals in Vietnam, in addition to addressing social, cultural, and religious dimensions, the authors argue that completing and developing the related legal system is the most

68 HSPI, IOS, and iSEE, *Results of the Referendum on Same-Sex Marriage: Research Report* (Nhà xuất bản Thế giới 2013) <<https://thuvien.lgbt/en/documents/ket-qua-trung-cau-y-kien-nguoi-dan-ve-hon-nhan-cung-gioi-2013>> accessed 4 November 2025. [in Vietnamese]

69 Ministry of Health (n 63).

effective legal tool for protecting their rights in practice. Key amendments for legal amendments should focus on the following matters:

First, priority should be given to improving laws on gender reassignment, with careful consideration of key issues, including the requirement for genital or chest surgery for legal recognition, the minimum age for medical intervention, and the permissible number of gender changes. A human rights-based approach should guide these reforms to ensure broader gender equality. The law will serve as a foundation for future amendments and the progressive refinement of the legal framework governing transgender individuals' rights. Furthermore, legislators should also ensure consistency between the provisions of the Law on Gender Reassignment and Vietnam's international commitments.

Second, regarding the Civil Law Code 2015, it is essential to amend the title of Article 37 by adding the word "right" before the phrase "gender reassignment" to ensure consistency in the structure and spirit of Section 2, which is titled "Personal Rights". Currently, the provision only reads "Gender Reassignment", whereas other provisions in the same section explicitly recognize rights, such as "right to change one's name," "right to re-determine one's gender," and "right to one's image". The absence of the word "right" diminishes the legal affirmation of this provision and creates the impression that it is a technical or medical procedure rather than a personal right recognised and guaranteed by the State. Finally, it is proposed to intensify public awareness and legal education campaigns to promote human rights more broadly and, specifically, the rights of transgender individuals. This initiative aims to foster understanding and respect for transgender rights, thereby reducing infringements.

REFERENCES

1. Dieu H, 'A Perspective on Transgender in Belief and Religion' *Báo Pháp luật Việt Nam* (Hanoi, 19 May 2019) <<https://baophapluat.vn/post-307240.html>> accessed 4 November 2025. [in Vietnamese]
2. Doan TNH, 'The Right to Change Gender According to the Provisions of Vietnamese Civil Law' (*Bộ Tư pháp*, 12 June 2018) <<http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2325>> accessed 4 November 2025. [in Vietnamese]
3. Doyle O, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27(3) *Oxford Journal of Legal Studies* 537.
4. Ferragamo M and Robinson K, 'Africa's Struggle Toward Inclusive LGBTQ+ Laws' (*Council on Foreign Relations*, 20 September 2023) <<https://www.cfr.org/article/africas-struggle-toward-inclusive-lgbtq-laws?utm>> accessed 4 November 2025
5. Flowers R and Mâu A, 'It is Time for Vietnam to Walk the Talk on Trans Rights' *Hanoi Times* (Hanoi, 15 March 2021) <<https://hanoitimes.vn/it-is-time-for-vietnam-to-walk-the-talk-on-trans-rights-319508.html>> accessed 4 November 2025

6. Gerstmann E, *Same-Sex Marriage and the Constitution* (CUP 2017)
7. Grosse I, 'Gender Values in Vietnam: Between Confucianism, Communism, and Modernization' (2015) 3(2) *Asian Journal of Peacebuilding* 253
8. Hoang T and Ha N, 'Ensuring Freedom of Belief and Religion in Vietnam' *Nhan Dan* (Hanoi, 14 March 2023) <<https://nhandan.vn/bao-dam-quyen-tu-do-tin-nguong-ton-giao-o-viet-nam-post742798.html>> accessed 4 November 2025. [in Vietnamese]
9. Kha V, 'Gender Reassignment: Is Vietnamese Law Allowed?' *Báo điện tử Dân Trí* (Ho Chi Minh, 23 April 2021) <<https://dantri.com.vn/ban-doc/chuyen-doi-gioi-tinh-phap-luat-viet-nam-co-cho-phep-20210421105057378.htm>> accessed 4 November 2025. [in Vietnamese]
10. Le TG, 'The Right to Transgender: Personal Rights in the Civil Code 2015' (2016) 14 *Kiểm sát* 38. [in Vietnamese]
11. Littlejohn LJ, 'Confucianism: How Analects Promoted Patriarchy and Influenced the Subordination of Women in East Asia' (Young Historians Conference 2017) <<http://archives.pdx.edu/ds/psu/19798>> accessed 4 November 2025
12. Mac THT, 'Recognizing the Issue of Gender Reassignment in International Human Rights Instruments' (2022) 5 *Tạp chí nhân quyền Việt Nam* 29. [in Vietnamese]
13. Mai TT, 'Transgender People's Aspiration to be Themselves in Vietnam – Practical and Legal Issues' (*Thư viện Quốc hội - Văn Phòng Quốc hội*, 2012) <<http://thuvienso.quochoi.vn/handle/11742/54923>> accessed 4 November 2025. [in Vietnamese]
14. Minh H, 'Changing Public Awareness, Ensuring Citizens' Right to Gender Reassignment' (*National Assembly of Vietnam: Electronic Information Portal*, 12 May 2023) <<https://quochoi.vn/tintuc/Pages/tin-hoat-dong-cua-quoc-hoi.aspx?ItemID=75738>> accessed 4 November 2025. [in Vietnamese]
15. Nawrot KA, 'Does Confucianism Promote Cooperation and Integration in East Asia?' (2020) 7 *International Communication of Chinese Culture* 1. doi:10.1007/s40636-020-00173-2
16. Ngô Thị Hường (ed), *Lecture Series on Gender Equality Law* (H Hồng Đức 2013). [in Vietnamese]
17. Nguyen AT, 'Report No 29/BC-DBQH on the Current Legal and Social Situation Proposed to Develop a Law on Gender Reassignment' (24 April 2023). [in Vietnamese]
18. Nguyen MT, *Transgender for People Suffering from Gender Identity* (Vietnam Lawyers' Association, Department of Legal Affairs of the Ministry of Health 2017). [in Vietnamese]
19. Nguyen TD, 'Must Have Surgery to be Recognised as Transgender?' (*Nhquang & Associates*, 4 August 2016) <<https://nhquang.com/vi/phai-qua-phau-thuat-moi-duoc-cong-nhan-la-nguoi-chuyen-gioi/>> accessed 4 November 2025. [in Vietnamese]

20. Nguyen TT, 'Discussing the Right to Gender Reassignment and Some Suggestions for the Draft Law on Gender Reassignment' [2021, 5 January] Tạp chí điện tử Luật sư Việt Nam <<https://lsvn.vn/ban-ve-quyen-chuyen-doi-gioi-tinh-va-mot-so-gop-y-cho-du-thao-luat-chuyen-doi-gioi-tinh-a6673.html>> accessed 4 November 2025. [in Vietnamese]
21. Nguyen VH (ed), *Improving the Law on Gender Reassignment in Vietnam* (Công an nhân dân 2020). [in Vietnamese]
22. Nguyen VT, 'The Right to Transgender is Human Right' Báo điện tử Pháp Luật thành phố Hồ Chí Minh (Ho Chi Minh, 4 February 2017) <<https://plo.vn/quyen-chuyen-doi-gioi-tinh-la-quyen-con-nguoi-post423287.html>> accessed 4 November 2025. [in Vietnamese]
23. Noralla N, '2023 Was a Bad Year for LGBTQ+ Rights in the MENA Region' (*The Tahrir Institute for Middle East Policy*, 4 June 2024) <<https://timep.org/2024/06/04/2023-was-a-bad-year-for-lgbtq-rights-in-the-mena-region-2024-is-set-to-be-even-worse/>> accessed 4 November 2025
24. Oosterhoff P and Hoang TA, 'Transgender Employment and Entrepreneurialism in Vietnam' (2018) 26(1) Gender & Development 33. doi:10.1080/13552074.2018.1429102
25. Osella S and Rubio-Marín R, 'Gender Recognition at the Crossroads: Four Models and the Compass of Comparative Law' (2023) 21(2) International Journal of Constitutional Law 574. doi:10.1093/icon/moad045
26. Pham HT and Dong TY, 'Prejudice, Stigma and Discrimination against Homosexual and Transgender People in Vietnam' (2015) 31(5) VNU Journal of Science: Social Sciences and Humanities <<https://js.vnu.edu.vn/SSH/article/view/262>> accessed 4 November 2025. [in Vietnamese]
27. Pham QP, *Lesbian, Gay, Bisexual and Transgender People in Vietnam* (Khoa Học Xã Hội 2014) [in Vietnamese]
28. Sekiguchi H, 'The Patriarchal Family Paradigm in Eighth-Century Japan' in Ko D, Haboush JK and Piggott JR (eds), *Women and Confucian Cultures in Premodern China, Korea, and Japan* (University of California Press 2003) 27. doi:10.1525/j.ctt1pp3b9.9
29. Sung S, 'Women Reconciling Paid and Unpaid Work in a Confucian Welfare State: The Case of South Korea' Queen's University Belfast (2003) 37(4) Social Policy and Administration 342. doi:10.1111/1467-9515.00344
30. Thang NT Nguyen Yen TH and Trang LM, 'Impacts of Sinosphere on Ensuring Equal Rights of Ethnic Minority Women in Southeast Asian Countries: Barriers, Challenges and Recent Developments' in Ananthavinayagan TV and Shenoy AV (eds), *The Wretched of the Global South: Critical Approaches to International Human Rights Law* (Springer 2024) 147. doi:10.1007/978-981-99-9275-1_8

31. Thanh C and others, ‘Should it be Illegal to Change Gender More than Once?’ (*Tuoi Tre Online*, 10 December 2023) <<https://tuoitre.vn/co-nen-cam-chuyen-doi-gioi-tinh-hai-lan-tro-len-20231210083841148.htm>> accessed 4 November 2025. [in Vietnamese]
32. Truong HQ, ‘Law on the Rights of Lesbian, Gay, Bisexual, Transgender and Intersex People in Vietnam: Current Situation and Prospects’ (2019) 3 Đặc san Thông tin Khoa học pháp lý. [in Vietnamese]
33. Truong HQ, *Rights of Lesbian, Gay, Bisexual, Transgender and Intersex People in Vietnam: From Awareness to Practice* (Nxb Tu Phap 2022). [in Vietnamese]
34. Van THN, ‘On the Right to Gender Reassignment from the Perspective of Individual Personal Rights’ [2021, 20 August] Tạp chí Tòa án nhân dân điện tử [in Vietnamese] <<https://tapchitoaan.vn/ban-ve-quyen-chuyen-doi-gioi-tinh-duoi-goc-do-quyen-nhan-than-cua-ca-nhan>> accessed 4 November 2025
35. Vu TM and Yamada H, ‘The Impacts of Confucianism on Gender Inequality in Vietnam’ (2024) 22(1) *The Journal of Economic Inequality* 165. doi:10.1007/s10888-023-09584-8

AUTHORS INFORMATION

Van Hoi Nguyen*

PhD, Hanoi Law University (HLU), Vietnam

hoi03032013@gmail.com

<https://orcid.org/0000-0002-0509-1605>

Corresponding author, responsible for writing – review & editing; conceptualisation; resources; project administration

Toan Thang Nguyen

Assoc. Prof.Dr, Hanoi Law University (HLU), Vietnam

ngthang@hlu.edu.vn

<https://orcid.org/0000-0002-6197-9385>

Co-author, responsible for conceptualisation; methodology; writing – original draft.

Thi Hoai Thuong Mac

PhD, Hanoi Law University (HLU), Vietnam

macthihoaituong.hlu@gmail.com

<https://orcid.org/0000-0002-0674-9130>

Co-author, responsible for conceptualisation, writing – original draft.

Thi Hong Yen Nguyen

Assoc. Prof.Dr, Hanoi Law University (HLU), Vietnam

nguyenhongyen@hlu.edu.vn

<https://orcid.org/0000-0003-2703-2363>

Co-author, responsible for methodology; writing – original draft.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Van Hoi Nguyen, Toan Thang Nguyen, Thi Hoai Thuong Mac and Thi Hong Yen Nguyen. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Dr. Olena Terekh. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Nguyen VH, Nguyen TT, Mac THT and Nguyen THY, 'Transgender Rights under International Human Rights Law and the Incorporation Process in Vietnam: Barriers, Challenges and Paths Forward' (2025) 8(4) Access to Justice in Eastern Europe 140-69 <<https://doi.org/10.33327/AJEE-18-8.4-a000140>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000140>

Summary: 1. Introduction. – 2. Methodology. – 3. The Right to Gender Reassignment under International Human Rights Law and Trends of Countries. – 4. Views and Public Opinions on Recognising Transgender Rights in Vietnam. – 4.1. *Is Transgenderism a Personal Right?*. – 4.2. *What are the Conditions for Being Recognised as a Transgender Person?*. – 4.3. *How Many Times Can an Individual Change his/her Gender?*. – 5. Vietnam's

Efforts in Building a Legal Basis to Ensure Transgender Rights. – 5.1. *Changes in Perception and Ideas Toward Codifying Transgender Rights.* – 5.2. *Vietnam's Efforts in Recognising Transgender Rights and Implementing International Commitments.* – 6. Discussion on the Challenges to the Recognition of Transgender Rights and the Implementation of the Laws on Transgender in Vietnam. – 6.1. *The Impact of Confucian Ideology on Transgender Rights.* – 6.2. *Social Barriers and Challenges: Stigma and Discrimination Against Transgender People.* – 6.3. *Barriers and Challenges in Performing and Enforcing Laws Related to Transgender People.* – 6.4. *Barriers and Challenges Related to Beliefs and Religions.* – 7. Conclusion.

Keywords: *Transgender rights, Human Rights Law, LGBT, Individual rights, Vietnamese Civil Law.*

DETAILS FOR PUBLICATION

Date of submission: 29 Sep 2025

Date of acceptance: 23 Oct 2025

Publication: 18 Nov 2025

Whether the manuscript was fast tracked? – No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 2 rounds with major revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>
Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The manuscript was prepared by the authors. AI tools were employed exclusively for spelling, grammar, and stylistic refinement. No generative AI was used to produce original content, research ideas, or analysis.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВА ТРАНСГЕНДЕРНИХ ОСІБ ЗГІДНО З МІЖНАРОДНИМ ЗАКОНОДАВСТВОМ У СФЕРІ ПРАВ ЛЮДИНИ ТА ПРОЦЕС ЇХ ВПРОВАДЖЕННЯ У В'ЄТНАМІ: ПЕРЕШКОДИ, ВИКЛИКИ ТА ШЛЯХИ РОЗВИТКУ

Ван Хой Нгуєн*, Тоан Тханг Нгуєн, Тхі Хоай Тхуонг Мак та Тхі Хонг Єн Нгуєн

АНОТАЦІЯ

Вступ. 24 листопада 2015 року, під час своєї 13-ої сесії, Національна асамблея ухвалила Цивільний кодекс 2015 року, який вніс фундаментальні зміни щодо особистих прав людини. Серед положень, що привернули значну увагу на внутрішньому та міжнародному рівні, була стаття 37, яка легалізувала процедури зміни статі. Цей крок став рушійним у визнанні та захисті прав людини, зокрема особистих прав, завдяки чому В'єтнам посів 62-ге місце у світі та 11-те в Азії серед країн, у яких дозволено особам змінювати свою стать. Тим не менш, оскільки зміна статі залишається відносно новим правовим регулюванням, у контексті В'єтнаму визнання та реалізація цього права для осіб все ще стикається з численними перешкодами та викликами.

Методи. У статті використовується поєднання різних методів юридичної науки, зокрема аналіз, історичне дослідження, синтез, експертна оцінка та порівняльне дослідження. Крім того, за допомогою аналітико-порівняльного методу у роботі розглядається дискусія в межах міжнародних стандартів, що сприяє об'єктивній оцінці сумісності законодавства В'єтнаму з міжнародними нормами. З огляду на це, у статті було закладено основу для пропозицій щодо вдосконалення внутрішньої правової бази та окреслено шлях до повного визнання цього права найближчим часом.

Результати та висновки. Метою цієї статті є уточнення правових та практичних питань, а також перспектив та викликів, з якими В'єтнам наразі стикається в процесі визнання та реалізації права осіб на зміну статі. На основі цього аналізу у дослідженні було запропоновано кілька рішень для В'єтнаму на найближчий час. Для досягнення цієї мети роботу було структуровано за такими основними частинами: (i) право на зміну статі згідно з міжнародним правом та світовими тенденціями; (ii) погляди та громадська думка щодо визнання прав трансгендерних осіб у В'єтнамі; (iii) зусилля В'єтнаму щодо створення правової бази для забезпечення прав трансгендерів; та (iv) проблеми у визнанні прав трансгендерних осіб та впровадженні відповідних законів у В'єтнамі.

Ключові слова: права трансгендерних осіб, законодавство про права людини, ЛГБТ, індивідуальні права, цивільне право В'єтнаму.

Research Article

THE MODEL OF REGULATION OF THE LEGAL PROFESSION IN KAZAKHSTAN AND FOREIGN JURISDICTIONS: THE SEARCH FOR A BALANCE BETWEEN STATE MONOPOLY AND SELF-REGULATION

Albina Kiyazova* and Maygul Abilova

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000124>

Date of submission: 28 May 2025

Date of acceptance: 29 Jul 2025

Last Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Albina Kiyazova
and Maygul Abilova

ABSTRACT

Background: The increasing demand for qualified legal assistance underscores the need for effective regulation of the legal profession. Depending on the distribution of regulatory functions, three models exist: state regulation, self-regulation and co-regulation. In Kazakhstan, legal assistance is provided by advocates and legal consultants, who operate under different frameworks. Advocates function within a co-regulation model, combining state licensing with professional autonomy, while legal consultants are governed by a self-regulatory system, in which professional bodies oversee admission and oversight. This divergence complicates the development of a coherent and effective legal assistance system, prompting debate on the unification of their legal status and governance.

Jurisdictions with well-developed legal systems, such as the UK and Germany, predominantly employ co-regulation, balancing professional autonomy with public oversight. Several post-Soviet countries, including Ukraine and partially Kazakhstan,

transitioned from state-controlled administrative regulation to self-regulation. The effectiveness of self-regulation, however, depends on the maturity and stability of its institutional foundation. In Kazakhstan, the self-regulatory system for legal consultants has already revealed structural weaknesses and requires reform. This study examines the regulatory model of the legal profession in Kazakhstan and selected foreign jurisdictions, identifies shortcomings in the national framework, and proposes recommendations for its enhancement.

Methods: *The study employs theoretical and specialised legal research methods. Analysis and synthesis, combined with a systematic approach, enabled the collection and systematisation of relevant materials (scientific literature and legal acts), classification of regulatory models, identification of differences, assessment of their efficiency, and the development of recommendations. The formal legal method facilitated the examination of legal norms in various jurisdictions, while the comparative legal method allowed for a cross-jurisdictional comparison, highlighting distinctive features and best practices.*

Results and Conclusion: *Regulation of the legal profession is governed by one of three models—public administration, self-regulation, or co-regulation—each differing in the degree of state and professional involvement. In jurisdictions with well-established legal institutions, co-regulation that combines state supervision with professional autonomy is the prevailing approach. In countries with developing legal systems, self-regulation is often introduced. In Kazakhstan, advocates operate under a co-regulatory model, whereas legal consultants are governed by a self-regulatory framework that exhibits notable institutional weaknesses. The question of unifying these two professional groups under a single regulatory authority remains pertinent. Comparative analysis of national and foreign experiences has revealed practices that can inform improvements to the Kazakh regulatory framework.*

1 INTRODUCTION

The legal profession comprises various specialists who can broadly be divided into two categories: those providing comprehensive legal assistance, such as lawyers, in-house counsel, legal consultants, and those offering specialised legal services, including bailiffs, mediators, and notaries. The former category constitutes the core of the profession, as these practitioners perform essential functions in safeguarding the rights and lawful interests of individuals and organisations and in securing their access to justice. Consequently, the growing complexity of legal systems underscores the necessity of establishing effective regulatory frameworks for advocates and other legal professionals delivering qualified legal assistance.

The purpose of this study is to identify the specific features of the regulatory framework governing the activities of legal service providers in the Republic of Kazakhstan, as well as in selected foreign jurisdictions. The author has focused on countries with well-established regulatory frameworks for the legal profession—namely, the United Kingdom, and Germany—where a full regulatory cycle has developed, encompassing the

introduction of entry requirements for the profession, rules of professional ethics, obligations for continuing legal education and liability insurance, as well as the implementation of internal oversight and disciplinary procedures. The study also considers the experience of Ukraine, a country undergoing post-Soviet legal transformation similar to Kazakhstan's, where the formation of the legal profession took place under similar conditions of predominant state-controlled legal governance.

This paper identifies the theoretical and legal features of regulatory models (state regulation, self-regulation, and co-regulation), and analyses the types of self-regulation, including voluntary, fully mandatory, and partially mandatory forms. It has been established that in the field of legal protection, the regulatory authority may be either a state body or a professional organisation. The regulator is vested with powers to set qualification requirements and decide on admission to the profession, adopt rules and standards governing professional activities, monitor compliance, and impose sanctions, including prohibiting further professional practice. The extent to which these powers are concentrated within state or non-state structures determines the type of regulatory model applied to the legal profession.

The structure of this article includes a review of the theoretical and legal foundations of the regulatory model in general, as well as an analysis of the legislative framework governing the activities of legal service providers in the Republic of Kazakhstan and selected foreign jurisdictions, including the United Kingdom, Germany, and Ukraine. The study identifies the key features of regulatory models in the legal services sector and proposes recommendations for enhancing the national regulatory framework, drawing on positive elements from foreign practices.

2 METHODOLOGY

The methodology of this study is grounded in the application of general theoretical and specialised legal research methods. Among the theoretical approaches, the method of analysis and synthesis, as well as the system method, were employed. The combined use of analysis and synthesis enabled the collection and systematisation of relevant research materials—including scientific literature and normative legal acts—the classification of regulatory models applied in various countries, the identification of differences in their implementation, and the formulation of appropriate recommendations. Through analysis, the distinctive features of each model (state regulation, self-regulation, and co-regulation) were identified, while synthesis contributed to the formation of a comprehensive understanding of both the Kazakhstani and foreign systems in the field of legal assistance. The systematic method was applied to examine the regulatory framework of the legal profession as a coordinated structure of interaction between governmental and professional structures, particularly in relation to admission procedures, oversight, and accountability within the profession.

In addition to theoretical methods, the study employed specialised legal methods, namely the formal legal method and the comparative legal method. The formal legal method was applied to examine the content of legal norms governing the activities of legal professionals in various jurisdictions. The comparative legal method enabled a cross-jurisdictional analysis of regulatory models, contrasting systems in countries with well-established legal traditions, such as the United Kingdom and Germany, against those in post-Soviet states still undergoing institutional transformation following a history of strict state control, such as Ukraine. This comparison enabled the identification of key characteristics of the models, their advantages and limitations, and the development of recommendations for enhancing Kazakhstan's national system of regulating the legal profession. Collectively, these methods provided an integrated approach to analysing the research subject and substantiating the author's conclusions.

3 THEORETICAL AND LEGAL FOUNDATIONS OF REGULATION

Regulation represents a purposeful form of governance within a specific area of public affairs. In the context of professional activity, regulation is expressed through the establishment of entry requirements for market participants and the imposition of rules of conduct. Entry conditions include personal characteristics (such as citizenship and good behaviour), professional qualifications, mandatory registration, and licensing. The laws of conduct aim to regulate the behaviour of individuals engaged in the activity, and include, for example, price regulation or restrictions on the organisational form of the activity.¹

Depending on the regulatory authority and the scope of its powers, two primary models of regulation are distinguished: state regulation and self-regulation. Self-regulation, in turn, may take one of three forms based on the degree of state involvement: voluntary, fully mandatory, and partially mandatory self-regulation. Each model varies in terms of the extent to which the state, the professional community, and other stakeholders are involved in the regulatory process.

Government oversight refers to the executive and administrative activities of state bodies endowed with authoritative powers aimed at the practical organisation of social processes in the development of society.² State regulation implies the authoritative establishment of mandatory requirements and rules governing professional activity. Within the regulatory competencies of the authorities, the use of permissive instruments is generally preferred.³ However, the core responsibilities of any regulatory authority are to ensure compliance with

1 Tine Heremans, 'Professional Services in the EU Internal Market: Quality Regulation and Self-Regulation' (PhD thesis, Katholieke Universiteit Leuven, Instituut voor Europees Recht 2010).

2 Kenzhebek Ospanov, *Fundamentals of Law: A Textbook* (5th edn, Jeti jarǵı 2017) 77.

3 Natalia Dubrova and Bolat Sarbasov, 'Legal Bases of State Regulation of Entrepreneurial Activity in the Republic of Kazakhstan' (2017) 3-2 Actual Problems of Humanities and Natural Sciences 47.

and enforcement of regulatory requirements.⁴ These functions are fulfilled through the exercise of state oversight mechanisms, which enable the detection and prevention of violations,⁵ the protection of public interests and national security, the facilitation of legitimate business activity and the creation of a safe and competitive economic environment.⁶ This model of governance constitutes a form of direct regulation.

An alternative to the traditional regulatory model is self-regulation, which involves the exclusion of government interference and implies the independent management of professional or business activities by members of a specific field. Self-regulation refers to the delegation of authority to develop and enforce rules to a private entity—self-regulatory organisations (hereinafter, SROs), which typically consist of regulated organisations and their representatives.⁷ In the context of self-regulation, organisations independently manage the activities of their members, who voluntarily comply with internal codes of conduct. This method of regulation is indirect and is implemented through the adoption of internal rules and standards governing professional activity, as well as through oversight and the imposition of liability measures in cases of non-compliance with the organisation's internal acts. Additionally, the self-regulatory framework provides mechanisms to ensure financial liability for harm caused during the course of professional activity.

Depending on the actor involved, self-regulation may be implemented individually within an organisation or an industry group. Its objectives may vary, encompassing functions such as market oversight, the protection of the public, or the safeguarding of environmental interests.⁸ Based on the degree of state involvement, three principal forms of self-regulation can be distinguished. Voluntary self-regulation refers to the arrangements in which rule-making and enforcement are carried out solely by an independent non-governmental organisation itself. Fully mandatory self-regulation arises where both legislative and enforcement functions concerning members are delegated to an institutionally autonomous organisation with state authorisation. Partially mandatory self-regulation denotes situations where only one of the regulatory functions is transferred to an independent institution. Importantly, mandatory self-regulation is accompanied by preservation of state oversight over the organisation, not over its members.⁹

4 Neil Gunningham, 'Compliance, Enforcement and Regulatory Excellence' in Cary Coglianese (ed), *Achieving Regulatory Excellence* (Brookings Institution Press 2017) 188, doi:10.2139/ssrn.2929568.

5 Dubrova and Sarbasov (n 3).

6 Begzat Sarbasov, Leila Zhanuzakova and Ayan Toleubekov, 'Actual Problems of Legislative Provision of Protection of the Rights of Entrepreneurs in the Implementation of Statecontrol and Supervision in the Republic of Kazakhstan' (2024) 29(4) Bulletin of Karaganda University: Law Series 25, doi:10.31489/2024L4/25-37.

7 Douglas C Michael, 'The Use of Audited Self-Regulation as a Regulatory Technique' (1995) 47(2) Administrative Law Review 171.

8 Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) Law and Policy 363, doi:10.1111/1467-9930.t01-1-00033.

9 Joseph V Rees, *Reforming the Workplace: A Study of Self-Regulation in Occupational Safety* (Law in Social Context, University of Pennsylvania Press 1988).

Under the model of self-regulation with mandatory membership, the transfer of public functions is based on legal provisions. The organisation performing such functions is defined by law and endowed with institutional autonomy in decision-making concerning its members, while maintaining accountability to both the state and society. These features underscore its public-legal nature.

The literature acknowledges that there is no clear-cut distinction between state regulation and self-regulation; regulatory systems typically operate along a spectrum between these two contrasting models with varying degrees of involvement from their instruments. The combination of the elements from both models constitutes co-regulation.¹⁰ Self-regulation with a certain amount of government intervention is recognised as a more stable and effective regulatory mechanism.¹¹

Within the framework of joint regulation, the state either develops a set of strict rules, guidelines, restrictions, and sanctions for private actors or intervenes in their activities when certain expectations from their independent management are not met.¹² Co-regulation, depending on the level of state involvement, is divided into three types: subcontracting (delegation of legislative and juridical components of state power to a private entity); concerted actions (the state establishes essential conditions for rulemaking); and incorporation (informal norms are formally integrated into the legislative framework).¹³

In the field of legal services, regulation may follow one of three models—state-, self- and co-regulation—each differing in the degree of distribution of regulatory functions between authorities and professional communities. These regulatory functions include setting admission requirements, approving professional standards, monitoring compliance, and imposing disciplinary sanctions.

Relying solely on either state or self-regulatory models entails risks: the former may undermine the independence of the legal profession, while the latter, without well-established professional traditions, can lead to insufficient oversight. Therefore, it is necessary to ensure a balance between professional autonomy and effective accountability mechanisms. Co-regulation, which combines limited state involvement with active professional self-governance, is considered the most balanced approach for jurisdictions with developed legal systems.

Regulatory legal acts of Kazakhstan incorporate features of both the state regulation model and the self-regulation model in governing public relations within the legal services sector. State regulation is implemented through the functioning of public

10 *ibid.*

11 Gunningham and Rees (n 8).

12 Andreas Doelker, 'Self-Regulation and Co-Regulation: Prospects and Boundaries in an Online Environment' (LLM thesis, University of British Columbia 2010).

13 Luc Huyse and Stefaan Parmentier, 'Decoding Codes: The Dialogue between Consumers and Suppliers through Codes of Conduct in the European Community' (1990) 13(3) *Journal of Consumer Policy* 259, doi:10.1007/BF00411510.

authorities, whose legal status, powers, tasks, and functions are defined by legislation. These functions are categorised as strategic (development of sectoral policy documents), regulatory (rule-making), implementation (execution of statutory powers, including the issuance of permits, enforcement measures) and oversight (inspections to ensure compliance with regulatory requirements). State bodies are prohibited from exercising functions not expressly assigned to them by legal acts.¹⁴

Regarding the self-regulation model, both its concept and operational conditions are normatively defined in the Law of the Republic of Kazakhstan “On Self-Regulation” (hereinafter, the Law on Self-Regulation). Article 1 of this Law defines self-regulation as a set of measures aimed at the “independent regulation by individuals and legal entities of their entrepreneurial or professional activities, based on the adoption of rules and standards by a self-regulating organisation, oversight of their enforcement, as well as ensuring the financial liability for subjects of self-regulation.”¹⁵

Building on the analysis of these regulatory models, the study subsequently examines the functioning of the institutional mechanism governing legal professionals in Kazakhstan.

4 REGULATORY FRAMEWORK GOVERNING LEGAL ASSISTANCE IN KAZAKHSTAN

In the Republic of Kazakhstan, comprehensive and qualified legal assistance is provided by advocates and legal consultants. The legal status of these professionals and the framework for regulating their professional activities are established by the Law of the Republic of Kazakhstan “On Advocacy and Legal Assistance”¹⁶ (hereinafter, the Law), as well as by-laws and regulations approved by orders of the Minister of Justice of the Republic of Kazakhstan. Despite the common nature of their activities, the legal status of both groups is characterised by significant differences.

A key requirement for advocates is obtaining a state license, which subjects their professional activity to additional regulation under the Law of the Republic of Kazakhstan “On Permissions and Notifications”¹⁷ (hereinafter, the Law on Permissions). In turn, the distinctive feature of the regulation of legal consultants’ activities is the introduction of a

14 Administrative Procedural and Process-Related Code of the Republic of Kazakhstan no 235-V LRK of 29 June 2020 (amended 16 March 2025) art 41 <<https://adilet.zan.kz/eng/docs/K2000000350>> accessed 15 May 2025.

15 Law of the Republic of Kazakhstan no 390-IV LRK of 12 November 2015 ‘On Self-Regulation’ (amended 8 June 2024) <<https://adilet.zan.kz/eng/docs/Z1500000390>> accessed 15 May 2025.

16 Law of the Republic of Kazakhstan no 176-VI LRK of 5 July 2018 ‘On Advocate Practice and Legal Assistance’ (amended 8 June 2024) <<https://adilet.zan.kz/eng/docs/Z1800000176>> accessed 15 May 2025.

17 Law of the Republic of Kazakhstan no 202-V LRK of 16 May 2014 ‘On Permissions and Notifications’ (amended 9 April 2025) <<https://adilet.zan.kz/eng/docs/Z1400000202>> accessed 15 May 2025.

legal regime of self-regulation, making the provisions of the Law on Self-Regulation mandatory for organising their professional operations.

Both categories of legal professionals provide comprehensive legal information and consulting, as well as protection and representation of the interests of individuals and legal entities in civil and administrative courts, before public authorities, and in other relevant forums. However, participation in criminal proceedings is the exclusive domain of advocates. The practice of advocacy is not considered an entrepreneurial activity, whereas legal consultants may engage in private practice as individual entrepreneurs.¹⁸

It should be noted that in Kazakhstan, both the advocacy and the institution of legal consultants operate independently of state and judicial authorities, enjoying relative autonomy in adopting internal regulations and making organisational and disciplinary decisions. Such independence from government interference is essential to safeguarding citizens' right to qualified legal assistance and ensuring access to fair justice, thereby fostering public trust in the legal protection system. In this regard, maintaining the self-governing structure of these professions, with limited public oversight and minimal administrative influence, is crucial.

4.1. Regulatory Framework for Advocates

Throughout its history, advocacy in Kazakhstan has been subject to oversight by both the state and an independent professional community. State regulation of advocates involves the exercise of regulatory (rule-making), implementation and oversight functions of the authorised body—the Ministry of Justice of the Republic of Kazakhstan (hereinafter, the Ministry).

The Ministry's rule-making function is exercised through the establishment of normative requirements for advocates in the Law and in departmental legal acts. Article 32 of the Law establishes the basic professional requirements for advocates: Kazakhstani citizenship, higher legal education, a license and membership in a Bar Association. To obtain a license, candidates must complete an internship and successfully pass an attestation conducted by a commission established under the justice authority.¹⁹ This commission includes advocates, representatives of the Ministry and other designated individuals. Article 32 also establishes restrictions on obtaining the status of an advocate, including the presence of an unexpunged criminal record, legal incapacity, the commission of an administrative corruption offence, and other limitations. Article 36 of the Law sets forth an additional requirement: advocates must hold a professional liability insurance contract.²⁰

18 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) arts 45, 75.

19 Order of the Acting Minister of Justice of the Republic of Kazakhstan no 20 of 20 January 2015 'On Some Issues of Licensing of Legal and Notary Activities' (amended 5 March 2015) <<https://adilet.zan.kz/kaz/docs/V15D0010270>> accessed 15 May 2025.

20 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) arts 32, 36.

The implementation function of the Ministry is expressed through the issuance of licenses and approval of internal regulatory documents developed by a professional organisation of advocates. The authorised body also carries out licensing control in accordance with the Law on Permissions.²¹ Oversight is aimed at verifying whether license applicants meet the qualification requirements prior to license issuance, as well as monitoring advocates' compliance with legal requirements after the license has been granted. If violations are identified during state supervision, advocates may be subject to enforcement measures, including suspension or revocation of the license.

The suspension of an advocate's license may be affected by the authorised body or by a court. The Ministry may suspend a permit in cases prescribed by law, for example, the advocate's request, failure to complete required continuing education, or if the advocate becomes a defendant in a criminal case.²² Courts may suspend licenses through administrative proceedings in cases involving administrative offences, such as violations of licensing regulations or non-compliance with qualification requirements.²³

Revocation of an advocate's license is permitted exclusively through judicial proceedings, whether administrative or civil. Knowingly providing false information during the license process or failing to comply with the terms of a suspended license constitutes an administrative offence.²⁴ If other grounds exist, the authorised body may initiate civil proceedings to revoke a license, including violations of the Law, principles of legal assistance, ethical standards, or the establishment of insufficient qualifications.²⁵ In case of disagreement, advocates may appeal first-instance court decisions to a higher court in accordance with the applicable administrative or civil procedure.

Professional regulation of advocates is also carried out by the professional community, which is represented by multiple regional Bar Associations and the Republican Bar Association (hereinafter, the RBA). According to official data, Kazakhstan has recorded a steady increase in the number of advocates. As of 1 January 2025, there were 20 territorial bar associations nationwide, with a total membership of 6,344 advocates, compared to 5,474 in 2020 and 4,505 in 2015.²⁶

A Bar Association is a non-profit, independent, professional, self-governing, and self-funded organisation. One Bar Association is established in each region, city of republican

21 Law of the Republic of Kazakhstan no 202-V LRK (n 17).

22 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) art 32.

23 Code of the Republic of Kazakhstan no 235-V LRK of 5 July 2014 'On Administrative Infractions' (amended 9 April 2025) art 464 <<https://adilet.zan.kz/rus/docs/K1400000235>> accessed 15 May 2025.

24 *ibid.*

25 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) art 44.

26 National Bar Association of the Republic of Kazakhstan, *National Report on the State of the Bar and the Activities of Lawyers for the Protection of Rights and Freedoms of Citizens in 2024* (NBA 2025) 9 <<https://advokatura.kz/document/289>> accessed 16 May 2025.

significance, and the capital; Kazakhstan comprises 17 regions and three cities of republican significance, including the capital.²⁷ Membership in a Bar Association is a mandatory prerequisite for exercising the right to practice law. To join a Bar Association, a candidate must obtain the state-issued license and must not fall under any of the statutory restrictions that disqualify an individual from acquiring the status of an advocate. Upon admission, the advocate receives an Advocates certificate issued by the Bar Association, with a standardised format approved by the RBA.

Bar Associations exercise supervisory powers by reviewing complaints against advocates and organising regular attestation and professional development.²⁸ In case of violations, a Bar Association, through its disciplinary commission, may impose disciplinary measures, including expulsion from the Bar Association. Such violations may also serve as grounds for suspension or revocation of an advocate's license, with final decisions made by the Ministry or the court based on materials submitted by the Bar Association.²⁹

The RBA unites regional Bar Associations on a mandatory basis and functions as a non-profit, independent, professional, self-governing, and self-financing organisation. Its normative functions include adopting the Code of Professional Ethics of Advocates and establishing the procedure for advocate attestation. In coordination with the Ministry, the RBA also approves standards and criteria for the quality of legal assistance, continuing legal education, and other internal documents.³⁰

Therefore, the professional activity of advocates is regulated both at the state level and by independent professional organisations of advocates. Direct state regulation encompasses all aspects of governance, including licensing, qualification requirements, permissive control, and enforcement measures such as suspension or revocation of a license. Professional regulation is exercised through the RBA's adoption of internal rules and standards, the participation of advocates in the attestation of license applicants, and the Bar Associations' oversight and imposition of disciplinary measures.

Thus, the regulation of advocates' activities incorporates elements of both state control and professional autonomy, reflecting a co-regulation model. The professional community of advocates holds public legal status, being established by legislation and performing a socially significant function. At the same time, advocacy maintains its organisational and financial independence, free from government interference.

27 'Administrative-Territorial Units of the Republic of Kazakhstan (as of January 1, 2025)' (*Bureau of National Statistics of Agency for Strategic Planning and Reforms of the Republic of Kazakhstan*, 19 February 2025) <<https://stat.gov.kz/ru/industries/social-statistics/demography/publications/281169/>> accessed 22 July 2025.

28 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) arts 50, 53.

29 *ibid*, art 73.

30 *ibid*, arts 67, 68.

4.2. Regulatory Framework for Legal Consultants

The legal status of legal consultants and the framework for organising their practice were first legally defined in Kazakhstan in 2018. Prior to this, their professional activity was largely unregulated, except for the period from 1997 to 2005, during which they were subject to mandatory licensing. Currently, the legal regime governing consultants' activities is based on a self-regulation model, with mandatory membership in one of several self-regulating organisations (SROs)—namely, the Chambers of Legal Consultants (hereinafter, the Chamber). Membership in a Chamber is mandatory for legal consultants. Their activities, unlike those of advocates, are not subject to licensing; nevertheless, the Law sets requirements for entry into the profession.

Legal consultants must hold a higher legal education degree, have at least two years of professional legal experience, successfully pass an attestation, be affiliated with Chambers, and ensure their professional liability. Individuals who are legally incapacitated or have an unexpunged criminal record are ineligible to acquire the status of a legal consultant. It is noteworthy that, unlike Bar Associations, Chambers are granted the legal right to establish additional requirements for their members.³¹

Attestation is conducted by the Chamber. Upon admission, the Chamber records the legal consultant in its Register of Legal Consultants, which is published on its official website, and issues a document confirming membership.³² Notably, the form of this document may vary because there is no unified sample as provided for the Advocate's certificate. It is recommended that the Law be amended to establish a standardised form of document confirming membership in a Chamber.

The Chamber of Legal Consultants functions as a self-regulatory, membership-based organisation.³³ Their activities, as those of SROs, must comply with the Law on Self-Regulation, which sets requirements for rule-making authority, internal oversight, and the enforcement of financial liability for members. In practice, Chambers complies with these conditions. First, Chambers are empowered to adopt the rules of professional conduct, the Code of Professional Ethics, admission criteria, standards for legal assistance, quality benchmarks and other binding acts for legal consultants. Second, they exercise internal oversight to monitor members' compliance with these rules and verify the existence of compulsory professional liability insurance at the time of admission.³⁴

If violations are identified as a result of internal inspections, Chambers is authorised to impose sanctions, including suspension of membership or expulsion from the Chamber.

31 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) arts 75, 77, 83.

32 *ibid*, art 83.

33 *ibid*, art 78.

34 *ibid*, arts 80, 83.

Such a measure of punishment carries elements of state coercion, as the loss of Chamber membership results in a legal consultant being deprived of the right to provide legal assistance. In case of violation of the consultant's rights by the Chamber or its governing bodies, he may seek redress by appealing to the authorised body or the court.³⁵ Chambers also performs the implementation function by conducting the attestation of individuals applying for the status of a legal consultant.

Considering the above, the activities of legal consultants are primarily regulated through a self-regulatory mechanism. However, the authorised body retains limited regulatory powers—establishing statutory requirements—and implementation powers, including mandatory approval of certain internal documents adopted by Chambers.³⁶

Self-regulation based on compulsory membership entails direct government oversight of SROs (in this case, Chambers). The authorised body performs regulatory (rule-making), implementation, and some control functions with respect to Chambers. The rule-making function involves establishing legislative requirements for Chambers and approving model charters.

The Law on Self-Regulation imposes specific obligations on SROs, including registration in the Register of SROs (a permissive requirement for carrying out activities),³⁷ adherence to a defined organisational structure, compliance with specified content of rules and standards, monitoring of members' activities, and other operational requirements.³⁸ The Ministry's implementation function encompasses approval of regulatory documents developed by Chambers and maintenance of the Register of SROs (Chambers).³⁹

As of March 2025, 50 Chambers of Legal Consultants are recorded in the Register of SROs,⁴⁰ with a total of 17,190 consultants listed, including those whose membership has been suspended or revoked.⁴¹ By comparison, in 2000, 87 Chambers operated in Kazakhstan, with a total membership of 9,410 consultants.⁴² Over the past five years, the number of persons obtaining the status of legal consultants has more than doubled, while the number of Chambers has nearly halved. This reduction primarily resulted from a 2021 legislative amendment that raised the minimum membership requirement from 50 to

35 *ibid*, art 95.

36 *ibid*, art 23.

37 *ibid*, arts 23, 78.

38 Law of the Republic of Kazakhstan no 390-IV LRK (n 15).

39 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) art 90.

40 'List of Chambers of Legal Consultants' (*Ministry of Justice of the Republic of Kazakhstan*, 2025) <<https://www.gov.kz/memleket/entities/adilet-krs/documents/details/801423>> accessed 16 May 2025.

41 'List of Legal Consultants' (*Ministry of Justice of the Republic of Kazakhstan*, 2025) <<https://www.gov.kz/memleket/entities/adilet-krs/documents/details/815423>> accessed 16 May 2025.

42 Ministry of National Economy of the Republic of Kazakhstan, *Report on the State of Regulation of Entrepreneurial Activity in the Republic of Kazakhstan for 2020* (13 October 2021) <<https://www.gov.kz/memleket/entities/economy/documents/details/224363?lang=kk>> accessed 16 May 2025.

200, prompting numerous mergers. Unlike Bar Associations, the establishment of Chambers is not tied to administrative-territorial boundaries, and therefore, the number of Chambers exceeds the number of regions.

Within the scope of its oversight function, the Ministry verifies the Chambers' compliance with sectoral legislation, internal rules and standards, and the Code of Professional Ethics. Where violations are identified, sanctions may include removal of a Chamber from the Register of SROs. Such a measure, however, has an impact on the legal consultants affiliated with the Chamber, as they are prohibited from practising until they secure membership in another Chamber.⁴³ This highlights the need for legislative guarantees to preserve consultants' professional status in such circumstances.

The Law also provides for the existence of the Republican Chamber of Legal Consultants (hereinafter, the RCLC), intended as a voluntary association of Chambers. Its mandate is limited to coordination and representation, and it lacks authority over non-member Chambers or individual consultants. Given these limited functions, the legal status of the RCLC appears unnecessary, as its purposes could be achieved through civil-law mechanisms of association.⁴⁴

Despite the existence of a self-regulatory model, Kazakhstan's Institute of Legal Consultants exhibits significant weaknesses. Oversight of consultants' qualifications and responsibilities remains inadequate; no unified electronic Register of Legal Consultants exists to track professional status or disciplinary actions; and the fragmentation of Chambers impedes the development of consistent standards, thereby undermining public trust in legal assistance.⁴⁵ These deficiencies manifest in divergent qualification requirements, unequal access to the profession across regions, inconsistent disciplinary practices, and ultimately, declining service quality.⁴⁶ These issues underscore the need for reform of the existing regulatory framework.

A further structural challenge in Kazakhstan's legal assistance system is the rationale behind maintaining two parallel professional tracks: advocates and legal consultants. While this separation allows for broader access to the legal services market, the absence of unified standards of admission, oversight, and accountability produces inconsistent qualification requirements and diminishes public confidence in both professions. Given

43 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) art 97.

44 Albina Kiyazova, 'Regulation of Professional Activity of Legal Consultants' (2024) 2 Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan 132.

45 Sagidolla M Baimurat, 'Improving the Quality of Legal Assistance' (*Zakon.kz*, 20 February 2022) <https://online.zakon.kz/Document/?doc_id=34236067> accessed 27 July 2025.

46 Aigerim Dzhaldybaeva, 'Prospects for the Development of Self-Regulation of the Legal Profession in Kazakhstan: Problems and Solutions' [2025] *Kazakhstan Law Review* <<https://kazlawreview.kz/perspektivy-razvitiya-samoregulirovaniya-yuridicheskoy-professii-v-kazahstane-problemy-i-putiresheniya/>> accessed 16 May 2025.

the substantial overlap in functions, advocates' monopoly over criminal cases being the principal distinction, the creation of a unified profession under a single regulatory framework, with options for specialisation, would strengthen coherence and credibility. This may be considered as a long term objective. In the short term, the United Kingdom's experience provides a potential model: separate professional regulators with equal status and authority operating under the supervision of a central oversight body. This comparative framework is examined below.

5 REGULATION OF LEGAL ASSISTANCE IN FOREIGN JURISDICTIONS

5.1. Legal Services Regulation in the United Kingdom

In the UK, legal assistance to the public is provided by various legal professionals, including solicitors, barristers and other representatives of the legal profession. The main legislative act regulating the legal profession is the Legal Services Act 2007⁴⁷ (hereinafter, LSA). Strategic oversight is exercised by the Lord Chancellor, while the Legal Services Board (hereinafter, LSB) acts as the state regulator. The LSB is accountable to the Lord Chancellor in personnel and financial matters⁴⁸ but operates independently in its functions.

Direct regulation of legal professionals is carried out by separate primary "approved regulators" for each profession. These approved regulators operate within the LSB framework but are formally appointed by the Lord Chancellor.⁴⁹ All representatives of regulated legal professions must register with their designated regulatory authority to practice professionally.⁵⁰ The LSB serves as the oversight regulator for the primary regulators and approves the regulatory acts developed by them—such as requirements for admission, codes of conduct and professional standards, procedures for entry and supervision, and imposition of disciplinary penalties—⁵¹ and verifies their compliance with the LSA and exercises other governing powers. In cases of non-compliance, the LSB may impose enforcement measures, including recommending to the Lord Chancellor the revocation of approved regulator status.⁵²

47 UK Legal Services Act 2007, c 29 (LSA) (amended 8 February 2024) <<https://www.legislation.gov.uk/ukpga/2007/29/contents>> accessed 16 May 2025.

48 *ibid*, schedule 1, s 1(1).

49 *ibid*, schedule 4, s 3(2).

50 *ibid*, schedule 4, s 14 (1).

51 *ibid*, schedule 4, s 2(1).

52 *ibid*, s 49.

The activities of solicitors are governed by the LSA 2007 and the Solicitors Act 1974.⁵³ The approved regulator for solicitors is the Law Society,⁵⁴ which performs a representative function. Regulatory authority is delegated to its independent arm,⁵⁵ the Solicitors Regulation Authority (hereinafter, SRA),⁵⁶ which is authorised to approve mandatory requirements, standards and regulations (for example, SRA Standards and Regulations),⁵⁷ oversee admission to the profession, and conduct disciplinary proceedings. The SRA is funded through compulsory contributions from its members.

To obtain the status of a solicitor, an individual must hold a legal education, pass the required examinations, complete two years of practical training, undergo a character and suitability assessment (including checks for criminal records or evidence of fraud),⁵⁸ and hold professional indemnity insurance.⁵⁹ Upon fulfilling all these conditions, the Law Society, through the SRA, issues a Practising certificate⁶⁰ and records the solicitor in the official list of all solicitors of the Supreme Court, known as “the Roll”.⁶¹ Upon obtaining the status of a Solicitor Advocate,⁶² the individual is granted rights of audience in the higher courts.

Barristers, in turn, are regulated under the LSA and the Courts and Legal Services Act 1990. The Bar Council (General Council of the Bar) serves as the approved regulatory body,⁶³ while direct regulation is carried out by its autonomous arm, the Bar Standards Board (hereinafter, BSB). Similar to the SRA, the BSB operates independently without government funding, sustained through mandatory member contributions. The BSB develops regulatory

53 UK Solicitors Act 1974, c 47 (SA) (amended 4 November 2024) <<https://www.legislation.gov.uk/ukpga/2007/29/contents>> accessed 16 May 2025.

54 LSA (n 47) schedule 4.

55 ‘Our Governance’ (*The Law Society*, 24 June 2025) <<https://www.lawsociety.org.uk/about-us/our-governance/>> accessed 28 June 2025.

56 Articles of Association of Solicitors Regulation Authority Limited (Co no 1260859, adopted 2022) art 4.1 <<https://www.sra.org.uk/globalassets/documents/sra/board-meetings/2022/annex-1---solicitors-regulation-authority-limited-articles.pdf>> accessed 15 May 2025.

57 ‘SRA Standards and Regulations’ (*Solicitors Regulation Authority*, 11 April 2025) <https://www.sra.org.uk/solicitors/standards-regulations-resources/?utm_source=chatgpt.com> accessed 16 May 2025.

58 SRA Authorisation of Individuals Regulations (amended 11 April 2025) regulations 1–3 <<https://www.sra.org.uk/solicitors/standards-regulations/authorisation-individuals-regulations/>> accessed 16 May 2025.

59 SRA Indemnity Insurance Rules (amended 11 April 2025) rule 2.1 <<https://www.sra.org.uk/solicitors/standards-regulations/indemnity-insurance-rules/>> accessed 16 May 2025.

60 SA (n 53) s 10 (1).

61 *ibid*, s 6 (1).

62 SRA Authorisation of Individuals Regulations (n 59) regulation 9.10.

63 LSA (n 47) schedule 4.

instruments, including the BSB Handbook,⁶⁴ drafts regulatory instruments, oversees compliance, and conducts disciplinary investigations.⁶⁵

To obtain the status of a barrister, a candidate must possess a legal education, provide certificates of good character with no impediments to practice (such as legal incapacity or a criminal record), complete training at one of the Inns of Court, and obtain a Certificate of Call to the Bar. Thereafter, the barrister must complete 12 months of work-based learning (pupillage) and obtain professional indemnity insurance against claims for professional negligence.⁶⁶ Upon fulfilment of these requirements, the Bar Council, through the BSB, may issue a Practising certificate.⁶⁷ Unlike solicitors, barristers are granted rights of audience in higher courts from the outset.

Complaints concerning the quality of legal services provided by solicitors and barristers are handled by the Office for the Consideration of Legal Complaints (Legal Ombudsman),⁶⁸ a public body accountable to the LSB. Complaints regarding violations of professional rules and standards are reviewed by the SRA for solicitors and the BSB for barristers. In cases of serious violations, matters may be referred to the independent adjudicatory bodies, such as the Bar Disciplinary Tribunal⁶⁹ or to the Bar Tribunals and Adjudication Service,⁷⁰ which may take measures such as imposing restrictions, suspending a solicitor or barrister, striking a solicitor's name off the Roll, disbandment for barristers, or issuing other corrective orders.

Thus, in the UK, the direct regulation of the legal profession is conducted by the SRA and BSB, both of which operate within the framework of "approved regulators" under the oversight of the LSB. Despite their public-law status and formal integration into the system of government supervision, these organisations maintain regulatory and financial independence in making decisions concerning their members. The UK's regulatory model, therefore, reflects a combination of government oversight and institutional autonomy, and can be characterised as co-regulation.

This model—managing multiple independent regulators with equal, comparable functions—offers valuable lessons for the Kazakhstani context. Despite existing differences in qualification requirements, a unified regulatory framework could govern both advocates and legal consultants. In particular, drawing on the UK bar model, a single professional organisation with regional branches and a comprehensive set of regulatory functions could be established for legal consultants, replacing the current fragmented chambers. If such a

64 Bar Standards Board, *BSB Handbook* (version 4.8, in force 12 May 2024) <<https://www.barstandardsboard.org.uk/the-bsb-handbook.html>> accessed 16 May 2025.

65 'The Work We Do' (*Bar Standards Board*, 27 February 2025) <<https://www.barstandardsboard.org.uk/about-us/what-we-do.html>> accessed 16 May 2025.

66 *BSB Handbook* (n 65) r C76–C78.

67 *ibid*, r Q3–Q5, r S60.

68 LSA (n 47) schedule 15.

69 SA (n 53) s 47.

70 Bar Standards Board (n 64) r E101.

model does not meet the conditions for self-regulation, the resulting governance would qualify as co-regulation, analogous to the model applied to advocates.

The British experience of distinguishing appellate bodies based on the nature of the complaint is also noteworthy. In the UK, one body handles disputes concerning the quality of legal services, while another adjudicates violations of professional rules. A similar dual-track approach could be considered in Kazakhstan: a dedicated body within the Ministry could address service-quality complaints, while disciplinary matters related to compliance with internal rules remain under the jurisdiction of professional communities. Such functional separation would help ensure impartial complaint handling and foster a transparent mechanism for monitoring the quality and integrity of legal services.

5.2. The German Model of Legal Profession Regulation

In Germany, legal services may be provided by qualified legal professionals—advocates (*Rechtsanwalt* for men and *Rechtsanwältin* for women)—as well as by professional practice entities (*Berufsausübungsgesellschaft*). This section focuses exclusively on the regulatory regime applicable to advocates. The regulatory framework governing their activities is established by the Federal Lawyers' Act 1959 (*Bundesrechtsanwaltsordnung*, hereinafter, BRAO)⁷¹ and the German Judicial Act (*Deutsches Richtergesetz*, hereinafter, DRiG).⁷²

The principal regulatory authority is the regional Bar Association (*Rechtsanwaltskammer*), an independent, self-governing public organisation established at the level of the Higher Regional Courts within each federal state. Bar Associations are empowered to issue a Certificate of Admission to the Bar, maintain electronic Registers of Advocates practising within their districts, oversee the activities of their members, monitor compliance with the Professional Code of Conduct (*Berufsordnung für Rechtsanwälte*, hereinafter, BORA), conduct disciplinary proceedings and perform other functions.⁷³ Each Bar Association operates under the administrative supervision of the territorial Ministry of Justice (*Landesjustizverwaltung*).⁷⁴

All regional Bar Associations are members of the Federal Bar Association (*Bundesrechtsanwaltskammer*, hereinafter, BRAK), which represents and promotes the interests of the legal profession at the national level. In coordination with the Ministry of Justice, BRAK maintains the Central Register of all advocates in Germany⁷⁵ and establishes

71 Federal Code for Lawyers (*Bundesrechtsanwaltsordnung* - BRAO) (amended 23 October 2024) <https://www.gesetze-im-internet.de/englisch_brao/index.html> accessed 17 May 2025.

72 German Judiciary Act (*Deutsches Richtergesetz* - DRiG) (amended 22 October 2024) <https://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html> accessed 17 May 2025.

73 BRAO (n 71) §§ 6, 31, 60, 73.

74 *ibid.*, §§ 60, 62.

75 *ibid.*, § 31(1).

a dedicated electronic mailbox (*besonderes elektronisches Anwaltspostfach*, hereinafter, beA) for each registered advocate.⁷⁶ BRAK also approves mandatory professional rules, including BORA, and establishes an independent body for out-of-court dispute resolution, the Arbitration Council (*Schlichtungsstelle*), which facilitates amicable resolution of disputes between advocates and clients.⁷⁷

Applicants for admission to the legal profession in Germany are subject to the same qualification requirements as judicial candidates.⁷⁸ This includes passing two state examinations and completing a two-year preparatory training (*Referendariat*) within judicial and government agencies.⁷⁹ The German legal education system is comprehensive and structured, contributing to high professional standards.⁸⁰ Career trajectories within the legal profession are largely determined by performance on the state examinations, with the final grade of the state exam regarded as a reliable indicator of a candidate's legal competence.⁸¹ The highest score opens the door to a career in the judicial system or public service, and is also in demand by leading law firms; however, fewer than 15% of candidates receive it.⁸² Almost 60-70% of young lawyers become advocates, drawn by the relative ease of joining law firms (no additional exams are required) and the limited number of positions in the civil service, prosecution and judiciary.⁸³

To obtain the right to practice as an advocate, candidates must join a Bar Association. Admission requirements include passing two state exams, not being subject to conditions that would result in admission refusal, taking an oath, and providing evidence of professional liability insurance.⁸⁴ Upon meeting these requirements, the Bar Association issues a Certificate of Admission to the Bar (*Urkunde über die Zulassung*)⁸⁵ and records the individual in the Register of Advocates of a Bar Association. Advocates are obligated to

76 *ibid*, § 31a (1).

77 *ibid*, § 191(f).

78 *ibid*, § 4.

79 DriG (n 72) § 5.

80 Daniela Schröder, 'Challenges of German First-Year Law Students – Empirical Results and Implications for Legal Education' (2022) 3(1) *European Journal of Legal Education* 23.

81 Armin von Bogdandy, *The German Sonderweg in Legal Education: Reflections for a General Debate in the Context of European Society* (MPIL Research Paper Series no 2024-01, Max Planck Institute for Comparative Public Law and International Law 2024) <<https://ssrn.com/abstract=4695167>> accessed 5 July 2025.

82 Ulrike Schultz, 'Legal Education in Germany – an Ever (Never?) Ending Story of Resistance to Change' (2007) in Vittorio Olgiati (ed), *Higher Legal Culture and Postgraduate Legal Education in Europa* (Edizioni Scientifiche Italiane 2008) 125.

83 Stefan Koriath, 'Legal Education in Germany Today' (2006) 24(1) *Wisconsin International Law Journal* 85.

84 BRAO (n 71) §§ 4,7, 26.

85 *ibid*, § 12.

actively use the beA email account, created by the BRAK, for legal correspondence, and must continuously maintain and improve their professional qualifications.⁸⁶

In cases of professional misconduct, the Bar Association conducts disciplinary investigations, which may result in warnings. If the violation is serious, the case is referred to the Disciplinary Court (*Anwaltsgericht*), which is established by the Bar Association but operates independently in its decision-making. The Disciplinary Court may impose sanctions including warnings, a written reprimand, fines, temporary bans from practising in specific areas of law, or disbarment.⁸⁷

The German legal system provides for a special category of full-time lawyer (*Syndikusrechtsanwalt*),⁸⁸ who holds the status of an advocate but works under an employment contract and acts exclusively in the legal interests of the employer. Unlike the classic *Rechtsanwalt*, who operates independently or within the framework of a law firm and serves external clients, *Syndikusrechtsanwalt* performs legal work within the framework of an employment relationship with a specific organisation. This advocate is required to obtain a separate admission (*Zulassung*) in the form of a special license issued by the Bar Association, based on an assessment of the legal functions to be performed.

The regulatory model of the legal profession in Germany represents a form of co-regulation, striking a balance between state oversight and professional self-governance. Despite the country's federal structure, regulation is unified under the BRAO. Admission to the profession is administered by the state authorities, while regional Bar Associations are responsible for oversight and disciplinary proceedings. This approach ensures high professional standards, institutional transparency, and robust professional autonomy.

Germany's experience in consolidating legal assistance professionals into a unified profession offers valuable guidance for Kazakhstan. At present, advocates in Kazakhstan undergo internships and comprehensive certification, while consultants are admitted based on proof of experience and a qualifying examination, reflecting significant disparities in standards. The unification of admission requirements, coupled with the establishment of a single regulatory model, would enhance oversight and promote consistent quality in the provision of legal services.

86 *ibid.*, §§ 31a(6), 43(6).

87 *ibid.*, §§ 113(1), 114.

88 *ibid.*, § 46a.

5.3. Regulation of Legal Practice in Ukraine

In Ukraine, legal assistance is primarily provided by advocates, whose activities are governed by a specific legal act—the Law of Ukraine “On the Bar and Legal Practice” (hereinafter, the Law on the Bar). Private lawyers also provide⁸⁹ certain types of legal assistance; however, these individuals lack formal recognition in legislation and are not subject to licensing. Consequently, this analysis focuses exclusively on advocacy. According to current legal provisions, the Ukrainian system is characterised by professional self-governance of the bar.⁹⁰

All practising advocates in Ukraine are members of the Ukrainian National Bar Association (hereinafter, UNBA), a non-governmental, non-profit professional organisation. The UNBA maintains the Unified Register of Advocates of Ukraine (hereinafter, the Unified Register), which provides public access to information regarding the number and composition of advocates.⁹¹

Bar self-governance operates at both national and regional levels. At the national level, governance bodies include the Congress of Advocates of Ukraine (the highest self-governing body), the Bar Council of Ukraine, the High Qualification and Disciplinary Commission of the Bar, and the High Auditing Commission of the Bar. At the regional level, governance is exercised by the Regional Conference of Advocates (the highest regional body), the Regional Bar Council, the Regional Qualification and Disciplinary Commission of the Bar (hereinafter, the RQDCB) and the Regional Audit Commissions of the Bar.⁹² The Regional Bar Council and the RQDCB are established as legal entities.

The Law on the Bar sets out specific requirements for applicants to obtain the status of an advocate: a full higher legal education, proficiency in the state language, at least two years of legal work experience, successful completion of a qualifying exam, completion of an internship, and the taking of the advocate's oath. The Law on the Bar also contains conditions that prevent obtaining the status of an advocate, including an outstanding criminal record, lack of legal capacity, and other restrictions.⁹³ Upon fulfilling these requirements, the Regional Bar Council issues the Certificate of the Right to Practice Law and the Advocate's Identity Card of Ukraine. The Law on the Bar does not require compulsory professional insurance. Advocates may employ assistants under a labour contract; assistants must possess a higher level of legal education and meet similar eligibility requirements.⁹⁴ Notably, prior work experience as an advocate's assistant in the last two years may exempt candidates from the internship requirement.⁹⁵

89 Law of Ukraine no 5076-VI of 05 July 2012 ‘On the Bar and Legal Practice’ (amended 15 November 2024) <<https://zakon.rada.gov.ua/laws/show/5076-17#Text>> accessed 17 May 2025.

90 *ibid*, art 2.

91 *ibid*, arts 17, 45.

92 *ibid*, art 46.

93 *ibid*, art 6.

94 *ibid*, arts 6, 16.

95 *ibid*, art 10(5).

Upon taking the oath of the advocate of Ukraine, advocates automatically become members of the UNBA and are obligated to adhere to the oath, comply with the rules of professional ethics, engage in continuous professional development, and follow the decisions of bar self-governance bodies.⁹⁶ Professional organisation is conducted through disciplinary mechanisms of self-governance.

The powers of bar self-governance bodies include: the Congress of Advocates of Ukraine, which approves the Rules of Professional Ethics; the Regional Bar Council, which issues a Certificate of the Right to Practice Law, oversees the implementation of decisions adopted by the Regional Conference of Advocates, promotes professional development, and updates the Unified Register; and the RQDCB, which organises and conducts qualification examinations, decides on suspension or termination of the right to practice law, and conducts disciplinary proceedings against advocates.⁹⁷ Disciplinary sanctions may include warnings, suspension of the right to practice law for one month to one year, or revocation of the right to practice law with subsequent exclusion from the Unified Register (for Ukrainian advocates) or simple exclusion from the Unified Register (for foreign advocates).⁹⁸ Disciplinary procedures involve verification of alleged misconduct, initiation of a disciplinary case, review of the case, and issuance of a decision.⁹⁹ This decision can be appealed to the Higher Qualification and Disciplinary Commission of the Bar or the court.¹⁰⁰

The state does not determine access to the legal profession, directly regulate their activities or impose sanctions. The Ministry of Justice of Ukraine is indirectly involved in managing the legal profession through the legislative establishment of professional requirements for advocates, as well as through its interaction with the UNBA. The judicial authorities are authorised to consider complaints against the actions of the UNBA and the RQDCB. Consequently, advocacy in Ukraine is characterised by comprehensive self-regulation and independence from the state.

Historically, until 2012, the regulation of advocates in Ukraine operated under a state-administrative model: qualification and disciplinary commissions were formed by state authorities with their direct participation, and the Higher Qualifications Commission functioned under the Cabinet of Ministers of Ukraine.¹⁰¹ The contemporary model, based on self-regulation with mandatory membership in a unified professional organisation, consolidates all key regulatory functions within the UNBA, which enjoys public-law status and decision-making independence. This transition to full self-regulation reflects both low

96 *ibid*, arts 45, 12, 21.

97 *ibid*, arts 55, 54, 48, 50.

98 *ibid*, art 35.

99 *ibid*, art 37.

100 *ibid*, art 42.

101 Law of Ukraine no 2887-XII of 19 December 1992 'On Advocacy' (repealed 19 November 2012) <<https://zakon.rada.gov.ua/laws/show/2887-12#Text>> accessed 26 July 2025.

public confidence in state authorities and a deliberate effort to achieve institutional independence following a prolonged period of administrative control.

Kazakhstan could benefit from legally defining the status of an assistant lawyer. While Kazakh legislation permits advocates to employ assistants, it does not establish formal requirements for this category.¹⁰² Assistants perform tasks assigned by advocates; therefore, their role is also socially significant and should meet qualification criteria similar to those in Ukraine, including higher legal education, absence of a criminal record, and legal capacity. In addition, prior work experience as an advocate's assistant could be recognised as grounds for exemption from the mandatory internship required for prospective advocates.

Finally, regarding disciplinary measures, Kazakh legislation provides for remarks, reprimands, severe reprimands, and exclusion from the Bar Association.¹⁰³ In practice, the first three sanctions have comparable legal and practical effects. As in Ukraine, these should be consolidated into a single category (e.g., "warning" or "remark"), to simplify the system and enhance clarity.

6 CONCLUSION

Regulation of legal professional activity encompasses the establishment of admission requirements, professional standards, oversight mechanisms, and the application of sanctions. In theory, three regulatory models are distinguished: state regulation, self-regulation and co-regulation. Full government regulation may limit the institutional independence of legal professionals, while pure self-regulation can compromise its accountability. A co-regulation model that balances autonomy with oversight is the most effective solution in the field of legal assistance.

In the Republic of Kazakhstan, comprehensive legal assistance is provided by advocates and legal consultants. The activity of advocates is governed under a co-regulation model, which combines state licensing with a two-tier system of professional self-governance and control. In contrast, legal consultants operate within a self-regulatory framework, where mandatory membership in a professional organisation is required. These organisations are responsible for admitting members, adopting internal rules and professional standards, monitoring compliance, and imposing disciplinary measures. The authorised body sets minimum entry requirements for consultants and oversees the activities of the Chambers by approving their internal regulations, maintaining official registries, reviewing internal documents, monitoring operations, and applying enforcement measures where necessary.

102 Law of Ukraine no 5076-VI (n 89) art 30.

103 Law of the Republic of Kazakhstan no 176-VI LRK (n 16) art 72.

The current model of self-regulation for legal consultants in Kazakhstan is marked by institutional instability, primarily due to the absence of unified regulation. To address this problem, it is advisable to create a single professional regulatory authority—potentially based on the RCLC—with territorial branches formed from current chambers. If the condition for full self-regulation cannot be maintained, regulation may be organised in a co-regulation format, similar to the model applied to advocates. This approach aligns with the United Kingdom's experience, where two distinct legal professions are regulated by separate bodies that share equal legal status and consistent regulatory powers.

The separation of legal consultants into a distinct category has also been subject to criticism. Although their functions largely mirror those of advocates, except for participation in criminal cases, legal consultants operate under a separate regulatory framework. This divergence impedes the development of a unified system for ensuring the quality of legal assistance. Potential solutions can be found in the regulatory models adopted by Germany, where legal assistance providers are integrated into a single profession, subject to a common regulatory framework that allows for differentiation based on levels of specialisation. Thus, Kazakhstan could improve national regulation either by establishing parity between the regulators of advocates and consultants or by merging both professions under a single regulatory authority.

Foreign experience demonstrates that in countries with a well-developed legal system, co-regulation predominates, ensuring a balance between professional independence and state supervision. On the contrary, in jurisdictions transitioning from a state-administrative model, regulation often evolves toward full self-regulation, as a response to previous state interference and a pursuit of professional autonomy. Comparative analysis has also highlighted several regulatory practices—indicated in the article—that may be effectively adapted to the Kazakh context.

In Kazakhstan, adopting a co-regulation approach to legal assistance for advocates and legal consultants appears optimal. Such a model would safeguard the legal profession's independence from administrative influence, while maintaining a degree of public accountability. Such a model would foster the development of a stable professional environment and improve the quality of legal assistance.

REFERENCES

1. Baimurat SM, 'Improving the Quality of Legal Assistance' (*Zakon.kz*, 20 February 2022) <https://online.zakon.kz/Document/?doc_id=34236067> accessed 27 July 2025.
2. Doelker A, 'Self-Regulation and Co-Regulation: Prospects and Boundaries in an Online Environment' (LLM thesis, University of British Columbia 2010).
3. Dubrova N and Sarbasov B, 'Legal Bases of State Regulation of Entrepreneurial Activity in the Republic of Kazakhstan' (2017) 3-2 Actual Problems of Humanities and Natural Sciences 47.

4. Dzhaldybaeva A, 'Prospects for the Development of Self-Regulation of the Legal Profession in Kazakhstan: Problems and Solutions' [2025] *Kazakhstan Law Review* <<https://kazlawreview.kz/perspektivy-razvitiya-samoregulirovaniya-yuridicheskoy-professii-v-kazahstane-problemy-i-puti-resheniya/>> accessed 16 May 2025.
5. Gunningham N and Rees J, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) *Law and Policy* 363, doi:10.1111/1467-9930.t01-1-00033.
6. Gunningham N, 'Compliance, Enforcement and Regulatory Excellence' in Coglianese C (ed), *Achieving Regulatory Excellence* (Brookings Institution Press 2017) 188, doi:10.2139/ssrn.2929568.
7. Heremans T, 'Professional Services in the EU Internal Market: Quality Regulation and Self-Regulation' (PhD thesis, Katholieke Universiteit Leuven, Instituut voor Europees Recht 2010).
8. Huyse L and Parmentier S, 'Decoding Codes: The Dialogue between Consumers and Suppliers through Codes of Conduct in the European Community' (1990) 13(3) *Journal of Consumer Policy* 253, doi:10.1007/BF00411510.
9. Kiyazova A, 'Regulation of Professional Activity of Legal Consultants' (2024) 2 *Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan* 122.
10. Koriath S, 'Legal Education in Germany Today' (2006) 24(1) *Wisconsin International Law Journal* 85.
11. Michael DC, 'The Use of Audited Self-Regulation as a Regulatory Technique' (1995) 47(2) *Administrative Law Review* 171.
12. Ospanov K, *Fundamentals of Law: A Textbook* (5th edn, Jeti jargı 2017).
13. Rees JV, *Reforming the Workplace: A Study of Self-Regulation in Occupational Safety* (Law in Social Context, University of Pennsylvania Press 1988).
14. Sarbasov B, Zhanuzakova L and Toleubekov A, 'Actual Problems of Legislative Provision of Protection of the Rights of Entrepreneurs in the Implementation of Statecontrol and Supervision in the Republic of Kazakhstan' (2024) 29(4) *Bulletin of Karaganda University: Law Series* 25, doi:10.31489/2024L4/25-37.
15. Schröder D, 'Challenges of German First-Year Law Students – Empirical Results and Implications for Legal Education' (2022) 3(1) *European Journal of Legal Education* 23.
16. Schultz U, 'Legal Education in Germany – an Ever (Never?) Ending Story of Resistance to Change' (2007) in Olgiati V (ed), *Higher Legal Culture and Postgraduate Legal Education in Europa* (Edizioni Scientifiche Italiane 2008) 125.
17. von Bogdandy A, *The German Sonderweg in Legal Education: Reflections for a General Debate in the Context of European Society* (MPIL Research Paper Series no 2024-01, Max Planck Institute for Comparative Public Law and International Law 2024).

AUTHORS INFORMATION

Albina Kiyazova*

LLM, Leading Researcher of the Department of International Law and Comparative Law, Institute of Legislation and Legal Information of the Republic of Kazakhstan under the Ministry of Justice of the Republic of Kazakhstan

kiyazova.a@zqai.kz.

<https://orcid.org/0009-0002-9865-5488>

Corresponding author, responsible for conceptualization, formal analysis, methodology, investigation and writing – original draft.

Maygul Abilova

PhD, Director, Center for Academic Programs and Projects, Academy of Justice under the High Judicial Council of the Republic of Kazakhstan, Kazakhstan

sta006@apvs.kz.

<https://orcid.org/0009-0003-3479-4929>

Co-author, responsible for conceptualization, supervision and writing – review & editing.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Albina Kiyazova and Maygul Abilova. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Kiyazova A and Abilova M, 'The Model of Regulation of the Legal Profession in Kazakhstan and Foreign Jurisdictions: the Search for a Balance between State Monopoly and Self-Regulation' (2025) 8(4) Access to Justice in Eastern Europe 170-96 <<https://doi.org/10.33327/AJEE-18-8.4-a000124>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000124>

Summary: 1. Introduction. – 2. Methodology. – 3. Theoretical And Legal Foundations of Regulation. – 4. Regulatory Framework Governing Legal Assistance in Kazakhstan. – 4.1. *Regulatory Framework for Advocates.* – 4.2. *Regulatory Framework for Legal Consultants.* – 5. Regulation of Legal Assistance in Foreign Jurisdictions. – 5.1. *Legal Services Regulation in the United Kingdom.* – 5.2. *The German Model of Legal Profession Regulation.* – 5.3. *Regulation of Legal Practice in Ukraine.* – 6. Conclusion

Keywords: government regulation, self-regulation, co-regulation, legal profession, admission of the profession, lawyer (advocates) or legal consultant.

DETAILS FOR PUBLICATION

Date of submission: 28 May 2025

Date of acceptance: 29 Jul 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

МОДЕЛЬ РЕГУЛЮВАННЯ ЮРИДИЧНОЇ ДІЯЛЬНОСТІ В КАЗАХСТАНІ
ТА ІНОЗЕМНИХ ЮРИСДИКЦІЯХ:
ПОШУК БАЛАНСУ МІЖ ДЕРЖАВНОЮ МОНОПОЛІЄЮ ТА САМОРЕГУЛЮВАННЯМ

Альбіна Киязова* та Майігуль Абілова

АНОТАЦІЯ

Вступ. Щораз більший попит на кваліфіковану правову допомогу підкреслює необхідність ефективного регулювання юридичної діяльності. Залежно від розподілу регуляторних функцій існують три моделі: державне регулювання, саморегулювання та співрегулювання. У Казахстані правову допомогу надають адвокати та юридичні

консультанти, які працюють за різними принципами. Адвокати працюють за моделлю співрегулювання, що поєднує державний контроль з професійною автономією, тоді як юридичні консультанти підпорядковуються системі саморегулювання, у якій професійні організації контролюють допуск та здійснюють нагляд. Ця розбіжність ускладнює розробку узгодженої та ефективної системи правової допомоги, що спонукає до дискусій щодо об'єднання їхнього правового статусу та управління.

Юрисдикції з добре розвиненими правовими системами, такі як Велика Британія та Німеччина, переважно використовують співрегулювання, що збалансовує професійну автономію з громадським наглядом. Кілька пострадянських країн, зокрема Україна та частково Казахстан, перейшли від державного адміністративного регулювання до саморегулювання. Однак ефективність саморегулювання залежить від зрілості та стабільності його інституційної основи. У Казахстані система саморегулювання юридичних консультантів вже виявила структурні недоліки та потребує реформування. Це дослідження розглядає модель регулювання юридичної діяльності в Казахстані та окремих іноземних юрисдикціях, визначає недоліки в національній системі та пропонує рекомендації щодо її вдосконалення.

Методи. У дослідженні використовуються теоретичні та спеціальні методи юридичного дослідження. Аналіз та синтез у поєднанні із системним підходом дозволили зібрати та систематизувати відповідні матеріали (наукову літературу та правові акти), класифікувати моделі регулювання, виявити відмінності, оцінити їхню ефективність та розробити рекомендації. Формально-правовий метод сприяв дослідженню правових норм у різних юрисдикціях, тоді як порівняльно-правовий метод дозволив провести міжюрисдикційне порівняння, висвітливши відмінні риси та найкращі практики.

Результати та висновки. Регулювання юридичної діяльності здійснюється за однією з трьох моделей – державне управління, саморегулювання або співрегулювання, кожна з яких відрізняється ступенем участі держави та професійної залученості. У юрисдикціях із добре розвиненими правовими інституціями переважає підхід співрегулювання, яке поєднує державний контроль з професійною автономією. У країнах із правовими системами, що розвиваються, часто запроваджується саморегулювання. У Казахстані адвокати працюють за моделлю співрегулювання, тоді як юридичні консультанти підпорядковуються системі саморегулювання, яка демонструє помітні інституційні недоліки. Питання об'єднання цих двох професійних груп під керівництвом єдиного регуляторного органу залишається актуальним. Порівняльний аналіз національного та зарубіжного досвіду виявив практики, які можуть бути основою для вдосконалення казахстанської регуляторної системи.

Ключові слова: державне регулювання, саморегулювання, співрегулювання, юридична діяльність, допуск до професії, юрист (адвокат) або юридичний консультант.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000125>

Date of submission: 30 May 2025

Date of acceptance: 31 Jul 2025

Last Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Phuong Nam Phan

Research Article

REGULATIONS ON EMISSIONS TRADING SYSTEM AND CARBON TAX: EXPERIENCES FROM CHINESE LAW AND LESSONS FOR VIETNAM

Nam Phan Phuong

ABSTRACT

Background: The defining challenge of the 21st century is climate change, which has necessitated countries to incorporate financial instruments ranging from carbon tax to the Emissions Trading System (ETS) for emission abatement. China, the world's biggest CO₂ emitter, has implemented an Environmental Protection Tax (EPT) since 2018 and launched a national ETS in 2021. Vietnam, committed to Net Zero by 2050 and currently developing its carbon market, faces significant challenges in strengthening its financial and legal regulations.

Methods: This article integrates qualitative methodology and comparative analysis to delineate the nexus between carbon taxation and Emissions Trading Systems (ETS), concomitantly emphasising the human right to a clean environment. The qualitative approach is employed for an in-depth examination of policy, economic, and societal facets within the respective jurisdictions of China and Vietnam. In parallel, comparative analysis serves as the central framework for assessing the efficacy of these two instruments in mitigating greenhouse gas emissions, alongside exploring their potential for synergy and associated challenges.

Results and Conclusions: *This article seeks to answer the question: In the process of building and perfecting regulations on the emissions trading system and carbon tax, what lessons can Vietnam learn from China's experience to ensure fairness and the right to live in a clean environment?*

China's ETS currently covers approximately ≈40% of CO₂ emissions, predominantly in the power sector. However, the lack of coordination between the EPT and ETS, low quota price and free allocation of allowances have discouraged investments in low-carbon technologies. Drawing on these lessons, Vietnam should consider adopting a carbon tax to replace the current Law on Environmental Protection Tax. Such legislation should incorporate reasonable provisions such as higher tax rates, flexible adjustment mechanisms, and targeted exemptions or reductions to influence consumer behaviour and reduce reliance on fossil fuels.

Furthermore, it is crucial to reform state budget management regulations concerning the utilisation of financial resources derived from carbon taxes and an Emissions Trading System (ETS). These funds should be allocated to finance environmentally friendly agricultural models, mangrove reforestation projects, and the development of irrigation systems resilient to mangrove inundation, thereby promoting environmental protection and long-term livelihood security. Concurrently, establishing a rational long-term roadmap for the development of a national carbon market is essential. This integrated approach, combining both financial instruments, will safeguard Vietnamese citizens' right to live in a clean environment and ensure compliance with the Net Zero commitment by 2050.

1 INTRODUCTION

Climate change is one of the major challenges of the 21st century as it poses significant threats to the global environment, economy and society. To achieve the objective of limiting the global temperature increase to below 2°C, as stipulated in the Paris Agreement (2015), countries are required to implement financial instruments such as carbon taxation and emissions trading systems (ETS). These instruments serve to place a price on carbon, internalise environmental externalities, and incentivise the development of low-carbon technologies.¹ China, the world's largest CO₂ emitter—responsible for 30% of total global emissions in 2021—has pioneered the adoption of the Environmental Protection Tax (EPT) since 2018 and subsequently introduced its national ETS in 2021. Consequently, China provides a valuable case study for examining the coordination of these tools.² Meanwhile, Vietnam, with its Net Zero target by 2050 at the 26th Conference of the Parties 26 (COP26),

1 Paris Agreement under the United Nations Framework Convention on Climate Change (adoption 12 December 2015) [2016] UNTS 3156/79.

2 International Energy Agency, *Global Energy Review: CO₂ Emissions in 2021* (IEA 2022) <<https://www.iea.org/reports/global-energy-review-co2-emissions-in-2021-2>> accessed 29 May 2025.

is building a carbon market under Decree 06/2022/ND-CP but faces challenges in terms of legal framework, monitoring technology and business awareness.³

The selection of China as the primary subject of this study stems not only from the country's important role in efforts to reduce global emissions but also from its considerable similarities with Vietnam in terms of legal regulations, political institutions and cultural foundations. In addition, the similarity in economic structure with the dependence on heavy industries such as coal power and cement, along with Asian cultural values that promote social stability, renders China's experience particularly relevant for Vietnam's reference. These similarities facilitate the application of lessons from China to the Vietnamese context, especially in building legal and institutional frameworks for climate change response finance instruments.

This article critically examines China's climate change finance regulations, focusing on the relationship between the Environmental Protection Tax (EPT) and the Emissions Trading System (ETS) to draw lessons for improving Vietnam's law. The analysis not only considers economic and environmental performance but also assesses four important legal aspects:

- i) legal and institutional frameworks such as China's Environmental Protection Tax Law (2016)⁴ and Vietnam's Environmental Protection Tax Law (2010);⁵
- ii) environmental justice, with particular reference to the rights of affected communities and mechanisms for public participation;⁶
- iii) human rights, notably the right to live in a clean environment in accordance with UN Resolution 48/13;⁷ and
- iv) comparative law, in relation to conformity with the Paris Agreement⁸ and insights drawn from the EU ETS.⁹

3 Decree of Vietnam No 06/2022/ND-CP 'On Mitigation of Greenhouse Gas (GHG) Emissions and Protection of Ozone Layer' (adoption 7 January 2022) <<https://thuvienphapluat.vn/van-ban/EN/Tai-nguyen-Moi-truong/Decree-06-2022-ND-CP-mitigation-of-green-house-gas-emissions/503148/tieng-anh.aspx>> accessed 29 May 2025; 'Socialist Republic of Vietnam: Nationally Determined Contribution (NDC) (updated in 2022) (Vietnam NDC 2022)' (*UN Climate Change*, 9 November 2022) <<https://unfccc.int/documents/622541>> accessed 29 May 2025.

4 Law of the People's Republic of China 'On Environmental Protection Tax' (adoption 25 December 2016) <https://www.mee.gov.cn/ywgz/fgbz/fl/201811/t20181114_673632.shtml> accessed 29 May 2025.

5 Law of the National Assembly of Vietnam No 57/2010/QH12 'On Environmental Protection Tax' (adoption 15 November 2010) <<https://thuvienphapluat.vn/van-ban/EN/Thue-Phi-Le-Phi/Law-No-57-2010-QH12-Environmental-protection-Tax/123975/tieng-anh.aspx>> accessed 29 May 2025.

6 Jingbo Cui and others, 'The Effectiveness of China's Regional Carbon Market Pilots in Reducing Firm Emissions' (2021) 118(52) *Proceedings of the National Academy of Sciences* e2109912118. doi:10.1073/pnas.2109912118.

7 Resolution HRC No 48/13 'The Human Right to a Clean, Healthy and Sustainable Environment' (adoption 8 October 2021) <<https://undocs.org/A/HRC/RES/48/13>> accessed 29 May 2025.

8 Paris Agreement (n 1).

9 'EU Emissions Trading System (EU ETS)' (*ICAP International Carbon Action Partnership*, 2024) <<https://icapcarbonaction.com/en/ets/eu-emissions-trading-system-eu-ets>> accessed 29 May 2025.

These aspects elucidate the mechanisms through which China integrates financial instruments, as well as the inherent limitations of such integration, providing Vietnam with critical insights to avert a repeat.¹⁰

2 RESEARCH METHODS

This article represents the culmination of a comprehensive approach that integrates qualitative methodology with comparative analysis to elucidate the relationship between carbon taxation and Emissions Trading Systems (ETS), while also clarifying the human right to a clean environment. The qualitative method was employed for an in-depth analysis of the policy, economic, and social dimensions within the specific contexts of China and Vietnam. Concurrently, comparative analysis played a central role in assessing the efficacy of these two financial instruments in reducing greenhouse gas emissions, while also exploring their synergistic potential and inherent challenges.

The aspects explored in this research are diverse and detailed, extending beyond mere economic and environmental effectiveness to encompass critical legal and social dimensions. Accordingly, the study delved into the legal and institutional frameworks by comparing China's Environmental Protection Tax Law (2016) and Vietnam's Law on Environmental Protection Tax (2010), aiming to derive lessons on how each nation integrates financial instruments and the limitations encountered. Furthermore, the research also examined issues of environmental justice, focusing on ensuring the rights of affected communities and mechanisms for public participation in the policy-making process. The right to a clean environment was also analysed within this article. Finally, comparative law was employed to assess alignment with the Paris Agreement (2015) and draw insights from the experience of the EU ETS, thereby broadening the perspective for recommendations.

With respect to data collection and analysis, the study conducted a synthesis and analysis of various sources of information, including legal documents from China and Vietnam, as well as reports and statistics from reliable agencies. Qualitative analysis was applied to the entire data set in order to deeply explore policy, economic and social dimensions, while comparative methods were used to evaluate experiences, generate concrete, specific and relevant lessons, and recommendations for Vietnam. The case of China's national ETS serves as an illustrative example of how this methodological framework can be operationalised. The case study focuses on China's ETS as a practical reference point from which Vietnam may draw lessons in pursuit of its Net Zero 2050 objective.¹¹

10 Haitao Xu and others, 'Comparing the Impacts of Carbon Tax and Carbon Emission Trading' (2023) 330 *Journal of Environmental Management* 117156. doi:10.1016/j.jenvman.2022.117156.

11 Vietnam NDC 2022 (n 3)

3 REGULATIONS ON THE EMISSION TRADING SYSTEM AND CARBON TAX: EXPERIENCES FROM CHINESE LAW AND LESSONS LEARNED FOR VIETNAM

3.1. Analysis of the Legal Framework and Climate Finance Institutions

3.1.1. Challenges in Developing Climate Finance Institutions in Vietnam

In Vietnam, the Law on Environmental Protection 2020 is a crucial legal document that establishes a legal framework for developing a carbon market in the country.¹² The law sets out greenhouse gas emission control principles, requires disclosure of environmental information, and encourages the use of economic tools such as carbon pricing to achieve climate goals. In particular, the Law emphasises the role of the carbon market in promoting industries to transition to green and sustainable production models.

Building on this foundation, Decree 06/2022/ND-CP¹³ on reducing greenhouse gas emissions and protecting the ozone layer establishes a specific roadmap for establishing a carbon market, including plans to pilot an Emissions Trading System (ETS) by 2028.¹⁴ The decree focuses on two main emission areas: the power sector (accounting for about 29% of Vietnam's total CO₂ emissions in 2023) and the cement industry (accounting for about 15% of emissions).¹⁵ Accordingly, the ETS will initially target large emission sources in these sectors, to control about 44% of total national emissions in its first phase. The decree also requires the establishment of a monitoring, reporting and verification (MRV) system to ensure the transparency and accuracy of emissions data, drawing on the experiences of China and the EU.¹⁶

Although the Law on Environmental Protection and Decree 06/2022/ND-CP are important steps, the implementation of the carbon market is still in its infancy. These regulations have laid the legal foundation, but it is necessary to supplement detailed guiding documents to ensure feasibility, particularly given Vietnam's heavy reliance on fossil energy, with coal power accounting for a significant proportion of the national emission structure.¹⁷

In parallel, the Law on Environmental Protection Tax (2010) is Vietnam's primary financial tool for addressing environmental pollution, covering several aspects related to greenhouse

12 Law of the National Assembly of Vietnam No 72/2020/QH14 'On Environmental Protection' (adoption 17 November 2020) <<https://vanban.chinhphu.vn/?pageid=27160&docid=202613>> accessed 29 May 2025.

13 Decree of Vietnam No 06/2022/ND-CP (n 3).

14 World Bank, *Vietnam Country Climate and Development Report* (World Bank Group 2022) <<https://openknowledge.worldbank.org/entities/publication/29e72556-d255-5c50-a086-245c1ccc4704>> accessed 29 May 2025.

15 Bui Hong Long, 'Vietnam's Net-Zero Commitment: Opportunities, Challenges and Solutions' (2024) 3 *Environment* 88.

16 Cui and others (n 6).

17 International Energy Agency (n 2).

gas emissions.¹⁸ This law imposes taxes on polluting products such as gasoline, coal, and plastic bags, with gasoline taxes ranging from 1,000 to 4,000 VND/litre (equivalent to 0.04-0.16 USD/litre).¹⁹ The tax is designed to encourage the transition to cleaner energy sources and reduce the consumption of polluting products.

However, the Law on Environmental Protection Tax has several limitations in responding to climate change. Most notably, it does not directly target CO₂ emissions but instead applies to products indirectly associated with emissions, thereby resulting in its effectiveness as a carbon pricing mechanism. Compared to international carbon taxes, such as those in Canada (\$40/ton of CO₂ in 2023) or Sweden (\$130/ton of CO₂), Vietnam's gasoline taxes are too low to create a strong incentive to reduce emissions.²⁰ Moreover, environmental tax revenues (estimated at \$2.5 billion per year) are directed primarily into the general budget rather than being allocated explicitly for renewable energy projects or for supporting vulnerable groups affected by climate change, such as communities in the Mekong Delta.²¹

Despite progress in developing a legal framework, Vietnam faces major challenges in deploying climate change finance instruments:

Firstly, a lack of detailed regulations on handling violations and quota allocation:

Decree 06/2022/ND-CP has not specified the sanctioning mechanism for enterprises that do not comply with ETS or provide inaccurate emission data.²² In addition, the allocation of quotas (free or auction) is still not clearly regulated, complicating the design of a fair and efficient carbon market. Experience from China shows that the allocation of free quotas in the first phase of its ETS (2021) has reduced financial pressure on businesses but also weakened incentives to invest in clean technology due to excessively low quota prices (~14 USD/ton of CO₂).²³ Vietnam must therefore issue detailed guiding decrees to avoid similar restrictions.

Second, the MRV system is weak: the monitoring, reporting, and verification (MRV) system is a core factor in ensuring the transparency and effectiveness of the ETS; however, Vietnam currently lacks the necessary infrastructure and professional human resources to implement MRV comprehensively. According to research by Nguyen Van Hieu and

18 Law of the National Assembly of Vietnam No 57/2010/QH12 (n 5).

19 Nguyen Minh Anh, 'The Significance of Vietnam's Environmental Tax Law in the Green Economy Transition Process' (Fiscal Policies and the Green Economy Transition: Generating Knowledge – Creating Impact : Third Annual Conference of the Green Growth Knowledge Platform, University of Venice, Italy, 29-30 January 2015).

20 Yao Wang, Shulin Xu and Xue Meng, 'Environmental Protection Tax and Green Innovation' (2023) 30(19) Environmental Science and Pollution Research 56628. doi:10.1007/s11356-023-26194-z.

21 Nguyen Van Hieu and Nguyen Hoang Nam, 'The Current Situation of Greenhouse Gas Emissions in Vietnam: Opportunities and Challenges' (2021) 728 Journal of Hydrometeorology 51. doi:10.36335/VNJHM.2021(728).51-66.

22 World Bank (n 14).

23 Da Zhang and others, 'Emissions Trading in China: Progress and Prospects' (2014) 75 Energy Policy 9. doi:10.1016/j.enpol.2014.01.022.

Nguyen Hoang Nam, only a limited number of large industrial facilities in Vietnam had a full greenhouse gas (GHG) emissions reporting system in 2021, primarily due to the absence of measurement technology and trained personnel.²⁴ This situation mirrors China's early challenges prior to launching its national ETS, which required several years to establish a reliable MRV system.²⁵ The lack of a robust MRV not only affects the ETS but also hinders the feasibility of applying a direct carbon tax, since accurate emissions data is a prerequisite for calculating taxes.

Third, dependence on fossil fuels and limited financial resources: the coal and cement power sectors—the two main targets of ETS—are important sectors of Vietnam's economy, but also the largest contributors to GHG emissions.²⁶ According to a World Bank report, Vietnam needs about \$368 billion between now and 2040 to transition to clean energy and develop sustainable infrastructure, yet current financial resources remain limited.²⁷ This situation underscores the need for Vietnam to leverage international funding from the Asian Development Bank (ADB), Green Climate Fund (GCF) and work with the EU to build capacity and implement effective financial instruments.²⁸

Finally, low business awareness: commercial centres and medium enterprises (SMEs), which account for more than 90% of all businesses in Vietnam, often perceive environmental taxes or ETS obligations as financial burdens rather than opportunities for technological innovation. For example, according to Mr. Nguyen Minh Anh, by 2023, only about 10% of enterprises in the textile and garment industry will apply green technology, due to high investment costs and a lack of preferential policies.²⁹ To overcome this, Vietnam could draw lessons from China, where EPT and ETS have raised business awareness through training programs and financial support mechanisms for the public green turmeric.³⁰

3.1.2. Experience From China: Strengths and Limitations of a Comprehensive Legal Framework

China has established a comprehensive legal and institutional framework to address climate change, centred on two main financial instruments: the Environmental Protection Tax (EPT) and the Emissions Trading System (ETS). These tools are designed to price carbon, localise environmental costs, and accelerate the transition to a low-carbon economy, in line with China's commitment under the Paris Agreement (2015) to reduce carbon intensity by 60-65% from 2005 levels by 2030.³¹ The role of the state is central, with close coordination

24 Hieu and Nam (n 21).

25 Cui and others (n 6).

26 Bui (n 15).

27 World Bank (n 14).

28 Green Climate Fund, 'FP071 Scaling Up Energy Efficiency for Industrial Enterprises in Vietnam' (GCF Watch, 16 March 2018) <<https://www.gcfwatch.org/project-tracker/fp071-scaling-up-energy-efficiency-for-industrial-enterprises-in-vietnam>> accessed 29 May 2025.

29 Nguyen (n 19).

30 Wang, Xu and Meng (n 20).

31 Paris Agreement (n 1).

between central and local agencies to ensure the effective implementation of these financial instruments and their integration into the national development strategy, with the goal of reaching the carbon peak by 2030 and carbon neutrality by 2060.

The Environmental Protection Tax Law, passed by the Chinese People's Congress on 25 December 2016 and effective on 1 January 2018, is the legal basis for imposing taxes on air pollutants (SO₂, NO_x), wastewater, solid waste, and noise. The tariff ranges from 1.2 to 12 yuan (about \$0.17-1.7) per unit of pollution depending on the type of pollutant and the applicable region.³² The law is administered by the State Tax Administration (STA) in coordination with the Ministry of Ecology and Environment (MEE), with local authorities responsible for collecting taxes and monitoring compliance.³³

The EPT law replaces the former pollution fee system, which was ineffective due to inconsistency and low fees that were insufficient deterrents.³⁴ Its primary objective is to encourage businesses to reduce their emissions by internalising environmental costs. However, a major limitation lies in the absence of a direct tax on CO₂, which weakens its role as a comprehensive carbon pricing mechanism, despite the fact that reductions in local pollutants indirectly contribute to lowering greenhouse gas emissions.³⁵ Revenue from EPT is estimated at 22 billion yuan (about \$3.1 billion) per year to finance environmental protection projects, including wastewater treatment system improvements, air quality monitoring, and renewable energy development.³⁶ However, the allocation of this revenue source has not been clearly stipulated in the law, leading to differences in efficiency between localities. For example, developed provinces such as Guangdong and Zhejiang utilise their revenue more efficiently in implementing environmental projects, while less-developed provinces like Shanxi face difficulties in terms of resources and technology.³⁷

China's ETS, officially launched on 16 July 2021, is the world's largest carbon trading system in terms of emissions coverage, with about 5.2 billion tons of CO₂ per year (more than 40% of total national emissions).³⁸ Regulated by the *Interim Regulation on the Management of Carbon Emissions Trading* (issued on 10 January 2024, effective from 1 May 2024), ETS currently focuses on the power sector with about 2,225 coal and gas power plants.³⁹ The system operates on the principle of "limit and trade," in which the MEE sets annual emission limits and allocates allowances to businesses. Businesses can buy and sell quotas on national

32 Law of the People's Republic of China 'On Environmental Protection Tax' (n 4).

33 *ibid*, art 14.

34 Yu He, Chuanhao Wen and Huan Zheng, 'Does China's Environmental Protection Tax Law Effectively Affect Companies? Evidence from the Stock Market' (2020) 57(15) *Emerging Markets Finance and Trade* 4436. doi:10.1080/1540496X.2020.1822810.

35 Xu and others (n 10).

36 Wang, Xu and Meng (n 20).

37 Cui and others (n 6).

38 'China National ETS' (*International Carbon Action Partnership (ICAP)*, 2024) <<https://icapcarbonaction.com/en/ets/china-national-ets>> accessed 29 May 2025.

39 *ibid*.

carbon exchanges such as the Shanghai Energy and Environment Exchange (SEEE) and the Hubei Carbon Emissions Exchange.⁴⁰

The ETS system is supported by a strict monitoring, reporting and verification (MRV) mechanism with detailed guidelines on emissions data collection, independent audits, and penalties for non-compliance, such as fines of up to 3 million yuan or quota cuts.⁴¹ In the first phase (2021-2023), the ETS mainly allocated free quotas based on emission intensity to reduce financial pressure on power businesses, but simultaneously weakened incentives to invest in low-carbon technology.⁴²

The above analysis shows that although certain successes have been achieved, in this context, China's regulations also show limitations, such as the lack of direct taxation of CO₂ in the EPT, along with the allocation of free quotas and low carbon prices in the ETS, which have reduced the effectiveness of encouraging investment in technologies to reduce emissions and clean energy transition. These are valuable lessons that Vietnam needs to heed to avoid repeating similar mistakes.

3.1.3. Recommendations for Vietnam: Improving the Legal Framework and Climate Finance Institutions towards Net Zero 2050

To complete the legal framework and climate finance institutions towards the Net Zero 2050 goal, Vietnam needs to implement the following solutions:

First, Vietnam needs to consider promulgating a carbon tax as a financial instrument to replace or supplement the 2010 Law on Environmental Protection Tax. To ensure efficiency and feasibility, the carbon tax rate needs to be designed based on the following criteria:

- i. A higher tax rate than the current environmental protection tax rate: currently, the environmental protection tax applied to gasoline (4,000 VND/litre) is equivalent to about 10-15 USD/ton of CO₂, much lower than the effective carbon tax recommended by the World Bank (40-80 USD/ton of CO₂ by 2030). The proposed starting carbon tax in Vietnam is about 30 USD/ton of CO₂ (equivalent to 750,000 VND/ton) with a roadmap to gradually increase to 50 USD/ton by 2035.
- ii. A flexible adjustment mechanism: tax rates should be adjusted according to inflation, carbon prices in the international market, and the affordability of economic sectors. For example, heavy industries (cement, steel) may be subject to lower taxes in the early stages to avoid economic shocks.
- iii. Exemptions for specific groups: small businesses, agriculture, and industries that use renewable energy should be exempted or reduced from carbon taxes to encourage the green transition.

40 Zhang and others (n 23).

41 *ibid.*

42 Xu and others (n 10).

Second, Vietnam needs to have policies to support small and medium-sized enterprises (SMEs). SMEs constitute the majority of Vietnam's economy but often lack the resources to comply with carbon tax or ETS regulations. Target support policies are therefore essential:

- i. official carbon tax exemption in the period 2028-2030 for small and medium-sized enterprises in the agriculture and transport sectors to reduce financial pressure;
- ii. technical assistance and support for small and medium-sized enterprises through the green fund, using the proceeds from ETS quota auctions;
- iii. free training courses on MRV and emissions management for small and medium-sized enterprises, in partnership with international organisations such as the EU, to leverage experience and resources.⁴³

Third, Vietnam needs to build a long-term roadmap for the national carbon market. To ensure sustainability and international integration, Vietnam needs to develop a long-term roadmap for the carbon market, with specific timelines:

- i. 2028-2030: implement ETS testing for the electricity and cement sectors, with a 100% free quota and apply a carbon tax at 5-10 USD/ton of CO₂ for transportation and agriculture. Refer to the EU's ETS model on how to set up an early-stage carbon market.⁴⁴
- ii. 2030-2035: increase the ETS quota auction rate to 50% and increase the carbon tax to 20-30 USD/ton of CO₂. Strengthen cooperation with international carbon markets (such as the EU or South Korea) to link the ETS system.⁴⁵
- iii. After 2035: complete the national carbon market, with 100% of ETS quotas auctioned and fully integrated into the international mechanism. This would ensure Vietnam meets its carbon neutrality commitments by 2050, in line with its commitments under the EU's international partnerships.⁴⁶

3.2. Analysis of Environmental Justice Issues and Climate Finance Policy

3.2.1. The Implementation of Environmental Justice In Response to Climate Change in Vietnam

Regarding the impact of pollution on the community: Currently, the provinces of Quang Ninh and Ha Tinh, where many coal-fired power plants and cement production facilities are concentrated, are areas heavily affected by environmental pollution caused by industrial activities.⁴⁷ In Quang Ninh, the coal mining industry and coal-fired power plants emit large

43 'International Partnerships: Vietnam' (European Commission, 2025) <https://international-partnerships.ec.europa.eu/countries/vietnam_en> accessed 5 June 2025.

44 'International Carbon Market' (European Commission, 2025) <https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/international-carbon-market_en> accessed 5 June 2025.

45 *ibid.*

46 'International Partnerships: Vietnam' (n 43).

47 Bui (n 15).

amounts of fine dust (PM2.5), sulfur dioxide (SO₂) and nitrogen oxide (NO_x), which cause air pollution and directly affect local public health.⁴⁸ According to a study, PM2.5 concentrations in some areas of Quang Ninh regularly exceed the World Health Organization (WHO) safety threshold, increasing respiratory and cardiovascular diseases in the community.⁴⁹ Similarly, in Ha Tinh, cement factories and the Formosa industrial park have caused significant air, water, and soil pollution, as well as slag and industrial wastewater, affecting the livelihood of people, especially farmers and fishermen.⁵⁰ These impacts not only violate people's right to live in a clean environment but also exacerbate social inequality, as poor and rural communities bear a greater burden of pollution than urban or wealthier areas.⁵¹

On the issue of disclosure of information about the environment and the participation of notaries in environmental issues: The Law on Environmental Protection 2020 clearly stipulates the requirement for disclosure of environmental information, including data on greenhouse gas emissions and pollution from industrial facilities, to increase community participation in monitoring and decision-making.⁵² Article 137 requires major emitting facilities to publicly publish annual emission reports, and at the same time, create conditions for people and social organisations to access information.⁵³ This regulation is in line with the principles of environmental justice, providing an opportunity for the community to monitor polluting activities and protect their rights.

In practice, however, the reality of implementation shows that public participation, especially in rural areas, is still very limited. In many areas, such as Quang Ninh and Ha Tinh, rural people often lack access to pollution data or climate policy information due to inadequate internet access, limited education and low legal awareness.⁵⁴ Moreover, state management agencies have not organised enough community consultation forums or disseminated easy-to-understand information, leading to a lack of transparency and diminished trust in the policy.⁵⁵ Compared to China, where Guangdong province has experimented with community consultation forums to discuss ETS, Vietnam needs to establish similar mechanisms to increase citizen participation, especially in areas heavily affected by pollution.⁵⁶

48 Hieu and Nam (n 21).

49 *ibid.*

50 Bui (n 15).

51 Resolution HRC No 48/13 (n 7).

52 Law of the National Assembly of Vietnam No 72/2020/QH14 (n 12).

53 *ibid.*

54 Nguyen (n 19).

55 Bui (n 15).

56 Zhang and others (n 23).

3.2.2. China's Environmental Justice Enforcement and Its Limitations

Impact of environmental pollution on communities near coal-fired power plants: Communities living near coal-fired power plants in provinces such as Shanxi and Inner Mongolia face serious health risks from air pollution, especially from PM2.5 fine particles and pollutants such as SO₂ (sulfur dioxide). Research by Cui and colleagues indicates that these coal-dependent regions—China's coal-fired power generation hubs—are hit hard by air pollution with PM2.5 levels regularly exceeding the World Health Organization's (WHO) safety threshold.⁵⁷ PM2.5 and SO₂ pollution has been linked to respiratory, cardiovascular diseases and increased premature mortality.⁵⁸

Although China's national ETS, launched in 2021, focuses on the power sector (which accounts for about 40% of the country's CO₂ emissions), the allocation of free quotas and low carbon prices (about \$14 per tonne of CO₂ in 2024) has reduced the financial incentive for coal-fired power plants to invest in pollution control or transfer technology. This leads to local⁵⁹ communities continuing to be negatively affected by pollution, violating the principle of environmental equity of equitable allocation of costs and environmental benefits.⁶⁰

For example, Shanxi—which supplies more than 25% of China's coal production—illustrates this imbalance. Rural communities near coal-fired power plants often do not benefit from renewable energy projects (such as solar or wind), which are concentrated mainly in coastal provinces such as Guangdong.⁶¹ Inequality in this region exacerbates environmental injustices, as poorer communities in Shanxi and Inner Mongolia incur higher health and environmental costs without adequate support from EPT⁶² or ETS revenues. This is an experience that Vietnam needs to learn from to avoid repeating.

On the issue of transparency and disclosure of emissions data: China's Environmental Protection Law (amended in 2014) requires businesses and government agencies to make emissions data public to ensure transparency and accountability.⁶³ However, the implementation of this requirement is limited, especially in providing information to the public. Emissions data is primarily managed by the Ministry of Ecology and

57 Cui and others (n 6).

58 C Arden Pope III and Douglas W Dockery, 'Health Effects of Fine Particulate Air Pollution: Connecting Lines' (2006) 56(6) *Journal of the Air and Waste Management Association* 709. doi:10.1080/10473289.2006.10464485.

59 Xu and others (n 10).

60 Da Zhang, Marco Springmann and Valerie Karplus, *Equity and Emissions Trading in China* (MIT Joint Program Report Series: Report 257, MIT Joint Program on the Science and Policy of Global Change 2014) <<https://dspace.mit.edu/handle/1721.1/88604>> accessed 29 May 2025.

61 Wang, Xu and Meng (n 20).

62 Cui and others (n 6).

63 Law of the People's Republic of China 'On Environmental Protection' (adoption 24 April 2014) <http://www.npc.gov.cn/zgrdw/npc/xinwen/2014-04/25/content_1861279.htm> accessed 6 May 2025.

Environment (MEE), with public access often limited to complex technical reports or technical information that is difficult to access for the unskilled.⁶⁴ According to Zhang et al.'s research, although ETS's monitoring, reporting, and verification (MRV) system has improved the accuracy of emissions data, information disclosure is still concentrated in central agencies such as the MEE, rather than being widely disseminated to affected communities.⁶⁵ This reduces the chances of being monitored by the public or participating in decisions related to carbon policy.

Moreover, rural communities—such as those in Shanxi—often lack formal channels to access information about emissions or contribute to environmental policymaking.⁶⁶ Although the Environmental Protection Law encourages public participation, enforcement mechanisms are weak, resulting in affected communities having no say in shaping policies such as EPT or ETS, violating the environmental justice principle of the right to participate.⁶⁷ This issue is also something that Vietnam needs to avoid when promulgating and adjusting regulations in the direction of transparency and publicity for environmental activities.

3.2.3. Recommendations For Vietnam to Improve Regulations to Promote Environmental Justice

To ensure that citizens' voices are incorporated into carbon policies, Vietnam needs to establish community consultation forums and learn from the EU's international cooperation mechanisms. According to the European Commission, the EU has supported Vietnam in sustainable development projects that highlight the central role of community participation in environmental policies.⁶⁸ Specific recommendations include:

- i. *Organising local forums:* Create consultation platforms in areas heavily affected by pollution, such as Quang Ninh (coal industry) and Ha Tinh (steel industry), enabling people to contribute their opinions on carbon taxes and ETS. These forums should be held periodically (quarterly or annually), with consultation outcomes publicly disclosed to enhance transparency.
- ii. *Learning from the EU:* The EU has implemented community consultation programmes to ensure climate policies are formulated based on the actual needs of people, as outlined in collaborative initiatives with partner countries. Vietnam can adopt this model to enhance transparency and accountability in emissions management.

64 Lei Zhang, Arthur PJ Mol and Guizhen He, 'Transparency and Information Disclosure in China's Environmental Governance' (2016) 18 *Current Opinion in Environmental Sustainability* 17. doi:10.1016/j.cosust.2015.03.009.

65 Zhang and others (n 23).

66 Zhang, Springmann and Karplus (n 60).

67 Julian Agyeman, Robert D Bullard and Bob Evans, 'Trends and Directions in Environmental Justice: From Inequity to Everyday Life, Community, and Equitable Sustainability' (2016) 41 *Annual Review of Environment and Resources* 321. doi:10.1146/annurev-environ-110615-090052.

68 'International Partnerships: Vietnam' (n 43).

China's experience demonstrates that insufficient implementation of such mechanisms diminishes public participation in state-led climate policies, despite the fact that communities are often the most directly affected. The promotion of the above solutions aims to improve the protection of human rights in climate change financial policies.

3.3 Analysis of the Right to Live in a Healthy Environment

3.3.1. Provisions of Vietnamese law to ensure the human right to live in a healthy environment

The Constitution of Vietnam (2013) in Article 43 affirms: "Everyone has the right to live in a clean environment, to be informed about the environment and to be protected from the adverse effects of the environment."⁶⁹ The Law on Environmental Protection (2020) concretises this right through regulations on the responsibilities of the state, businesses and communities in reducing pollution and responding to climate change. Article 4 of this Law clearly states that environmental protection is the right and obligation of each individual and organisation, and emphasises the role of financial instruments such as taxes and environmental protection fees in encouraging⁷⁰ environmentally friendly behaviours.

However, the Law on Environmental Protection Tax (2010), promulgated under Law No. 57/2010/QH12,⁷¹ has been ineffective in driving behavioural change among polluters. The law imposes tariffs on eight groups of goods, including gasoline, coal, plastic bags and chemicals such as hydrogen-chloro-fluoro-carbon (HCFC). However, the current tax rate (1,000–4,000 VND/litre for gasoline, equivalent to 0.04–0.16 USD/litre) is considered too low compared to the global average carbon tax rate (2–4 USD/ton of CO₂).⁷² According to Nguyen Thi Kim Ngan, this tax fails to internalise the negative external costs of CO₂ emissions, thus discouraging businesses in heavy industries such as cement, steel and coal-fired power to switch to clean technology.⁷³ For example, CO₂ emissions from industrial sectors in Vietnam continued to rise steadily between 2015 and 2022, reflecting the inadequacy of environmental tax rates.⁷⁴ Moreover, the list of taxable objects also ignores serious pollutants such as pesticides and e-waste, limiting the scope of the policy.⁷⁵

69 Constitution of the Socialist Republic of Vietnam (adopted 28 November 2013) <https://www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2013> accessed 29 May 2025.

70 Law of the National Assembly of Vietnam No 72/2020/QH14 (n 12).

71 Law of the National Assembly of Vietnam No 57/2010/QH12 (n 5).

72 World Bank, 'Carbon Pricing Dashboard' (World Bank Group, 2025) <<https://carbonpricingdashboard.worldbank.org>> accessed 5 June 2025.

73 Nguyen Thi Kim Ngan, 'Inadequacies from Vietnam's Environmental Tax Policy' (2023) 16 Economics and Forecasts Review <<https://kinhtevadubao.vn/nhung-bat-cap-tu-chinh-sach-thue-moi-truong-cua-viet-nam-27918.html>> accessed 29 May 2025.

74 World Bank, *The State and Trends of Carbon Pricing 2023* (World Bank Group 2023). doi:10.1596/978-1-4648-2006-9.

75 Tran Linh Huan, 'The Current Status of Laws on Air Environment Protection and Recommendations for Improvement' [2022] Vietnam Lawyer Journal <<https://lsvn.vn/thuc-trang-phap-luat-ve-bao-ve-moi-truong-khong-khi-va-kien-nghi-hoan-thien1648255266-a116872.html>> accessed 29 May 2025.

The measurement, reporting and verification (MRV) system specified in Decree 06/2022/ND-CP on reducing greenhouse gas emissions also faces critical shortcomings. As noted by Tran Linh Huan, existing regulations lack detailed guidance on measurement methods and verification standards, leading to asynchronous and non-transparent emission data.⁷⁶ As a result, environmental protection tax revenues are not effectively used to finance climate change response programs but are mainly integrated into the general budget, reducing public confidence in the fairness of the policy.⁷⁷ Experience from European countries such as Sweden shows that the introduction of a high carbon tax (approximately \$30 per ton of CO₂) and reinvestment of revenue into renewable energy projects has helped increase access to a clean environment.⁷⁸ Vietnam could strengthen its framework by establishing a national environment fund to manage environmental tax revenues transparently and effectively.

In addition, the Mekong Delta, which contributes roughly 50% of rice production and 12% of national GDP, is heavily affected by climate change, facing rising sea levels, saltwater intrusion and land subsidence. According to Nguyen Thi Hue, sea levels in the Mekong Delta have risen by an average of 3.5 millimetres per year over the past two decades, flooding 40% of agricultural land and affecting the livelihoods of more than 17 million people, mainly farmers and fishermen.⁷⁹ These impacts reduce agricultural productivity, increase the economic burden, and threaten food security in the region. However, the region receives disproportionate support from climate change finance policies. Hue pointed out that the Mekong Delta only receives about 4.7% of the public investment budget for renewable energy in the 2018-2023 period, while provinces such as Quang Ninh and Ninh Binh are prioritised for large-scale wind and solar power projects.⁸⁰ This inequality poses the issue of environmental justice as vulnerable communities in the Mekong Delta bear the brunt of climate change without adequate access to resources to adapt or mitigate their impacts.

From a human rights perspective, the lack of investment in clean energy and adaptation solutions in the Mekong Delta violates the principle of equitable access to climate change solutions, highlighted in Resolution 48/13.⁸¹ For example, while the northern provinces have a renewable energy capacity of over 5,000 MW, the Mekong Delta only reaches about 500 MW, mainly from small solar power projects.⁸² Financial policies such as environmental tax exemptions or green credits for sustainable solutions (such as water-efficient irrigation systems or solar energy for agriculture) have also not been implemented effectively in the

76 *ibid.*

77 Tran Luong Quang Minh, 'Environmental Tax Policies in European Countries and Recommendations for Vietnam' (2023) 1(814) *Finance* 24.

78 *ibid.*

79 Nguyen Thi Hue, 'The Impact of Climate Change on Agricultural Development and Adaptation Solutions of the Agricultural Sector' (2024) 50 *Journal of Natural Resources and Environment Science* 158.

80 *ibid.*

81 Resolution HRC No 48/13 (n 7).

82 World Bank (n 14).

region. As Hue underscores, farmers are often forced to shoulder adaptation costs, such as purchasing water pumps to prevent salinity intrusion, while lacking financial support from the state, thereby increasing the economic vulnerability of disadvantaged communities.⁸³

3.3.2. Experience From China in the Regulation to Ensure Human Rights to Live in A Healthy Environment

In China, financial policies such as the Environmental Protection Tax (EPT) and the Emissions Trading System (ETS) are designed to reduce greenhouse gas emissions and improve environmental quality, thus indirectly supporting the right to live in a clean, healthy, and sustainable environment. However, limitations in policy design and implementation, along with regional inequalities and unfair distribution of revenue, have reduced the effectiveness of human rights protections, especially for vulnerable communities.

In China, the EPT has been implemented since 2018, and the national ETS was launched in 2021 to price polluting activities and encourage the transition to clean energy, contributing to the realisation of the right to live in a clean environment as stipulated in Resolution 48/13.⁸⁴ The EPT imposes tariffs based on emissions of pollutants such as SO₂ and NO_x, while the ETS sets CO₂ emission limits for the power sector, which accounts for about 40% of total national emissions.⁸⁵ These policies have achieved a number of results, such as a 15% reduction in PM_{2.5} concentrations in major cities between 2018 and 2023, improved air quality, and reduced pollution-related health risks.⁸⁶

However, the low EPT tax rate (about 1.2–12 yuan/ton of pollutants, equivalent to \$0.17–1.7) and the allocation of free quotas in the ETS (accounting for more than 90% of the total quota by 2024) have reduced the financial incentive for businesses to invest in pollution control or energy transition technologies.⁸⁷ The price of carbon in the ETS market, which hovers around \$14 per tonne of CO₂ in 2024, is also significantly lower than the \$135 per tonne recommended by the World Bank to meet the Paris Agreement target.⁸⁸ As a result, coal-fired power plants in Shanxi and Inner Mongolia continue to emit large amounts of PM_{2.5} and SO₂, threatening the right of local communities to live in a clean environment.⁸⁹ These restrictions show that China needs to adjust its financial policy to ensure environmental efficiency and protect human rights in a more substantive way. Vietnam also needs to consider and calculate the consequences of issuing financial regulations to avoid repeating China's mistakes.

83 Hue (n 79).

84 Resolution HRC No 48/13 (n 7).

85 Cui and others (n 6).

86 Wang, Xu and Meng (n 20).

87 Xu and others (n 10).

88 World Bank, *The State and Trends of Carbon Pricing 2024* (World Bank Group 2024). doi:10.1596/978-1-4648-2127-1.

89 Pope and Dockery (n 58).

In addition, regional inequalities in the implementation of policies to respond to climate change in China have compromised the human rights of communities in underdeveloped regions. Provinces such as Shanxi and Inner Mongolia, which depend on the coal and coal power industry, suffer high medical costs due to severe air pollution. Research shows that PM_{2.5} concentrations in Shanxi often exceed 50 µg/m³, double the WHO safety threshold, causing respiratory and cardiovascular diseases, threatening people's right to life and health.⁹⁰ Meanwhile, coastal provinces such as Guangdong and Zhejiang benefit from renewable energy projects such as solar and wind power, with total clean energy capacity accounting for more than 60% of the country in 2023.⁹¹ This disparity exacerbates environmental injustice, as poorer communities in Shanxi and Inner Mongolia suffer the consequences of pollution without benefiting from the energy transition.

Moreover, communities in Shanxi and Inner Mongolia often lack access to information and participation in decision-making processes, violating the principle of participatory fairness highlighted in Resolution 48/13.⁹² For example, renewable energy projects concentrated in coastal provinces rarely consult with local communities, leading to an unfair distribution of environmental and economic benefits.⁹³ To protect human rights, China needs to prioritise investment in clean energy in coal-dependent regions and ensure participation of local communities in policy making. In the process of learning from experience, Vietnam also needs to be aware of this limitation in China's regulations to complete its national regulations.

Another weakness lies in the distribution of Environmental Protection Tax (EPT) revenues and policies aimed at protecting vulnerable groups. With annual revenues estimated at \$3 billion per year (equivalent to 20 billion yuan), the EPT represents a potentially important resource to support vulnerable communities and promote human rights in the context of climate change.⁹⁴ However, much of this revenue is allocated to local government general funds rather than specific programs aimed at supporting groups heavily affected by pollution, such as those in Shanxi and Inner Mongolia.⁹⁵ This results in vulnerable communities not receiving adequate compensation or support to mitigate the health and economic impact of air pollution.

For instance, health care programs or environmental infrastructure improvements in heavily polluted areas are rarely funded from EPT revenues, even though these communities bear a high health burden from pollutants such as PM_{2.5}.⁹⁶ According to Yi Ma and Wen Xiang, the lack of transparency in the distribution of EPT revenue also reduces the ability

90 Cui and others (n 6).

91 Zhang, Springmann and Karplus (n 60).

92 Resolution HRC No 48/13 (n 7).

93 Agyeman, Bullard and Evans (n 67).

94 Wang, Xu and Meng (n 20).

95 Zhang, Mol and He (n 64).

96 Pope and Dockery (n 58).

of NGOs and local communities to monitor the use of this resource, violating the right to access information.⁹⁷ To protect human rights, China needs to establish a transparent revenue distribution mechanism, prioritise projects that support health and the environment in vulnerable areas and refer to international models such as the Green Climate Fund in financing environmental justice initiatives.⁹⁸

Consequently, transparency and clarity in the allocation of carbon tax and EPT revenues are something that Vietnam must pay attention to when building and refining the adjustment model for carbon emission activities into the environment.

3.3.3. Lessons Learned for Vietnam in Perfecting Regulations to Ensure Human Rights to Live in a Healthy Environment

Given Vietnam's current situation, and drawing lessons from China's experience, it is crucial that Vietnam carefully designs and implements policies to improve its regulatory framework and ensure the human right to live in a healthy environment. The Mekong Delta, one of the regions most heavily affected by climate change, faces issues such as sea level rise and land degradation, all of which threaten the livelihoods of millions of people. Learning from China's inefficient use of carbon tax revenues, Vietnam should approach the direction of carbon tax revenue and auction of ETS quotas that need to be allocated to support sustainable solutions in the region:

- i. *Renewable energy financing*: The European Commission's document on the international carbon market emphasises that EU ETS revenues are used to finance renewable energy projects, such as wind and solar, thereby reducing dependence on fossil fuels and creating green jobs.⁹⁹ In Vietnam, the revenue from the carbon tax (proposed at US\$5-10 per tonne of CO₂) can be used to deploy small-scale solar farms in provinces such as Can Tho and Bac Lieu, providing clean energy to rural communities and reducing pressure on the national grid.
- ii. *Supporting sustainable livelihoods*: The European Commission's *International Partnerships* document states the EU's support for sustainable agriculture projects in Vietnam, including climate-resilient farming.¹⁰⁰ Based on this experience, Vietnam can use carbon tax revenues to finance low-emission rice farming, eco-friendly aquaculture, and mangrove-based livelihood models in the Mekong Delta. These initiatives would help communities maintain their livelihoods while adapting to the impacts of climate change.

97 Yi Ma and Wen Xiang, 'Law Enforcement Through Authoritarian Environmentalism? State and Non-State Actors in China's Environmental Public Interest Litigation' (2023) 52(3) *China Current Affairs Journal* 464. doi:10.1177/18681026231185791.

98 'About GCF' (*Green Climate Fund*, 2025) <<https://www.greenclimate.fund/about>> accessed 29 May 2025.

99 'International Carbon Market' (n 44).

100 'International Partnerships: Vietnam' (n 43).

- iii. *Community Fund*: In the EU, ETS revenues have been used to support community-driven initiatives such as ecosystem restoration and green infrastructure improvements.¹⁰¹ Vietnam could establish a community fund for the Mekong Delta, financed by carbon tax revenues to finance locally proposed projects—such as planting mangroves or building irrigation systems—that directly protect the environment and long-term livelihoods.

4 CONCLUSION

To build a legal foundation for financial responses to climate change, Vietnam can learn from China's experience, especially in developing carbon tax laws and ensuring social justice.

First, improve carbon tax laws and effectively use carbon tax revenues. In China, the low EPT rate and free subsidies in the ETS have not provided enough incentive to encourage low-carbon technology investment. Therefore, Vietnam should consider imposing a carbon tax to replace or supplement the current Law on Environmental Protection Tax. Tax rates will need to be set appropriately, increasing over time from current levels and with a complex indexing system that reflects inflation, international carbon prices, and the affordability of economic actors. An initial tariff of around \$30 per tCO₂, rising to \$50 per tonne by 2035, could be a good place to start.

Equally important is the transparent and efficient use of carbon tax revenues and ETS auction revenues. These revenues should be earmarked for priority areas rather than absorbed into general fiscal consolidation funds—a limitation observed in China's practice. Funds could be directed to support sustainable agriculture programs, mangrove planting projects, as well as flood control, irrigation and renewable energy projects. In particular, it is necessary to exempt carbon taxes or provide technical and financial assistance to small and medium-sized enterprises in the early stages to ease the pressure and encourage investment in green production.

Second, ensure the disclosure of environmental information and transparency and the right to a healthy environment and social equality. Transparency in emissions data is a critical issue. China has struggled to publicly release its emissions figures. Therefore, Vietnam must strengthen the MRV system to ensure the accuracy and transparency of emissions data and make it available to affected communities. This would enable the public to easily monitor and participate in carbon policymaking decisions.

Public participation is also an integral part. Environmental consultation forums should be established regularly in heavily polluted areas such as Quang Ninh (coal industry) and Ha

101 *ibid.*

Tinh (steel industry). Such forums would ensure that communities have their voices heard in environmental decision-making, thereby advancing environmental justice and protecting the constitutional right to a clean, healthy and sustainable environment. China's experience demonstrates that without such mechanisms, public participation in state policies remains.

Finally, human rights and regional justice must be protected. China's experience highlights regional disparities in the distributive impacts of environmental policies. Vietnam must also invest in clean energy and adaptation solutions in these vulnerable areas—most notably the Mekong Delta—to ensure equitable access to climate resources. Revenues from carbon taxes and ETS could finance ecosystem restoration, green infrastructure, enhancement, and livelihood support programs for people living in climate-sensitive bioregions.

Coordinating and selectively drawing on China's experiences, along with shaping a long-term roadmap for the national carbon market and strengthening international cooperation, will help Vietnam effectively and equitably implement its Net Zero commitment by 2050.

REFERENCES

1. Agyeman J, Bullard RD and Evans B, 'Trends and Directions in Environmental Justice: From Inequity to Everyday Life, Community, and Equitable Sustainability' (2016) 41 Annual Review of Environment and Resources 321. doi:10.1146/annurev-environ-110615-090052
2. Anh NM, 'The Significance of Vietnam's Environmental Tax Law in the Green Economy Transition Process' (Fiscal Policies and the Green Economy Transition: Generating Knowledge – Creating Impact : Third Annual Conference of the Green Growth Knowledge Platform, University of Venice, Italy, 29-30 January 2015).
3. Cui J and others, 'The Effectiveness of China's Regional Carbon Market Pilots in Reducing Firm Emissions' (2021) 118(52) Proceedings of the National Academy of Sciences e2109912118. doi:10.1073/pnas.2109912118
4. He Y, Wen C and Zheng H, 'Does China's Environmental Protection Tax Law Effectively Affect Companies? Evidence from the Stock Market' (2020) 57(15) Emerging Markets Finance and Trade 4436. doi:10.1080/1540496X.2020.1822810
5. Hieu NV and Nam NH, 'The Current Situation of Greenhouse Gas Emissions in Vietnam: Opportunities and Challenges' (2021) 728 Journal of Hydrometeorology 51. doi:10.36335/VNJHM.2021(728).51-66
6. Huan TL, 'The Current Status of Laws on Air Environment Protection and Recommendations for Improvement' [2022] Vietnam Lawyer Journal <<https://lsvn.vn/thuc-trang-phap-luat-ve-bao-ve-moi-truong-khong-khi-va-kien-nghi-hoan-thien1648255266-a116872.html>> accessed 29 May 2025.

7. Hue NT, 'The Impact of Climate Change on Agricultural Development and Adaptation Solutions of the Agricultural Sector' (2024) 50 *Journal of Natural Resources and Environment Science* 158.
8. Kim Ngan NT, 'Inadequacies from Vietnam's Environmental Tax Policy' (2023) 16 *Economics and Forecasts Review* <<https://kinhtevadubao.vn/nhung-bat-cap-tu-chinh-sach-thue-moi-truong-cua-viet-nam-27918.html>> accessed 29 May 2025.
9. Long BH, 'Vietnam's Net-Zero Commitment: Opportunities, Challenges and Solutions' (2024) 3 *Environment* 88.
10. Ma Y and Xiang W, 'Law Enforcement Through Authoritarian Environmentalism? State and Non-State Actors in China's Environmental Public Interest Litigation' (2023) 52(3) *China Current Affairs Journal* 464. doi:10.1177/18681026231185791
11. Pope III CA and Dockery DW, 'Health Effects of Fine Particulate Air Pollution: Connecting Lines' (2006) 56(6) *Journal of the Air and Waste Management Association* 709. doi:10.1080/10473289.2006.10464485
12. Quang Minh TL, 'Environmental Tax Policies in European Countries and Recommendations for Vietnam' (2023) 1(814) *Finance* 24.
13. Wang Y, Xu S and Meng X, 'Environmental Protection Tax and Green Innovation' (2023) 30(19) *Environmental Science and Pollution Research* 56628. doi:10.1007/s11356-023-26194-z
14. Xu H and others, 'Comparing the Impacts of Carbon Tax and Carbon Emission Trading' (2023) 330 *Journal of Environmental Management* 117156. doi:10.1016/j.jenvman.2022.117156
15. Zhang D and others, 'Emissions Trading in China: Progress and Prospects' (2014) 75 *Energy Policy* 9. doi:10.1016/j.enpol.2014.01.022
16. Zhang D, Springmann M and Karplus V, *Equity and Emissions Trading in China* (MIT Joint Program Report Series: Report 257, MIT Joint Program on the Science and Policy of Global Change 2014) <<https://dspace.mit.edu/handle/1721.1/88604>> accessed 29 May 2025.
17. Zhang L, Mol APJ and He G, 'Transparency and Information Disclosure in China's Environmental Governance' (2016) 18 *Current Opinion in Environmental Sustainability* 17. doi:10.1016/j.cosust.2015.03.009

AUTHORS INFORMATION

Nam Phan Phuong

Deputy Dean, Faculty of Commercial Law, Ho Chi Minh City University of Law, Vietnam
phanphuongnam@gmail.com
<https://orcid.org/0009-0009-6293-0899>

Corresponding author, responsible for conceptualization, methodology, data curation, resources, investigation, formal analysis and writing – original draft.

Competing interests: No competing interests were disclosed.

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Phuong Nam Phan. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.
Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Phan PN, 'Regulations on Emissions Trading System and Carbon Tax: Experiences from Chinese Law and Lessons for Vietnam' (2025) 8(4) Access to Justice in Eastern Europe 197-221
<<https://doi.org/10.33327/AJEE-18-8.4-a000125>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000125>

Summary: 1. Introduction. – 2. Research Methods. – 3. Regulations on the Emission Trading System and Carbon Tax: Experiences from Chinese Law and Lessons Learned for Vietnam. – 3.1 *Analysis of the Legal Framework and Climate Finance Institutions.* – 3.1.1 *Challenges in Developing Climate Finance Institutions in Vietnam.* – 3.1.2. *Experience*

From China: Strengths And Limitations of a Comprehensive Legal Framework. – 3.1.3. Recommendations for Vietnam: Improving the Legal Framework and Climate Finance Institutions Towards Net Zero 2050. – 3.2. Analysis of Environmental Justice Issues and Climate Finance Policy. – 3.2.1. The Implementation of Environmental Justice in Response to Climate Change in Vietnam. – 3.2.2. China's Environmental Justice Enforcement and Its Limitations. – 3.2.3. Recommendations for Vietnam to Improve Regulations to Promote Environmental Justice. – 3.3 Analysis of the Right to Live in a Healthy Environment. – 3.3.1. Provisions of Vietnamese Law to Ensure Human Right to Live in a Healthy Environment. – 3.3.2. Experience From China in the Regulation to Ensure Human Right to Live in a Healthy Environment. – 3.3.3. Lessons Learned for Vietnam in Perfecting Regulations to Ensure Human Right to Live in a Healthy Environment. – 4. Conclusion.

Keywords: Carbon tax, Emissions Trading System, Environmental justice, Human rights to live in a clean environment, Vietnam.

DETAILS FOR PUBLICATION

Date of submission: 30 May 2025

Date of acceptance: 31 Jul 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 2 rounds – first round with major revisions and second round with minor revisions.

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The manuscript was prepared by the author. AI tools were employed exclusively to assist in refining the language. No generative AI was used to produce original content, research ideas, analysis, or conclusions.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВИЛА РЕГУЛЯЦІЇ СИСТЕМИ ТОРГІВЛІ ВИКИДАМИ ТА ПОДАТКУ НА ВУГЛЕЦЬ: ДОСВІД КИТАЙСЬКОГО ЗАКОНОДАВСТВА ТА УРОКИ ДЛЯ В'ЄТНАМУ

Нам Фан Фуонг

АНОТАЦІЯ

Вступ. Значним викликом 21-го століття є зміна клімату, яка змусила країни впровадити фінансові інструменти, починаючи від податку на вуглець до Системи торгівлі викидами (СТВ) задля скорочення викидів. Китай, найбільший у світі емітент CO₂, запровадив податок, пов'язаний з охороною навколишнього середовища (Environmental Protection Tax – далі ЕПТ), з 2018 року та запровадив національну СТВ у 2021 році. В'єтнам, який прагне досягти нульових викидів до 2050 року та наразі розвиває свій ринок вуглецю, стикається зі значними труднощами у зміцненні своїх фінансових та правових норм.

Методи. Ця стаття поєднує якісну методологію та порівняльний аналіз, щоб окреслити зв'язок між оподаткуванням вуглецю та Системою торгівлі викидами (СТВ), одночасно підкреслюючи право людини на чисте навколишнє середовище. Якісний підхід використовується для поглибленого вивчення політичних, економічних та соціальних аспектів у відповідних юрисдикціях Китаю та В'єтнаму. Паралельно, порівняльний аналіз є основою для оцінки ефективності цих двох інструментів у пом'якшенні викидів парникових газів, а також дослідження їхнього потенціалу для синергії та пов'язаних із цим проблем.

Результати та висновки. У цій статті поставлено за мету відповісти на питання: у процесі розробки та вдосконалення нормативно-правових актів щодо системи торгівлі викидами та податку на вуглець, які уроки може винести В'єтнам з досвіду Китаю, щоб забезпечити справедливість та право жити в чистому навколишньому середовищі?

Система торгівлі викидами (СТВ) Китаю наразі охоплює приблизно 40% викидів CO₂, переважно в енергетичному секторі. Однак відсутність координації між ЕПТ та СТВ, низька ціна квот та безкоштовний розподіл квот не сприяють інвестиціям у низьковуглецеві технології. Спираючись на ці уроки, В'єтнам повинен розглянути можливість запровадження вуглецевого податку замість чинного Закону про податок на охорону навколишнього середовища. Таке законодавство повинно містити обґрунтовані положення, такі як вищі податкові ставки, гнучкі механізми коригування та цільові пільги або скорочення, щоб впливати на поведінку споживачів та зменшувати залежність від викопного палива.

Крім того, вкрай важливо реформувати нормативно-правові акти управління державним бюджетом щодо використання фінансових ресурсів, отриманих від податків

на вуглець та Системи торгівлі викидами (СТВ). Ці кошти слід виділити на фінансування екологічно чистих сільськогосподарських моделей, проєктів з відновлення мангрових лісів та розвитку іригаційних систем, стійких до затоплення цих лісів, тим самим сприяти довгостроковій безпеці та захисту довкілля. Водночас, важливо розробити раціональний довгостроковий план розвитку національного ринку вуглецю. Такий комплексний підхід, що поєднує обидва фінансові інструменти, захистить право громадян В'єтнаму жити в чистому довкіллі та забезпечить дотримання зобов'язання щодо нульових викидів до 2050 року.

Ключові слова: *податок на вуглець, Система торгівлі викидами, екологічна справедливість, право людини жити в чистому довкіллі, В'єтнам.*

Research Article

LEGAL LIABILITY FOR GREENWASHING ACTIVITIES IN THE FINANCIAL SECTOR

Dalia Kubiliūtė

ABSTRACT

Background. This article analyses greenwashing as an evolving legal concept in the EU financial sector. While the topic is studied across disciplines, a legal-theoretical perspective is applied here, arguing that within the EU regulatory framework, greenwashing is primarily defined and developed through "soft law" instruments such as regulatory guidance, interpretative materials, and supervisory opinions, rather than consolidated in binding legal acts.

Methods. The research employs a legal-doctrinal approach supported by qualitative analysis combining linguistic, logical, and systematic interpretation of EU legislation with a review of supervisory authority reports, national laws, and selected court cases. This assessment is further complemented by academic and policy research.

Results and Conclusions. EU legal acts do not provide a consolidated definition of "greenwashing" that applies uniformly to all market participants and stakeholders. Given its open-ended nature, specific liability for greenwashing activities is not clearly established in the laws regulating

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000132>

Date of submission: 02 May 2024

Date of acceptance: 16 Sep 2025

Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Dalia Kubiliūtė

financial market participants' activities, leaving uncertainty about what kind of liability may be imposed. The analysis concludes that key features for avoiding greenwashing include transparency, accountability, certainty, and clarity (reliability), and good governance by financial market participants. Liability may be imposed indirectly through other legal provisions, such as consumer protection, misleading advertising, or environmental law. Enforcement practice suggests that reputational risk often outweighs formal sanctions, with supervisory and law enforcement bodies assuming broader roles.

1 INTRODUCTION

Nowadays, everyone can express an opinion on terms such as "sustainability," "greenwashing," or "ecological," and other concepts closely related to environmental protection. The use of these terms has been associated with the Sustainable Development Goals (SDGs), introduced in the General Assembly Resolution and European Parliament Recommendations for the European Union's future integrated policy on climate change.¹ As a result, these terms are no longer novel in society and are widely used and analysed. However, not everyone can explain how they specifically relate to the financial sector.

The financial sector might be defined as one of the key factors influencing the implementation of the SDGs within European Union (EU) policies and mitigating the negative effects of climate change. It plays a critical role in financing the transition to greener projects and overcoming the so-called "green finance gap",² i.e., the lack of sufficient financial resources to be directed toward green investments. Moreover, public funds are insufficient; mobilising private capital could significantly boost sustainable investments, i.e., investments in green and sustainable projects, and help reduce the negative environmental changes.³ As outlined in the European Union Green Deal,⁴ the EU and its Member States should coordinate their support to engage with partners to bridge the funding gap by mobilising private finance.

- 1 UNGA Res 70/1 'Transforming our World: The 2030 Agenda for Sustainable Development' (25 September 2015) <<https://sdgs.un.org/2030agenda>> accessed 30 April 2025; European Parliament Res 2008/2105(INI) '2050: The Future Begins Today – Recommendations for the EU's Future Integrated Policy on Climate Change' (4 February 2009) <https://www.europarl.europa.eu/doceo/document/TA-6-2009-0042_EN.html> accessed 30 April 2025.
- 2 Paola D'Orazio and Lilit Popoyan, 'Fostering green investments and tackling climate-related financial risks: Which role for macroprudential policies?' (2019) 160 *Ecological Economics* 25. doi:10.1016/j.ecolecon.2019.01.029.
- 3 European Commission, Communication 'Next Steps for a Sustainable European Future: European Action for Sustainability' (COM(2016) 739 final, 22 November 2016) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016DC0739>> accessed 30 April 2025; European Commission, Communication 'The European Green Deal' (COM(2019) 640 final, 11 December 2019) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0640&qid=1759306008713>> accessed 30 April 2025.
- 4 European Commission, COM(2016) 739 final (n 3).

The regulation of sustainable activities by financial market participants⁵ in the EU started relatively recently. It is considered that in the finance sector, the first sources that introduced the considerable importance and meaning of sustainability and the term "greenwashing" were the Taxonomy Regulation,⁶ adopted in June 2020, and Regulation on Sustainability-Related Disclosures in the Financial Services Sector⁷ (SFDR), adopted in November 2019. When adopting these legal acts, the legislator included the greenwashing concept as an inseparable part of the sustainable activities of the financial market participant.

Despite the gradual development of regulatory frameworks, these frameworks are already in force and shall be respected. In practice, financial market participants face many questions regarding the (non)applicability of greenwashing: What constitutes greenwashing? Who is responsible for the supervision? What liability arises from greenwashing activities? This article analyses the concept of greenwashing from an EU legal perspective and identifies the legal consequences of non-compliance with the restriction on carrying out greenwashing acts.

The urgency of addressing greenwashing is supported by empirical evidence. For instance, the EU financial sector accounts for a higher share of the total alleged greenwashing cases reported by stakeholders on EU companies. In 2022, it represented 23% of the total alleged greenwashing cases involving EU companies, including 9% involving EU banks.⁸ Quantitative studies within the EU further show a clear rise in potential greenwashing cases across multiple industries, including the banking sector. ESMA has emphasised that greenwashing, whether intentional or inadvertent, has the potential to undermine trust in sustainable finance markets and policies, underscoring the necessity of enhanced supervisory oversight and verification of ESG claims.⁹

-
- 5 In the context of this study, financial market participants are defined as financial market participants providing investment services.
 - 6 Regulation (EU) 2020/852 of the European Parliament and of the Council 'On the Establishment of a Framework to Facilitate Sustainable Investment, and amending Regulation (EU) 2019/2088' (18 June 2020) [2020] OJ L 198/13.
 - 7 Regulation (EU) 2019/2088 of the European Parliament and of the Council 'On Sustainability-Related Disclosures in the Financial Services Sector' (27 November 2019) [2019] J L 317/1.
 - 8 European Banking Authority (EBA), 'EBA Progress Report on Greenwashing Monitoring and Supervision' (EBA/REP/2023/16, 31 May 2023) 23 <https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2023/1055934/EBA%20progress%20report%20on%20greenwashing.pdf> accessed 30 April 2025.
 - 9 European Securities and Markets Authority (ESMA), 'Progress Report on Greenwashing: Response to the European Commission's request for input on "greenwashing risks and the supervision of sustainable finance policies"' (ESMA30-1668416927-2498, 31 May 2023) 12 <https://www.esma.europa.eu/sites/default/files/2023-06/ESMA30-1668416927-2498_Progress_Report_ESMA_response_to_COM_RfI_on_greenwashing_risks.pdf> accessed 30 April 2025.

It is considered that, since the greenwashing phenomenon is relatively new in the regulatory environment of the finance sector, the liability for performing greenwashing activities in the EU finance sector is not explicitly defined. Legal consequences may arise indirectly through other violations influenced by greenwashing acts. This article is important because there is limited legal analysis on enforcement measures for financial market participants in greenwashing. Such a situation arises as the regulation is relatively new, and there is limited experience on how to prevent such activities.

This research employs a legal-doctrinal research method, supported by qualitative analysis. It reviews EU legislation, reports and guidance from supervisory authorities, selected national laws and court cases, as well as academic and policy literature. The research question focuses on how liability for greenwashing arises when there is no stand-alone offence, and what practical steps could be taken to reduce regulatory fragmentation. Greenwashing is analysed as a broad concept encompassing all ESG factors—environmental, social, and governance.

2 METHODOLOGY

This research is based, *inter alia*, on the doctrinal legal method, along with systematic, logical, and linguistic analysis, and is supported by qualitative analysis. It reviews EU legislation, reports and guidance from supervisory authorities, selected national laws and court cases, as well as academic and policy literature. Such an approach suits an open-textured and evolving field, enabling both explanation of the current regulatory framework and noting areas where further clarification or convergence may be needed.

3 THE GREENWASHING AS A LEGAL CONCEPT

This research employs systematic, logical, and linguistic methods to select and review legal materials, enabling a qualitative evaluation of the greenwashing legal concept as a phenomenon in financial regulation from the perspective of legal theory. As expressed by Colaert, law and economics can be used to explain financial regulation (explanatory function), but also to evaluate whether such regulation is justified (evaluative function), or to assess whether additional, alternative, or even less regulation is necessary (normative function).¹⁰

One of the first legal acts to influence the activities of financial market participants was the Sustainable Finance Disclosure Regulation (SFDR). While the term "greenwashing" is not *expressis verbis* included in this document, a systematic analysis of its provisions and related

10 Veerle Colaert, 'The Changing Nature of Financial Regulation: Sustainable Finance as a New Policy Objective' (2022) 59(6) Common Market Law Review 1669. doi:10.54648/COLA2022115.

supplementing documents indicates the legislator's intent for financial market participants to avoid greenwashing practices. For instance, Article 13 of SFDR provides that financial market participants and financial advisers shall ensure that their marketing communications do not contradict the information disclosed under this Regulation, i.e., to disclose all information as determined by SFDR.

In June 2020, the SFDR was supplemented by the Taxonomy Regulation, which identified the term "greenwashing" *expressis verbis*. The term is defined in the preamble of the regulation as the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly when basic environmental standards have not been met.¹¹ The Taxonomy Regulation, together with the SFDR and accompanying legislation such as SFDR RTS,¹² aims to clarify the concepts of sustainable investment and sustainable, environmentally friendly activities. Provisions such as the principle of doing no significant harm," linked to specific sustainability indicators in the SFDR RTS, are designed to minimise the opportunity for possible greenwashing activities by financial market participants.

The rapidly evolving sustainable financial policy underscores the importance of identifying and regulating greenwashing for both markets and regulatory institutions. However, the introduction of the term in legal acts has sparked significant debate in society. As several authors note, the Taxonomy Regulation and the SFDR RTS place definitions of greenwashing in recitals, which are not formally binding but can inform purposive interpretation.¹³ Moreover, the initial focus of greenwashing definitions was primarily on environmental matters, leaving behind the other two spheres of sustainability¹⁴—governance and social aspects, equally important in the context of ESG.¹⁵ However, it should be noted that the legislator, responding to the emerging discourse on the value of each ESG principle, has recently incorporated the other ESG aspects—social and

11 Regulation (EU) 2020/852 (n 6) preamble (11).

12 European Commission Delegated Regulation (EU) 2022/1288 'Supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports' (6 April 2022) [2022] OJ L 196/1.

13 Tadas Zukas and Uwe Trafkowski, 'Sustainable Finance: The Regulatory Concept of Greenwashing under EU Law' (2022) 2 EuZ - Zeitschrift für Europarecht C14.

14 Chrysa Alexandraki, 'Sustainable Finance Law: The EU Paradigm and the Way Forward' (ORBilu-University of Luxembourg, 24 March 2021) 6 <<https://orbilu.uni.lu/handle/10993/46661>> accessed 30 April 2025.

15 Georg Kell, 'The Remarkable Rise of ESG' [2021, December 10] Forbes <<https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=36e772f61695>> accessed 30 April 2025.

governance—in the applicable regulation.¹⁶ Such a set of events demonstrates that legislators and policymakers (in this case, policymakers focused on the EU's transition to a low-carbon economy under the European Green Deal) are responding to market changes and input from financial market participants, experts, and scientists.

Debates in legal discourse suggest that the term "greenwashing," as provided in the Taxonomy Regulation and other legal acts, may appear broad and vague, and is therefore, in some cases, interpreted broadly. Scientists and regulatory institutions aim to provide a precise definition of greenwashing and identify its key features—essentially, what constitutes such activity—so that financial market participants can identify and avoid possible greenwashing practices. This illustrates how the rule of law evolves: a legal norm cannot anticipate and regulate every possible scenario; rather, it should establish a framework, leaving its application to interpretation by institutions and scientists. At the intersection of normative interpretation, it is important to recognise that a higher norm cannot define the act of its application in all aspects. Some discretion must be preserved so that the overarching norm serves as a guiding framework, within which specific acts must operate. Even the most detailed orders leave room for judgment by the individual implementing them, as decisions often depend on external circumstances that the issuing authority could not fully foresee.¹⁷

Accordingly, while the Taxonomy Regulation does not provide a clear definition of greenwashing—and its scope may initially seem too narrow for certain aspects of financial service business regulation—regulatory institutions or courts may have the ability to provide a broader explanation of the greenwashing term adopted to the currently evolving financial market. Moreover, as sustainability regulation evolves, the concept of greenwashing has taken a more defined shape. It is increasingly understood as a practice in which sustainability-related statements, declarations, actions, or communications fail to clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or services, potentially misleading consumers, investors, or other market participants.¹⁸

At the early stage of the sustainability regulation in the finance sector, the focus of greenwashing was primarily on environmental aspects, marketing activities, and financial products. Today, regulators recognise that greenwashing can encompass all ESG factors, and its scope has expanded to cover not only individual financial products but also entities and the overall "sustainable investment value chain,"¹⁹ without distinguishing any particular activities. This paper focuses on the financial sector, where greenwashing may take many forms.

16 Directive (EU) 2022/2464 of the European Parliament and of the Council 'Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting' (14 December 2022) [2022] OJ L 322/15.

17 Hans Kelsen, *Pure Theory of Law* (University of California Press 2002) 278.

18 EBA (n 8) 9.

19 ESMA (n 9) 5.

Academic and policy literature has attempted to categorise greenwashing into typologies such as greenrinsing, greenlabelling, and greenlighting. However, applying these categories too strictly may unintentionally narrow the legal understanding of greenwashing. If authorities were to enforce regulation based solely on fixed categories, it could create legal loopholes for financial market participants to exploit and hinder regulators' ability to interpret sustainability misconduct dynamically. It is stated by European Securities and Markets Authority (ESMA), greenwashing may be defined in a number of ways, but it intuitively refers to market practices, both intentional and unintentional, whereby the publicly disclosed sustainability profile of an issuer and the characteristics and/or objectives of a financial instrument or a financial product either by action or omission do not properly reflect the underlying sustainability risks and impacts associated to that issuer, instrument or product.²⁰

This article does not attempt to propose a single binding definition. However, for the purposes of this research, greenwashing in the financial sector can be formally understood as a practice whereby sustainability-related statements, disclosures, or actions of a financial market participant do not accurately or fairly reflect the underlying sustainability profile of the entity, product, or service. This definition integrates elements from EU regulations and supervisory interpretations and is tailored to the legal analysis undertaken here. In a broader sense, the scope is not limited to environmental misrepresentations but extends across all ESG factors—environmental, social, and governance. Greenwashing is thus framed as a legally relevant but not yet fully consolidated category, with its contours shaped dynamically by regulators, courts, and market practice.

Legal scholars emphasise the explanatory and evaluative function of financial regulation, yet the literature is divided on whether current "soft law" approaches are adequate. Some view the lack of a binding definition as a necessary space for regulatory discretion and interpretative evolution, while others see it as creating grey areas and uncertainty for both regulators and market participants.

More broadly, greenwashing has not been formally adopted through binding legislation; it is expressed in the preamble of a regulation, in supporting documents, or otherwise in "soft law". As financial markets develop rapidly and greenwashing now extends beyond the activities of financial market participants, the concept has increasingly been examined in an interdisciplinary manner, encompassing political, financial and legal dimensions. Supervisory authorities' interpretations of greenwashing create mandatory compliance requirements within the financial sector, guiding participants to minimise potentially destructive behaviour.

20 European Securities and Markets Authority (ESMA), 'Sustainable Finance Roadmap 2022-2024' (ESMA30-379-1051, 10 February 2022) <https://www.esma.europa.eu/sites/default/files/library/esma30-379-1051_sustainable_finance_roadmap.pdf> accessed 30 April 2025.

Beyond the EU's regulatory approach, several international organisations are playing a growing role in addressing greenwashing on a global scale. The International Sustainability Standards Board (ISSB), established after COP26, seeks to unify ESG disclosure standards globally. The Glasgow Financial Alliance for Net Zero (GFANZ) brings together over 450 financial institutions across 45 countries committed to net-zero targets. The European Supervisory Authorities (ESAs) have contributed through joint progress reports on greenwashing in 2023. These organisations signal the move toward more harmonised, international ESG governance and underscore that greenwashing is now addressed not only as a regional but also as a global financial and legal challenge.

4 THE GREENWASHING PREVENTIVE MEASURES

Identifying greenwashing in the finance sector is generally more complex than in other business sectors. Greenwashing is habitually associated with marketing activities (in the European Parliament Resolution of 4 February 2009²¹ only reference to marketing materials is provided) where businesses create the impression of sustainability, environmental friendliness without substantiation. A classic non-financial example would be green-coloured cosmetics packaging, implying that a product is natural. Evidence of greenwashing in traditional sectors can be seen, heard, or otherwise identified,²² whereas in the financial sector, such conduct may not be immediately apparent. Greenwashing may only be identified later through audit results, annual reports, after systematic monitoring of the financial market participant or disclosed to regulatory institutions or publicly by a whistleblower, stakeholder or another person who notices possible signs of greenwashing.

A notable case in Germany²³ illustrates this complexity: following a whistleblower report, authorities investigated a financial market participant providing investment services. The greenwashing activity was suspected since the investment product's documents (prospectuses and others) presented incomplete information about the sustainable investment product. The funds of these investors were not directed to such sustainable activities. This case demonstrates that greenwashing in financial services is often not visible at first glance.

Greenwashing detection in the finance sector might be a complex procedure due to several reasons. Third-party ESG ratings can vary depending on methodology, and companies often provide self-reported data without concrete standardisation. For example, a bank may finance an offshore wind project that is marketed as a fully green project due to zero carbon

21 European Parliament Res 2008/2105(INI) (n 1).

22 Sebastião Vieira de Freitas Netto and others, 'Concepts and Forms of Greenwashing: A Systematic Review' (2020) 32 *Environmental Sciences Europe* 6-10. doi:10.1186/s12302-020-0300-3.

23 'Germany: Deutsche Bank Raided in "Greenwashing" Probe' (DW, 31 May 2022) <<https://www.dw.com/en/germany-deutsche-bank-raided-in-greenwashing-probe/a-61986810>> accessed 30 April 2025.

emissions, yet it might cause severe biodiversity loss in marine ecosystems (which in some cases might not even be considered). The question arises whether such a financial project would be qualified as greenwashing. This type of dilemma illustrates how financial market participants frequently lack the technical expertise to evaluate environmental or social impacts and must increasingly rely on external specialists: engineers, ecologists, ethicists and others, to navigate ESG trade-offs.

When considering the opinions of regulatory institutions and scientists, the following indicators of greenwashing behaviour are emphasised most: transparency, accountability, certainty, clarity (reliability), and good governance.

To assess the sustainable activities of financial market participants, first, such activities must be transparent. This requirement comes from the regulation itself. Both the SFDR and the Taxonomy Regulation clearly and unambiguously establish the legislator's requirements for transparency, including: a transparent and disclosed sustainability risk policy, transparent disclosure of information at the entity and product levels, transparent remuneration policies, and other related requirements. Transparency obliges financial market participants to disclose all information about their operations and products—ranging from contractual conditions of the financial product and investment policies to fees and taxes—so that clients (e.g., investors) can assess all possible investment risks and make informed investment decisions. Any deviation from this factor may constitute a greenwashing act and result in liability for the financial market participant.

As noted by the International Organization of Securities Commissions (IOSCO) in 2021 in the Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management, all of this, combined with a lack of commonly agreed-upon terminologies and investor education on sustainable products, has led to the risk of greenwashing and investor confusion. This may result in investors purchasing products that do not meet their expectations from a sustainability perspective which, over time, may lead to an undermining of investor confidence in this segment of the market.²⁴

Non-compliance with the principle of transparency can be illustrated by the following example of greenwashing: an asset manager makes public commitments to sustainability-related disclosure frameworks for positive media coverage but fails to comply with those frameworks on an ongoing basis.²⁵ As IOSCO points out, adherence to transparency principles provides investors with insight into how asset managers address sustainability in their risk management processes and may help investors and regulators assess whether

24 International Organization of Securities Commissions (IOSCO), *Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management: Final Report* (FR08/21, OICU-IOSCO 2021) 11 <<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD688.pdf>> accessed 30 April 2025.

25 *ibid* 14.

these practices support their sustainability-related claims and disclosures. This could help prevent greenwashing at the asset manager level.²⁶

The accountability preventive indicator follows the transparency requirement. Transparency can only be meaningful when the accountability of the financial market participant is ensured, i.e., a detailed and periodic presentation of information on the entity and product level is provided. This can be achieved through periodic reports.

However, to implement this requirement, there is at least one problematic area: financial market participants often self-select the ESG indicators they plan to adhere to and prepare their reports internally. This creates a grey area regarding objectivity and accuracy. This grey zone also creates space for greenwashing activities. For example, financial market participants, to attract more attention from investors, may present a slightly "polished" version of a report, omitting even minor deviations from stated investment strategies. As noted by IOSCO, periodic reporting requirements can help prevent greenwashing by reducing information asymmetries. A product with stated sustainability-related investment objectives may fail to follow those objectives in practice.²⁷ Therefore, in this case, as it is said, technology also plays a relevant and vital role: easier, more standardised data submission reduces errors, lowers costs, and improves the accuracy of information for supervisory authorities.

Certainty and clarity (reliability) as preventive indicators are distinguished from accountability, though they are closely related to accountability and transparency. Accountability is ineffective if the reported information is inaccurate or even falsified. Ensuring accountability involves establishing clear reference points, definitions and quantitative metrics at the outset. If the numbers are considered, any financial projection depends on the reference point taken and how one interprets the information (the numbers). Therefore, clear limits and reference numbers established in the initial stage would help ensure more transparent monitoring and reflection in periodic reports, thereby reducing areas for greenwashing.

From a legal perspective, certainty and clarity as preventive indicators can be analysed through the presentation of information in policies, pre-contractual documents, contracts, and marketing materials. Insufficient detailing in investment strategies, inadequate disclosure of fees, or even the non-disclosure of management voting procedures can all create conditions conducive to greenwashing.

For example, a product may be labelled "sustainable," yet its disclosure may state that ESG factors may be considered in the product's investment strategies, without any binding commitment.²⁸ Similarly, a product's marketing materials may indicate that the product

26 *ibid* 22.

27 *ibid* 50.

28 *ibid* 29.

uses corporate engagement, proxy voting, and shareholder proposals to achieve its socially responsible investment objectives, while its prospectus fails to disclose these methods in its investment strategy, and its proxy voting policy summary does not explain how proxy voting supports those objectives.²⁹

The authors also identify good governance as a preventive indicator against greenwashing. This involves systematic and deliberate efforts to prevent possible greenwashing acts in the company at the governance level, including unconscious activities as a human factor, through training, monitoring, and implementation of legal acts, monitoring activities of partners, and monitoring and analysing greenwashing activities on the market.³⁰

If the activities of financial market participants (or their products) are transparent—meaning that all necessary information is properly disclosed, clear, verifiable, and accessible to regulatory institutions and stakeholders—these serve as essential indicators of compliance with regulations designed to prevent greenwashing.

5 LEGAL LIABILITY FOR GREENWASHING ACTIVITIES

In its review, the ESMA³¹ provided a comprehensive analysis of greenwashing based on available practice and insights from financial market participants and other stakeholders. However, as ESMA itself points out, it is still difficult to identify the responsibility for greenwashing, since this term is not sufficiently disclosed, and many factors are important for its identification.³² Consequently, imposing sanctions for greenwashing is challenging, as liability must be clearly and precisely defined in legal acts.³³ For now, liability for greenwashing can only be applied indirectly—through existing provisions on other types of violations.

As with other forms of liability, it is necessary to assess whether the party acted with fault or with a conscious intention to act unlawfully. As expressed by Colaert and others, in identifying greenwashing, it is important to consider aspects such as intentionality, negligence, or the lack of robustness and appropriateness of due diligence efforts, which may, where relevant, constitute aggravating factors in the context of supervisory and enforcement actions.³⁴

29 *ibid* 31.

30 Michael Watson and Tom Nener, 'Greenwashing in the European Financial Services Sector' (*Pinsent Masons*, 7 July 2022) <<https://www.pinsentmasons.com/out-law/analysis/greenwashing-european-financial-services>> accessed 30 April 2025.

31 ESMA (n 9).

32 *ibid* 71.

33 Kelsen (n 17) 125.

34 Veerle Colaert and Florence De Houwer, 'Greenwashing' in the Financial Sector: A Critical Evaluation of the Current Legal Framework (Working Paper Series no 1, Jan Ronse Institute for Company and Financial Law 2025) 18. doi:10.2139/ssrn.5148813.

The principal legal acts determining sustainability requirements for financial market participants—such as the Taxonomy Regulation or the SFDR—do not prescribe concrete penalties for non-compliance with these provisions. Regulatory institutions guide the application of this regulation. The supervision for compliance with the set regulatory standards and non-compliance with greenwashing activities is under the scope of national institutions. However, there is no clear liability identified in national legal acts for performing the greenwashing act in the financial sector, and possible liability may arise from other legal acts that are not directly applicable to financial market participants.

For example, the Climate and Resilience Law adopted by the French Parliament in 2021 indirectly applies to greenwashing. It provides that the misrepresentation of “the scope of the advertiser's commitments, in particular concerning the environment, the nature, the process or the reason for the sale or the provision of services” may qualify as a misleading practice. Violation of such provisions is punishable by imprisonment of up to two years and a fine of EUR 300,000.³⁵

Therefore, in practice, a question arises: what is the specific liability for non-compliance with these legal acts and/or for the performance of greenwashing in the financial sector? Opinions on this vary. Some view such regulatory measures as a deterrent, while others regard them as an opportunity, where the possible benefit or gain may outweigh the cost of liability. Moreover, since liability provisions are often not directly applied to financial market participants, some actors may assume that such measures fall outside the scope of their operations.

Greenwashing practices may, however, be linked to several existing offences, depending on the jurisdiction. For example, misrepresenting the environmental characteristics of a financial product may amount to a misleading commercial practice under consumer protection law. False or incomplete disclosure of sustainability information may be considered fraudulent misrepresentation or violations of securities laws, particularly where price-sensitive sustainability claims mislead investors. When documents are intentionally altered to conceal unsustainable activities, this may amount to document falsification. Where greenwashing directly contributes to ecological damage, liability may also extend to environmental offences, including illegal pollution or non-compliance with emission standards. Administrative liability may also arise from breaches of financial supervision rules, such as non-compliance with information disclosure obligations—for which national regulators may impose fines, public warnings, or other restrictions that may adversely affect the reputation of the financial market participant.

35 Celine Bey and others, 'Greenwashing: Exploring the Risks of Misleading Environmental Marketing in China, Canada, France, Singapore and the UK' (Gowling WLG, 25 September 2023) <<https://gowlingwlg.com/en/insights-resources/articles/2023/the-regulation-of-greenwashing>> accessed 30 April 2025.

At the EU level, the primary institutions that should be responsible for detecting and enforcing compliance with greenwashing regulations include the ESMA, EBA, and EIOPA, as well as consumer protection agencies, competition councils, environmental inspectorates, and financial supervisory authorities of financial market participants, such as the Bank of Lithuania, Federal Financial Supervisory Authority in Germany (i.e., BAFIN) or Autorité des Marchés Financiers in France (i.e., AMF).

However, since the Taxonomy Regulation defines greenwashing as “marketing a financial product as environmentally friendly,” if consumer rights are violated or the rights of other market participants are violated, other institutions, such as the consumer rights protection service, may also initiate investigations. Although the proposed Green Claims Directive³⁶ explicitly excludes financial services, financial instruments, and financial products from its scope (Article 1), it could nonetheless serve as an interpretive reference or be applied indirectly by analogy in relevant cases. It is also worth noting that greenwashing activities may cause administrative or criminal liability for certain entities or individuals if such activities cause damage to nature.

Greenwashing regulation is expanding globally, with jurisdictions increasingly adopting binding measures to address misleading sustainability claims. In the United States, the Securities and Exchange Commission (SEC) established a Climate and ESG Task Force in 2021 to detect and sanction inaccurate ESG-related disclosures. Although the unit was dissolved in 2024, its functions were integrated into the agency’s broader enforcement framework.³⁷ In the United Kingdom, the Financial Conduct Authority (FCA) has proposed restrictions on the use of terms such as “sustainable” and “ESG” in investment product marketing.³⁸

Within the EU, the proposed Green Claims Directive remains pending, with negotiations suspended. If adopted, it would permit fines of up to 4% of annual turnover for false environmental claims, excluding financial products (Article 17(3)).³⁹ Moreover, in the context of greenwashing, investigations may not necessarily be initiated by the regulatory authorities supervising financial service providers, but rather by other competent law enforcement bodies, such as the police or environmental protection inspectorates.

36 European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive)’ (COM/2023/166 final, 22 March 2023) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52023PC0166>> accessed 30 April 2025.

37 ‘SEC Announces Enforcement Task Force Focused on Climate and ESG Issues’ (US Securities and Exchange Commission, 4 March 2021) <<https://www.sec.gov/newsroom/press-releases/2021-42>> accessed 14 August 2025.

38 Financial Conduct Authority (FCA), ‘Consultation on Sustainability Disclosure Requirements (SDR) and Investment Labels’ (Consultation Paper CP22/20, October 2022) <<https://www.fca.org.uk/publication/consultation/cp22-20.pdf>> accessed 14 August 2025.

39 Green Claims Directive (n 36).

Recent enforcement trends illustrate this shift toward stronger accountability. In 2023, one of Germany's biggest investment companies received sanctions from the SEC (USD 19 million) and from prosecutors in Germany in 2025 (EUR 25 million) for misleading ESG disclosures.⁴⁰ Likewise, another leading global investment company faced SEC action for procedural failures in governance documents.⁴¹ These examples indicate a shift from voluntary ESG frameworks to enforceable obligations, often enforced under general consumer protection or anti-fraud provisions.

The form of liability applied depends on the institution initiating the investigation and the nature of the violation. Responsibility may rest with the financial market participant as a legal entity, or its shareholders/founders, or with employees responsible for making investment decisions. In some cases, even an employee who unintentionally commits a greenwashing act may be implicated. For example, in the famous Shell case, the company's shareholder sued its board of directors for failing to manage climate-related risks adequately.⁴²

Liability for greenwashing may vary from a certain percentage of the company's income to a personal fine for a natural person, punitive measure, or other sanctions. However, it is often the reputational damage that leads to the biggest losses. Once credibility is lost, likely, existing and potential investors will not risk transferring their funds to a financial market participant that fails to address sustainability risks or is perceived to abuse the market or sustainability-related claims.

Another prominent case is the Volkswagen case in 2015, in which the company was accused of falsifying nitrogen oxide and CO₂ emissions data for 11 million Volkswagen cars globally, including approximately 500,000 units in the United States.⁴³ The company's emissions were found to be up to 40 times above official estimates, concealing roughly one million tons of air and climate pollution. Following the scandal, the company's share price dropped by 22%⁴⁴ and continued to decline further, illustrating the devastating reputational and financial consequences of environmental misconduct.

40 Mark Segal, 'Deutsche Bank's DWS Fined \$27 Million for Greenwashing' (*ESG Today*, 2 April 2025) <<https://www.esgtoday.com/deutsche-banks-dws-fined-27-million-for-greenwashing/>> accessed 14 August 2025.

41 'SEC Charges Goldman Sachs Asset Management for Failing to Follow its Policies and Procedures Involving ESG Investments' (*US Securities and Exchange Commission*, 22 November 2022) <<https://www.sec.gov/newsroom/press-releases/2022-209>> accessed 14 August 2025.

42 Sam Meredith, 'Shell's Board of Directors Sued Over Climate Strategy in a First-Of-Its-Kind Lawsuit' (*CNBC*, 9 February 2023) <<https://www.cnn.com/2023/02/09/oil-shell-board-of-directors-sued-by-investors-over-climate-strategy.html>> accessed 30 April 2025.

43 Richard Matthews, 'Lessons Learned from Volkswagen's Epic Greenwash' (*Change Oracle*, 3 February 2016) <<https://changeoracle.com/2016/02/03/fallout-from-volkswagens-epic-greenwash/>> accessed 30 April 2025.

44 'Volkswagen AG Shares Drop 22% After Admitting it Cheated on Emission Tests' (*National Post*, 21 September 2015) <<https://financialpost.com/news/transportation/volkswagen-ag-shares-drop-22-after-admitting-it-cheated-on-emission-tests>> accessed on 30 April 2025.

Financial market participants may face even greater liability when affected clients seek compensation for losses due to greenwashing activities, including indirect losses, particularly where contractual provisions are insufficient to protect the firm's interests. Moreover, when such greenwashing acts cause damage to nature, the damage must be assessed and compensated accordingly by relevant specialists.

For instance, in 2021, the Department of Environmental Protection in Lithuania imposed a EUR 4,400 fine on a cardboard production company for an incident during which untreated sewage entered the Curonian Lagoon. At the same time, a criminal case was filed against the company's shareholder, board chairman, executive officer, and former executive officers for abuse, falsification, and disposal of documents and violations of environmental protection rules. In the same criminal case, the Department of Environmental Protection in Lithuania has submitted a civil lawsuit exceeding EUR 48 million to compensate for environmental damage.⁴⁵ Nevertheless, the imposed penalty for environmental pollution, a civil lawsuit, and impending criminal liability during the incident resulted in the company's shares dropping by 30%.⁴⁶

Assessing whether greenwashing has occurred often depends on the subjective opinion of regulatory institution representatives. The application of liability to financial market participants depends on many factors, including the qualifications of the persons conducting the investigation—specifically, their knowledge of greenwashing practices and greenwashing terms, sustainable regulation, and financial market dynamics. Supervisory authorities and courts face significant challenges when handling such cases, as they must integrate complex expertise from multiple domains and rely on evolving standards. The novelty of greenwashing as a legal and market concept further complicates this task, as there is no clear practice yet that could be used to analyse specific activities of financial market participants as greenwashing activities.

The current EU legislative framework, while steadily expanding, remains insufficient to provide legal certainty regarding liability for greenwashing in the financial sector. Reliance on indirect mechanisms—such as consumer protection, advertising law, or environmental damage provisions creates fragmented enforcement and uneven supervisory practice across Member States. This patchwork approach risks undermining investor confidence and hindering the credibility of the sustainable finance markets.

45 Case No eI3-6716-583/2022 (Regional Administrative Court, Chamber of Klaipėda (Lithuania), 13 December 2022); Valdas Pryšmantas, 'Teisme – aplinkosaugininkų ir "Grigeo Klaipėdos" ginčas dėl 4,4 tūkst eurų baudos' (*15min*, 1 May 2023) <<https://www.15min.lt/naujiena/aktualu/lietuva/teisme-aplinkosaugininku-ir-grigeo-klaipedos-gincas-del-4-4-tukst-euru-baudos-56-1990222>> accessed 30 April 2025.

46 Jurgita Šimelevičienė, '"Grigeo" baudžia ir investuotojai: akcijos biržoje per pusvalandį smuko trečdaliu' (*15min*, 1 October 2020) <<https://www.15min.lt/verslas/naujiena/bendroves/grigeo-akcijos-birzoje-per-pusvalandi-smuko-40-proc-663-1258460>> accessed 30 April 2025.

A more pragmatic way forward would focus on convergence rather than full unification. This could involve defining minimum criteria for identifying greenwashing across sectors, encouraging proportional sanctioning principles without prescribing identical penalties, and fostering more structured information-sharing between national supervisors. While such steps would not create a perfect one-size-fits-all model, they could reduce fragmentation and provide greater predictability for financial market participants.

6 CONCLUSION

Greenwashing is a broad and interdisciplinary concept. Based on available materials and existing practices, four key aspects of greenwashing prevention can be distinguished: transparency, accountability, certainty, clarity (reliability), and good governance. Adherence to these principles enables conscientious financial market participants to significantly reduce the potential risks of engaging in greenwashing.

However, in the absence of specific regulation of greenwashing activities in the financial sector, naturally, only conscious financial market participants who understand the ultimate consequences for humanity caused by greenwashing (effects of climate change) will choose to comply with the requirements of "soft law". Others may instead rely on the SFDR's principle of "comply or explain," which allows financial market participants to be more lenient in assessing their commitments to sustainability.

At present, liability for greenwashing activities in the financial sector can be imposed only indirectly, i.e., when liability for other violations is applied. Supervisory authorities of financial market participants should remain the main subjects for imposing liability measures for non-compliance with legal acts regulating the activities of financial market participants. However, greenwashing activities can extend beyond financial activities or inaction—it may also involve environmental harm, deficiencies in company management, or adverse social impacts. Therefore, greenwashing may give rise to not only administrative but also criminal liability for certain activities. In such cases, investigations may be initiated by law enforcement institutions.

Moreover, the assessment of greenwashing acts depends heavily on the background and professional experience of the supervisory authority's representatives or experts. Evaluating financial market participants' activities in many cases requires financial knowledge, and currently, there are few practical cases to draw upon. This lack of experience may lead to inconsistent application of liability for greenwashing across different cases.

The application of liability for greenwashing in the financial sector can take several forms. It may be imposed on the financial market participant as a legal entity, on its shareholders or founders, or on employees responsible for making investment decisions. In some instances, even an employee or related subject who unintentionally

commits a greenwashing act may be held liable. Additionally, it is worth noting that financial fines are not the most significant loss for financial market participants or their representatives. Rather, the reputational damage and loss of existing or potential investors can have far greater losses.

REFERENCES

1. Alexandraki C, 'Sustainable Finance Law: The EU Paradigm and the Way Forward' (ORBilu-University of Luxembourg, 24 March 2021) <<https://orbilu.uni.lu/handle/10993/46661>> accessed 30 April 2025
2. Bey C and others, 'Greenwashing: Exploring the Risks of Misleading Environmental Marketing in China, Canada, France, Singapore and the UK' (Gowling WLG, 25 September 2023) <<https://gowlingwlg.com/en/insights-resources/articles/2023/the-regulation-of-greenwashing>> accessed 30 April 2025
3. Colaert V and De Houwer F, 'Greenwashing' in the Financial Sector: A Critical Evaluation of the Current Legal Framework (Working Paper Series no 1, Jan Ronse Institute for Company and Financial Law 2025) 18. doi:10.2139/ssrn.5148813
4. Colaert V, 'The Changing Nature of Financial Regulation: Sustainable Finance as a New Policy Objective' (2022) 59(6) Common Market Law Review 1669. doi:10.54648/COLA2022115
5. D'Orazio P and Popoyan L, 'Fostering Green Investments and Tackling Climate-Related Financial Risks: Which Role for Macroprudential Policies?' (2019) 160 Ecological Economics 25. doi:10.1016/j.ecolecon.2019.01.029
6. de Freitas Netto SV and others, 'Concepts and Forms of Greenwashing: A Systematic Review' (2020) 32 Environmental Sciences Europe 19. doi:10.1186/s12302-020-0300-3
7. Kell G, 'The Remarkable Rise of ESG' [2021, December 10] Forbes <<https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=36e772f61695>> accessed 30 April 2025
8. Kelsen H, *Pure Theory of Law* (University of California Press 2002)
9. Matthews R, 'Lessons Learned from Volkswagen's Epic Greenwash' (*Change Oracle*, 3 February 2016) <<https://changeoracle.com/2016/02/03/fallout-from-volkswagens-epic-greenwash/>> accessed 30 April 2025
10. Watson M and Nener T, 'Greenwashing in the European Financial Services Sector' (*Pinsent Masons*, 7 July 2022) <<https://www.pinsentmasons.com/out-law/analysis/greenwashing-european-financial-services>> accessed 30 April 2025
11. Zukas T and Trafkowski U, 'Sustainable Finance: The Regulatory Concept of Greenwashing under EU Law' (2022) 2 EuZ - Zeitschrift für Europarecht C2

AUTHORS INFORMATION

Dalia Kubiliūtė

PhD student, Master of laws, Faculty of Law, Vilnius University, Lithuania.

dalia.kubiliute@tf.stud.vu.lt.

<https://orcid.org/0009-0003-5942-8095>

Corresponding author, solely responsible for the manuscript preparing.

Competing interests: No competing interests were disclosed.

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Dalia Kubiliūtė. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Kubiliūtė D, 'Legal Liability for Greenwashing Activities in the Financial Sector' (2025) 8(4)
Access to Justice in Eastern Europe 222-41 <<https://doi.org/10.33327/AJEE-18-8.4-a000132>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000132>

Summary: 1. Introduction. – 2. Methodology. – 3. The Greenwashing as a Legal Concept. – 4. The Greenwashing Preventive Measures. – 5. Legal Liability for Greenwashing Activities. – 6. Conclusion.

Keywords: *financial market participant; greenwashing; liability; compliance; transparency.*

DETAILS FOR PUBLICATION

Date of submission: 02 May 2024

Date of acceptance: 16 Sep 2025

Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 2 rounds: first with major revisions, second with minor revisions.

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The author declares that no artificial intelligence tools were used in the writing, translation, or editing of this manuscript. The research and the content of the article represent the author's own original work.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЮРИДИЧНА ВІДПОВІДАЛЬНІСТЬ ЗА ГРІНВОШІНГ У ФІНАНСОВОМУ СЕКТОРІ

Даля Кубілюте

АНОТАЦІЯ

Вступ. У цій статті аналізується грінвошинг як правова концепція, що розвивається, у фінансовому секторі ЄС. Хоча ця тема вивчається в різних дисциплінах, тут застосовується теоретико-правовий підхід, згідно з яким у нормативно-правовій базі ЄС грінвошинг переважно визначається та розвивається за допомогою інструментів «м'якого права», таких як нормативні вказівки, тлумачні матеріали та висновки наглядових органів, а не є закріпленим в нормативно-правових актах.

Методи. У дослідженні використовується доктринальний підхід, що підтримується якісним аналізом, який поєднує лінгвістичне, логічне та систематичне тлумачення законодавства ЄС з оглядом звітів наглядових органів, національного законодавства та

окремих судових справ. Ця оцінка додатково доповнюється академічними та політичними дослідженнями.

Результати та висновки. Правові акти ЄС не містять консолідованого визначення «грінвошингу», яке б однаково застосовувалося до всіх учасників ринку та зацікавлених сторін. З огляду на його відкритий характер, конкретна відповідальність за грінвошинг не чітко встановлена в законах, що регулюють діяльність учасників фінансового ринку, це спричиняє невизначеність щодо того, який вид відповідальності може бути застосований. Аналіз показує, що ключовими характеристиками уникнення грінвошингу є прозорість, підзвітність, визначеність та ясність (надійність), а також належне управління учасниками фінансового ринку. Відповідальність може бути покладена опосередковано через інші правові положення, такі як захист прав споживачів, оманлива реклама або екологічне законодавство. Практика правозастосування свідчить про те, що репутаційний ризик часто переважає формальні санкції, а наглядові та правоохоронні органи беруть на себе ширші функції.

Ключові слова: учасник фінансового ринку; грінвошинг; відповідальність; дотримання правил; прозорість.

Research Article

BLOCKCHAIN AND SMART PUBLIC PROCUREMENT CONTRACTS: A COMPARATIVE LEGAL ANALYSIS OF DIGITAL TRANSFORMATION IN THE PUBLIC SECTOR

**Mohammed Abdelsalam, Alaa Abouahmed,
Abdallah Shatat Adham Hashish and Enas AlQodsi***

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000137>

Date of submission: 12 Aug 2025

Date of acceptance: 04 Oct 2025

Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Mohammed Abdelsalam,
Alaa Abouahmed, Abdallah Shatat,
Adham Hashish and Enas AlQodsi

ABSTRACT

Background. The rapid advancement of digital technologies has introduced blockchain as a potential tool in public procurement contracts within the public sector. Smart contracts, particularly within civil law frameworks, have gained legislative recognition in jurisdictions such as France and several U.S. states. This development raises important questions about integrating blockchain-based smart contracts into governmental procurement systems, with a view to enhancing procedural transparency and operational efficiency, while acknowledging the limitations and dependencies on institutional frameworks.

The central issue lies in clarifying the legal and technical implications of blockchain-based smart procurement contracts. The research examines their potential to streamline public procurement management and improve procedural efficiency, while recognising the need for legal safeguards that maintain administrative law principles and accommodate institutional constraints.

Methods. *This study adopts a comparative analytical approach, examining relevant legal provisions, technical requirements, and administrative practices across multiple jurisdictions. Various blockchain models—public, private, hybrid, and consortium—are evaluated for their suitability in procurement processes. Legislative experiences regulating smart contracts are analysed to extract best practices and inform a cautious framework for public sector adoption.*

Results and Conclusions. *The analysis indicates that blockchain-based smart procurement contracts may reduce bureaucratic delays and minimise human errors, while providing immutable records that can support accountability. However, successful implementation requires legal and institutional adjustments to address enforceability, liability allocation, interoperability, and data protection. A practical model illustrating each operational step—from drafting to automated execution—is proposed, emphasising feasibility and legal compliance rather than assuming transformative effects. The study highlights the necessity of tailored legislation, standardised protocols, and targeted training for public officials to support the cautious integration of blockchain in public procurement contracting. These measures aim to guide the legally informed and context-sensitive adoption of smart contracts, contributing to sustainable digital transformation in public sector governance.*

1 INTRODUCTION

The accelerated integration of blockchain technologies into public sector operations has generated extensive scholarly discourse, particularly regarding their application in smart contracts. While numerous prior studies have explored the technical foundations and general legal implications of blockchain in administrative contexts, there remains a significant gap in understanding how different legal systems¹—particularly within civil law jurisdictions—can adapt blockchain-based smart administrative contracts to public procurement frameworks without compromising essential principles of administrative law.²

This research directly addresses that gap by systematically examining the interplay between blockchain's technical features—decentralisation, immutability, and transparency—and the procedural safeguards embedded in administrative contract law, such as equality between bidders, procedural transparency, and the protection of public interest. It is important to emphasise that blockchain is not a panacea for institutional or administrative shortcomings;

- 1 Ibrahim Kamel Al Shawabkeh and Mouaid Alqudah, 'Independent Regulatory Bodies in the Jordanian Legal System: An Evaluative Review' (2023) 9(2) *International Journal of Public Law and Policy* 188. doi:10.1504/IJPLAP.2023.130014.
- 2 Illinois Public Act 101-0514 'Blockchain Technology Act' (2020) <<https://www.ilga.gov/legislation/publicacts/101/101-0514.htm>> accessed 4 October 2025; Ibrahim Kamel Al-Shawabkeh, 'Legal Guarantees for Objective Performance Evaluation of the Federal Public Employee in the UAE Legislation' (2020) 10(3) *Lawyer Quarterly* 217; Ibrahim Kamel Al Shawabkeh and Mouaid Alqudah, 'Independent Regulatory Bodies in the Jordanian Legal System: An Evaluative Review' (2023) 9 *International Journal of Public Law and Policy* 188. doi:10.1504/IJPLAP.2023.130014.

its effectiveness relies on robust legal frameworks, sound administrative practices, and appropriate oversight mechanisms.

Unlike existing studies that largely focus on either technical or legal analysis, this work integrates both dimensions to assess feasibility, legal risks, and adaptability within diverse civil law systems. The study recognises that implementing blockchain in public contracts involves complex legal, institutional, and political challenges that must be carefully managed, rather than assuming a straightforward technological solution. The novelty of this study lies in its comparative evaluation of legislative and regulatory approaches across multiple jurisdictions, including those with advanced blockchain legislation (such as France and selected U.S. states), and its adaptation of best practices for MENA-region civil law systems, where scholarly attention remains limited despite growing governmental interest in digital transformation. This comparative perspective enables the identification of legal mechanisms that can balance blockchain innovation with existing administrative norms while maintaining enforceability, accountability, and procedural integrity.

Furthermore, the study outlines a cautious operational approach for blockchain-based smart administrative contracts, detailing the stages from drafting and compliance verification to automated execution and post-contract audit. This approach illustrates potential integration pathways while acknowledging institutional, legal, and practical constraints.

By combining doctrinal analysis with a pragmatic operational framework, the research provides insights into how blockchain could be integrated effectively yet cautiously within public contracting processes. In doing so, it bridges theoretical and practical perspectives, offering guidance for legislators, regulators, and procurement authorities, without overstating the technology's transformative power.

2 METHODOLOGY

This study adopts a **comparative qualitative legal research methodology**, integrating doctrinal analysis with a practical operational framework. It examines legal provisions, legislative initiatives, and regulatory frameworks governing smart contracts and blockchain applications in public procurement across multiple jurisdictions, with a focus on civil law systems such as France and selected MENA countries, while drawing comparative insights from U.S. states that have enacted smart contract legislation. Doctrinal analysis was applied to statutory texts, administrative law principles, and judicial interpretations to evaluate the compatibility of blockchain features—such as automation, decentralisation, and immutability—with core administrative safeguards, including transparency, accountability, and equality among bidders.

The study further evaluates different blockchain models (public, private, hybrid, and consortium) for their suitability in procurement processes, considering technical aspects such as interoperability, data protection, and auditability. Legislative case studies were

analysed to extract best practices and inform a cautious framework for operational integration. Finally, the research develops a practical model mapping each stage of blockchain-based procurement—from drafting and compliance verification to automated execution and post-contract audit—highlighting legal feasibility and operational considerations. This methodology allows for a context-sensitive, comparative evaluation of blockchain's potential in public procurement, balancing innovation with legal and institutional constraints.

3 THE CONCEPT OF BLOCKCHAIN TECHNOLOGY

Recent studies have continued to expand the legal and technological understanding of blockchain-based smart contracts, highlighting how liability structures within distributed ledger systems have evolved and emphasising the regulatory gaps that affect enforceability in public administration. These insights also underline blockchain's growing readiness for public-sector use, as well as the potential for misuse and criminal offences. Security and privacy challenges associated with blockchain have been addressed,³ alongside another significant issue: the importance of interoperability and establishing clear standards for the performance and execution of smart contracts.⁴

Smart administrative contracts represent a qualitative shift in how contracts are concluded and executed within public administrations.⁵ These contracts rely on intelligent software that automatically executes contractual terms using blockchain technology. Their ideal integration exemplifies the relationship between blockchain technology and smart contracts,⁶ as blockchain provides the technical foundation for these contracts by offering a secure and transparent platform for recording and automatically executing agreed-upon terms.⁷ This integration enhances trust among contracting parties and ensures the precise and transparent execution of contracts. The adoption of blockchain technology in smart

3 Enas Mohammed Al-Qodsi, Iyad Mohammad Jadalhaq and Mohammed El Hadi El-Maknouzi, 'The Place of UAE's Food Security in the National Legislation and its Role in Supporting Global Food Security' (2024) 10(1) Cogent Social Sciences 2319379. doi:10.1080/23311886.2024.2319379

4 Dirk A Zetsche, Ross P Buckley and Douglas W Arner, 'The Distributed Liability of Distributed Ledgers: Legal Risks of Blockchain' (2018) 4 University of Illinois Law Review 1361; Rui Zhang, Rui Xue and Ling Liu, 'Security and Privacy on Blockchain' (*arXiv*, 16 August 2019) arXiv:1903.07602v2 [cs.CR] <<https://arxiv.org/abs/1903.07602>> accessed 4 October 2025.

5 Enas Mohammed Alqodsi and Leila Arenova, 'Smart Contracts in Contract Law as an Auxiliary Tool or a Promising Substitute for Traditional Contracts' (2024) 16(3) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction. doi:10.1061/JLADAH.LADR-1132.

6 Konstantinos Christidis and Michael Devetsikiotis, 'Blockchains and Smart Contracts for the Internet of Things' (2016) 4 IEEE Access 2292. doi:10.1109/ACCESS.2016.2566339.

7 Don Tapscott and Alex Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin Is Changing Money, Business, and the World* (Penguin 2016).

contracts not only improves the efficiency and flexibility of contractual procedures but also provides data protection and the integrity of legal and administrative processes.⁸

However, it is important to recognise that while blockchain can enhance transparency and automation, its effectiveness in public administration ultimately depends on legal safeguards, institutional oversight, and adherence to administrative law principles.

3.1. Jurisprudential Concept of Blockchain Technology

Blockchain can be understood as a ledger that exists simultaneously on many computers. This means that, unlike traditional ledgers, it is not stored in a single place or on a single computer. For instance, imagine a file containing specific data exists across an extensive network of computers. Furthermore, this file can be modified and data added to it on one of these computers. At the same time, all copies of the file are updated simultaneously across the entire network of computers. This means that all users of this extensive network of computers can see the updated information as soon as it is changed.

Therefore, one of the main features of blockchain technology is decentralisation, meaning no single person or organisation controls it. Its updates and maintenance are carried out by a network of users, each of whom has a copy of this ledger. The concept of "blocks" originated in the idea that information is organised into distinct blocks, each linked to the previous one. It is challenging to modify the information in one block without affecting the subsequent blocks.

As a result of decentralisation, another key feature of blockchain technology is trust and transparency. This is because every person in the network can access the same ledger simultaneously as all other users.⁹

Hence, blockchain technology can be understood as a digital notary public. While the traditional role of a notary is to verify transactions and parties and record them to prevent fraud, blockchain performs a similar function through a decentralised network of participants working simultaneously on a single ledger. This collective verification process makes fraud or manipulation extremely difficult, while also enhancing transparency and procedural reliability. Nevertheless, its effectiveness in public-sector operations ultimately depends on the surrounding institutional frameworks, legal safeguards, and administrative oversight.¹⁰

8 David Yermack, 'Corporate Governance and Blockchains' (2017) 21(1) *Review of Finance* 7. doi:10.1093/rof/rfw074.

9 Michel Curry, 'Blockchain Technology and the Legal Field' (*Moritz College of Law*, 2022) <<https://moritzlaw.osu.edu/sites/default/files/2022>> accessed 4 October 2025; Habiba Al Shamsi, 'Enhancing Digital Transactions with Blockchain Technology: Descriptive-Analytical Study' (2024) 7(3) *Access to Justice in Eastern Europe* 485. doi:10.33327/AJEE-18-7.3-a000322.

10 Tapscott D and Tapscott A (n 7); Yermack (n 8); Zetzsche, Buckley and Arner (n 4).

Jurisprudential Concept of Blockchain Technology

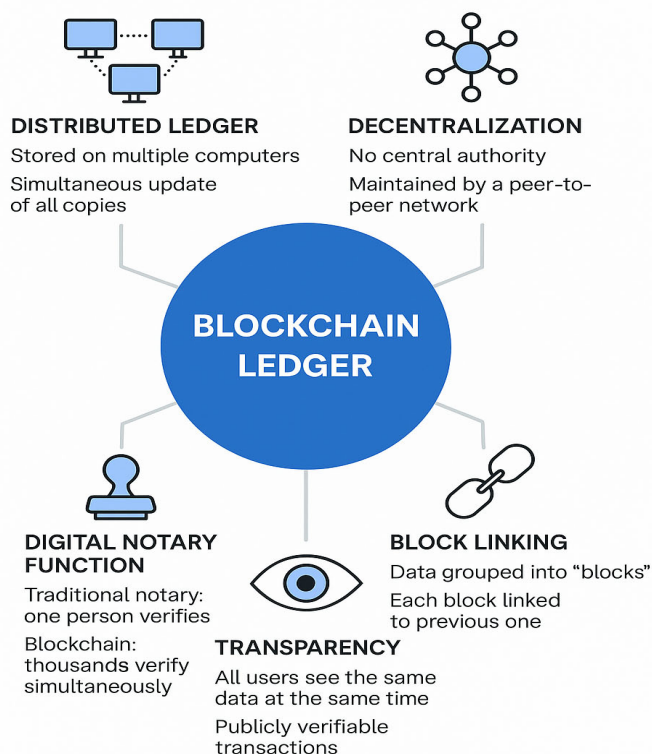


Figure 1. Key Components of Blockchain Technology from a Jurisprudential Perspective¹¹

3.2. Legislative Approaches to Defining Blockchain Technology

According to the definitions provided by Forbes and IBM regarding blockchain technology, it is defined as “a shared, immediate, encrypted, and decentralised electronic ledger used to process and record financial transactions, contracts, physical assets, supply chain information, and more. The responsibility for managing this ledger is not assigned to any single person or entity; rather, it remains open to all participants, where every individual

11 Alan T Sherman and others, 'On the Origins and Variations of Blockchain Technologies' (*arXiv*, 15 October 2018) arXiv:1810.06130 [cs.CR] <<https://arxiv.org/abs/1810.06130>> accessed 4 October 2025.

within the chain can access the details of every record—or block—and trace information across a secure network without the need for third-party verification.”¹²

Moreover, several scholars have defined blockchain technology as a system for documenting all electronic steps, verifying and authenticating data and transactions, and storing them in an encrypted manner within private networks based on the peer-to-peer (P2P) principle.¹³

The Blockchain Technology Act (BTA), enacted by the State of Illinois in the United States and effective as of 1 January 2020, defines blockchain technology as “an electronic record created by a decentralised method by multiple parties to verify and store a digital record of transactions which is secured by the use of cryptographic hash technology of previous transaction information.” This Act also defines “Electronic record” as “a record created, generated, sent, communicated, received, or stored by electronic means, including a blockchain or a smart contract.” It also defines “Smart contract” as “a contract stored as an electronic record which is verified by the use of a blockchain.”¹⁴

Blockchain technology is applied across financial transactions, smart administrative contracts, and asset transfers, potentially supporting transparency, security, and procedural efficiency, while recognising that these outcomes depend on institutional and legal safeguards. Such safeguards include a clear legislative framework (e.g., the Illinois Blockchain Technology Act, 2020), regulatory and administrative oversight, robust data protection, dispute-resolution mechanisms, and technical interoperability standards to ensure that smart contracts function reliably within existing public-sector processes. By emphasising these legal and institutional conditions, the paragraph acknowledges that blockchain alone cannot resolve governance, accountability, or procedural challenges in public administration, reflecting lessons from U.S. pilot implementations and mitigating the risk of technological determinism.¹⁵

This approach aligns with the definition provided by prominent legal scholars, who accurately describe blockchain as a decentralised digital system used to create an immutable and indelible ledger of transactions and data, secured through encryption technologies and managed in a distributed manner among multiple parties without the need for a central intermediary. This system aggregates information into sequentially and temporally linked blocks,¹⁶ with each transaction being verified through majority consensus among network participants. Blockchain technology is utilised across a wide range of applications, including

12 Joseph J Bambara and others, *Blockchain: A Practical Guide to Developing Business, Law, and Technology Solutions* (McGraw Hill 2018); Stephanie Susnjara and Ian Smalley, ‘What is Blockchain Technology?’ (IBM, 2020) <<https://www.ibm.com/topics/what-is-blockchain>> accessed 4 October 2025.

13 Marcella Atzori, ‘Blockchain Technology and Decentralized Governance: Is the State Still Necessary?’ (2017) 6(1) *Journal of Governance and Regulation* 45. doi:10.22495/jgr_v6_i1_p5.

14 Illinois Public Act 101-0514 (n 2).

15 Tapscott D and Tapscott A (n 7); Yermack (n 8); Zetzsche, Buckley and Arner (n 4).

16 Emad Abdel Rahim Dahiyat, ‘Towards New Recognition of Liability in the Digital World: Should we be More Creative?’ (2011) 19(3) *International Journal of Law and Information Technology* 224. doi:10.1093/ijlit/ear006.

financial transactions, smart contracts, and asset transfers, providing high levels of transparency, security, and efficiency in the management of digital data and transactions.¹⁷

4 TYPES OF BLOCKCHAIN TECHNOLOGY

There are many different types of blockchain technology models, all of which depend on factors such as their degree of decentralisation, the privacy of transactions and data, the identity of participants, how consensus is reached, speed, energy consumption, transaction costs, and scalability.¹⁸ To fully understand what this technology can offer, it is essential to distinguish between the various types of blockchain systems.

4.1. Public Blockchain

Public blockchains are open-source platforms that anyone in the world can access and utilise. Anyone can join the network by linking a digital wallet to the blockchain and connecting a personal device. This platform uses a peer-to-peer (P2P) system, meaning transactions occur directly between users without the involvement of intermediaries. This makes operations faster and more efficient. Anyone can join the network since there are no specific participation requirements. Bitcoin and Ethereum are two well-known public blockchain platforms primarily focused on the exchange and transfer of cryptocurrencies.¹⁹

These are decentralised networks that do not require permission to access. Accordingly, anyone can access them, view their contents, and contribute to them without needing anyone else's approval. This makes them transparent, as they are open to everyone. It should be noted that they are immutable and that users can remain anonymous, as they are not required to reveal their identities. As a result, some users may use pseudonyms, making monitoring difficult and raising concerns about compliance with anti-money laundering regulations and the prevention of evasion.²⁰ Additionally, there are challenges

17 Zetsche, Buckley and Arner (n 4).

18 Fran Casino, Thomas K Dasaklis and Constantinos Patsakis, 'A Systematic Literature Review of Blockchain-Based Applications: Current Status, Classification, and Open Issues' (2019) 36 *Telematics and Informatics* 55. doi:10.1016/j.tele.2018.11.006.

19 Vitalik Buterin, *A Next-Generation Smart Contract and Decentralized Application Platform* (Ethereum White Paper, 2014) <https://ethereum.org/content/whitepaper/whitepaper-pdf/Ethereum_Whitepaper_-_Buterin_2014.pdf> accessed 4 October 2025; Moatasem El-Gheriani and Adham Hashish, 'Harnessing the Crypto-Horse: Factors Affecting a Friendly Regulator of the Crypto-Industry: Dubai as a Test Case' (2025) 34(3) *Information & Communications Technology Law* 241. doi:10.1080/13600834.2025.2452718.

20 Ibrahim Kamel Al-Shawabkeh, 'Using the Tax to Reduce Environmental Pollution in the United Arab Emirates: Possibility and Challenges' in Enas Mohammed AlQodsi and Asma Khaleel Abdallah (eds), *Legal Frameworks and Educational Strategies for Sustainable Development* (IGI Global Scientific Publishing 2025) 1. doi:10.4018/979-8-3693-2987-0.ch001.

in determining legal jurisdiction when court intervention is needed to resolve disputes arising from their use.

While public blockchains offer transparency, immutability, and operational efficiency, their adoption in public sector contracting is constrained by several factors. These include challenges in ensuring legal compliance, accountability, and procedural fairness, particularly in areas such as contract modification, force majeure, dispute resolution, and administrative discretion. Real-world pilot projects, such as blockchain-based government procurement trials in the United States and Europe, have demonstrated both potential benefits and limitations, highlighting the need for careful design, regulatory oversight, and technical feasibility assessment before full-scale implementation.

In the United States, pilot programs in defence and logistics are testing blockchain systems, though widespread adoption is not yet realised. For instance, Wyoming's Stable Token Commission launched a state-backed stable token on test networks in 2024, with full issuance planned for 2025. These initiatives indicate a growing interest in integrating blockchain into public sector operations, but also underscore the complexities involved in scaling such technologies. Similarly, in Europe, several countries have initiated blockchain projects aimed at enhancing transparency and efficiency in public services. However, many of these projects remain in pilot phases, with limited scalability and challenges in aligning with existing legal frameworks. These examples illustrate the cautious approach governments are taking towards blockchain adoption, emphasising the importance of addressing legal and technical challenges before full-scale implementation.²¹

4.2. Private Blockchain

Private blockchains are characterised by strict rules, unlike public ones that are open to everyone. They are controlled by a central authority or intermediary that determines who can access them and sets the rules for participation. This gives complete control over how the network operates and who can join. Banks, government agencies, and private companies

21 'Blockchain in Government Contracts: What You Need to Know' (*US Federal Contractor Registration*, 26 December 2024) <<https://blogs.usfcr.com/blockchain-federal-contracting>> accessed 3 October 2025; Emmanuel, 'Blockchain Use Cases in the Government and Public Sector' (*Tectum*, 21 March 2025) <<https://tectum.io/blog/blockchain-use-cases-in-the-government-and-public-sector/>> accessed 4 October 2025; 'Government Contracting and Blockchain: The Future of Federal Innovation' (*Government Contracting Digest*, 25 June 2025) <<https://govcondigest.com/government-contracting-and-blockchain-the-future-of-federal-innovation/>> accessed 3 October 2025; 'How the US Government Is Using Crypto, and Where It Could Go' (*US Federal Contractor Registration*, 20 June 2025) <<https://blogs.usfcr.com/gov-crypto-projects>> accessed 3 October 2025; Kostiantyn Tsentsura, 'How Governments Are Using Blockchain in 2025' (*Yellow.com*, 19 August 2025) <<https://yellow.com/research/how-governments-are-using-blockchain-in-2025-from-digital-identity-to-cbdc-and-voting>> accessed 3 October 2025; Roopali Joshi, 'Use Cases of Blockchain in Government and Public Sector' (*A3Logics*, 23 October 2024) <<https://www.a3logics.com/blog/blockchain-in-government/>> accessed 3 October 2025.

often use private blockchains. Transactions in these networks are conducted securely within a closed, trusted environment, ensuring a high level of privacy and security. This could be significant, for example, when it comes to contracts conducted by health providers.²²

As for private blockchains, they are networks affiliated with an entity or institution and are therefore controlled by that institution or entity. This also means access is controlled, so users must be authorised and granted permission to enter. The data within such blockchains is often protected by legal provisions related to data privacy. Generally, this type of blockchain is better positioned to comply with legal frameworks concerning data protection, transfer, and processing.

Private blockchains are characterised by strict rules, unlike public ones that are open to everyone. They are controlled by a central authority or intermediary that determines who can access them and sets the rules for participation. While these features provide privacy and operational control, they do not automatically ensure legal compliance, procedural fairness, or accountability in public sector applications. Banks, government agencies, and private companies often use private blockchains, but even in these controlled environments, challenges remain regarding contract modification, force majeure, dispute resolution, liability, and administrative discretion.

Private blockchain networks require ongoing monitoring and oversight to ensure adherence to data protection and other legal obligations; failure to do so could result in significant legal and administrative liabilities. Real-world pilot projects, such as internal blockchain-based contract management systems in European municipalities and select U.S. state agencies, have shown potential to streamline operations while maintaining confidentiality, yet these initiatives also highlight practical limitations, such as scalability, regulatory alignment, and the need for specialised training for officials.²³

Furthermore, implementing private blockchains in governmental contexts involves financial, technical, and political considerations, including investment in infrastructure, integration with existing administrative systems, and alignment with local and national legislation. Therefore, while private blockchains offer controlled, secure, and efficient environments for contractual processes, their successful deployment in the public sector depends critically on robust legal frameworks, institutional safeguards, and ongoing administrative oversight.²⁴

22 Ayman Mohamed Afify and others, 'Unveiling the Right to Health in Egypt: Exploring the Transformations and Challenges in Egyptian Constitutional Law and Policy' (2023) 12 *Academic Journal of Interdisciplinary Studies* 95. doi:10.36941/ajis-2023-0156.

23 Joshi (n 21); Emmanuel (n 21).

24 Blockchain in Government Contracts (n 21); Tsentsura (n 21).

4.3. Hybrid Blockchain

Hybrid blockchains combine characteristics of both public and private networks. Some data is publicly accessible, while other data requires authorisation. This dual nature provides operational flexibility but also introduces legal and administrative challenges, particularly in public sector applications. Effectiveness depends on institutional frameworks, regulatory oversight, and the assignment of accountability to prevent misuse or legal violations.

Even in hybrid blockchains, challenges remain regarding contract modification, force majeure, dispute resolution, liability allocation, and administrative discretion. Real-world pilot projects have highlighted both opportunities and limitations: for example, the Dubai Land Department has implemented a hybrid blockchain for land registration, combining public access to certain records with restricted access to sensitive data. Similarly, some U.S. state agencies have experimented with hybrid blockchains to manage government contracts, demonstrating efficiency gains but also revealing practical limitations such as regulatory alignment, scalability, and staff training requirements.²⁵

Implementation in governmental contexts also involves financial, technical, and political considerations, including infrastructure investment, integration with existing administrative systems, and compliance with national and local legislation. Therefore, while hybrid blockchains offer flexibility and potential operational improvements, their deployment in public-sector contracting must be carefully managed through robust legal frameworks, continuous monitoring, and clear governance structures.²⁶

Table 1. Summary of Blockchain Technology Types²⁷

Type	Access	Control	Transparency	Privacy	Legal Considerations	Feasibility Implementation Challenges
Public Blockchain	Open to all	Decentralised	High	Anonymous Pseudonymous	Difficult to regulate; AML compliance; legal jurisdiction	Limited control; challenges with public procurement rules; accountability issues

²⁵ Joshi (n 21).

²⁶ Alaa Abouahmed, Ahmed Eldakak and Aliaa Zakaria, 'Using Electronic Auctions for Contracting in the UAE Federal Government Procurements' in Bahaaeddin AM Alareeni and Islam Elgedawy (eds), *Studies in Systems, Decision and Control* (Springer Cham 2023) 884. doi:10.1007/978-3-031-39158-3_82.

²⁷ Jesse Anglen, 'Different Types of Blockchains: Public, Private, and Hybrid' (*Rapid Innovation*, 2025) <<https://www.rapidinnovation.io/post/different-types-of-blockchains-public-private-and-hybrid>> accessed 4 October 2025.

Private Blockchain	Restricted	Centralised	Limited to authorised participants	High	Easier compliance; data privacy; monitor liability	Requires oversight; regulatory alignment; specialised training; scalability issues
Hybrid Blockchain	Mixed: some public, some restricted	Mixed: some open, some centralised	Partial: public + private data	Depends on data classification	Requires adaptable legal frameworks; administrative safeguards; compliance monitoring	Complex implementation; regulatory alignment; technical and political hurdles; infrastructure investment; real-world pilot learning

5 THE CONCEPT OF SMART ADMINISTRATIVE CONTRACTS

There is currently no universally accepted definition of a smart contract. Various scholars and practitioners conceptualise smart contracts differently, with interpretations often shaped by their focus on the contractual processes, operational mechanisms, or anticipated outcomes. Despite the advantages of smart contracts, their adoption in administrative or public sector contracts is not without limitations. Legal recognition remains evolving, and ambiguities in jurisdiction, liability allocation, and contract modification pose significant challenges.²⁸ Furthermore, technical constraints, such as blockchain scalability, interoperability, and secure coding requirements, must be considered.²⁹ Therefore, while smart contracts can improve efficiency and transparency, they do not replace the need for careful legal oversight and risk management in public contracting processes.³⁰ Legal

28 Ahmad Ghandour and others, 'Legal Framework for Blockchain Contracts: An Analysis Under UAE Law' (SSRN, 14 December 2024) <<https://ssrn.com/abstract=5056550>> accessed 4 October 2025; Dalila Djamane, 'Smart Contracts: Global Perspectives and Legal Realities', pt 2 (*Daily Jus*, 6 August 2025) <<https://dailyjus.com/legal-tech/2025/08/smart-contracts-global-perspectives-and-legal-realities-part-2>> accessed 3 October 2025.

29 Irina Heaver, Alla Melnichenko and Zainab Kamran, 'Blockchain 2025 – UAE – Global Practice Guides' (*Chambers and Partners*, 12 June 2025) <<https://practiceguides.chambers.com/practice-guides/blockchain-2025/uae>> accessed 3 October 2025.

30 'DIFC Announces Enactment of New Digital Assets Law, New Law of Security and Related Amendments to Select Legislation' (*Dubai International Financial Centre (DIFC)*, 13 March 2024) <<https://www.difc.com/whats-on/news/difc-announces-enactment-of-new-digital-assets-law---new-law-of-security-and-related-amendments>> accessed 3 October 2025; 'UAE Cryptocurrency Regulations' (*Virtuzone*, 24 January 2025) <<https://virtuzone.com/blog/uae-cryptocurrency/>> accessed 3 October 2025.

institutions still play a critical role in interpreting and enforcing contractual obligations that fall outside the scope of automated execution. In this regard, the legislature must adopt a specific definition following thorough and lengthy parliamentary debates and discussions with stakeholders.³¹ A smart contract is an electronic agreement executed by two or more parties through a coded program. However, this program must operate within a blockchain network. Since the contract contains terms and rules, the program must include a set of predefined and mutually agreed-upon regulations and conditions. It is characterised by automatic execution once the conditions are met, without the need for intermediaries. The smart contract is characterised by decentralisation, self-verification, and immutability, ensuring the secure and reliable execution of agreed-upon obligations while enabling the programmed and transparent exchange of assets and funds.³² This would increase competition among entities seeking to win and secure administrative contracts.³³

Table 2. Comparison Between Traditional Contracts and Smart Contracts³⁴

Feature	Traditional Contracts	Smart Contracts	Legal / Practical Considerations
Form	Written or verbal agreement	Code executed on a blockchain	Smart contract code must comply with applicable legal standards; lack of uniform definition ³⁵
Execution	Manual, requires human intervention	Automatic, triggered by predefined conditions	Limited flexibility for unforeseen events; cannot easily adapt to force majeure or discretionary decisions ³⁶
Enforcement	Enforced by legal institutions	Enforced through blockchain consensus mechanisms	Ambiguous legal recognition; liability and dispute resolution still require oversight ³⁷
Intermediaries	Often requires third parties (e.g., lawyers, notaries, banks)	No intermediaries required	Third parties may still be needed for verification, legal advice, or regulatory compliance ³⁸

31 Tarek Abo El-Wafaa, Ahmed Khalil and Adham Hashish, 'Parliamentary Question: Insights from the Federal National Council in the UAE' (2024) 10(6) Heliyon e27671. doi:10.1016/j.heliyon.2024.e27671.

32 Kevin Werbach and Nicolas Cornell, 'Contracts Ex Machina' (2017) 67(2) Duke Law Journal 313.

33 Moatasem El-Gheriani and Adham Hashish, 'Egypt Amends its Competition Law to Establish a Pre-Merger Control System' (2023) 14(2) Journal of European Competition Law & Practice 106. doi:10.1093/jeclap/lpad014.

34 Yu Haizhe, Deng Xiaopengorcid and Zhang Na, 'To What Extent Can Smart Contracts Replace Traditional Contracts in Construction Projects?' (2023) 32(3) Engineering, Construction and Architectural Management 1393. doi:10.1108/ECAM-04-2023-0379.

35 Ghandour and others (n 28).

36 Djamane (n 28).

37 Heaver, Melnichenko and Kamran (n 29).

38 UAE Cryptocurrency Regulations (n 30).

Transparency	Private with limited accessibility	Transparent and verifiable on the blockchain	High transparency may conflict with data privacy regulations ³⁹
Security	Vulnerable to tampering or loss	Cryptographically secure and immutable	Security depends on correct coding; vulnerabilities may have irreversible consequences ⁴⁰
Cost and Time Efficiency	Potentially expensive and time-consuming	Lower cost and faster execution	Initial development and deployment costs can be high; maintenance required ⁴¹
Flexibility in Modification	Can be renegotiated or modified	Difficult to modify once deployed	Legal amendments may require workarounds; immutability limits adaptability ⁴²
Jurisdiction and Legal Framework	Clearly defined and varies by jurisdiction	Ambiguous, with evolving legal recognition	Legal uncertainty may hinder adoption in government contracts ⁴³

6 TYPES OF SMART ADMINISTRATIVE CONTRACTS

Smart administrative contracts are categorised into two principal types: deterministic smart administrative contracts and non-deterministic smart administrative contracts, as detailed below:

6.1. Deterministic Smart Administrative Contracts

Deterministic smart administrative contracts rely entirely on information embedded within the blockchain network to execute their terms autonomously, without requiring external data sources. While this technological determinism can significantly improve operational efficiency and reduce human intervention, it also introduces critical limitations—particularly in public-sector contexts where unforeseen circumstances such as force majeure, contract modification, or discretionary administrative decisions are routine.⁴⁴ Such rigidity potentially undermines the rule of law and public sector accountability if there are no embedded legal mechanisms for judicial or arbitral oversight.⁴⁵

39 Djamane (n 28).

40 Heaver, Melnichenko and Kamran (n 29).

41 DIFC (n 30).

42 Ghandour and others (n 28).

43 UAE Cryptocurrency Regulations (n 30).

44 Eric Tjong Tjin Tai, 'Force Majeure and Excuses in Smart Contracts' (2018) 26(6) *European Review of Private Law* 787.

45 Iyad Mohammad Jadalhaq and others, 'A Systematic Reviews and Meta-Analyses of Interruption of the Statute of Limitations for Civil Claims: A Comparative Study of Arab Legislations' (2023) 9(6) *Heliyon* e16756. doi:10.1016/j.heliyon.2023.e16756.

Empirical evidence from real-world deployments further illuminates these constraints. In Seoul's Yeongdeungpo District, a blockchain-based system for evaluating public tenders increased transparency but faced scalability challenges and stakeholder resistance, limiting broader adoption.⁴⁶ Meanwhile, Estonia has been a pioneer in legally recognising smart contracts in administrative systems—particularly in e-residency and healthcare records—but even there, legal clarity remains bounded by interoperability and regulatory education challenges.⁴⁷

Given these realities, deterministic smart contracts should be viewed not as panaceas for governmental inefficiencies, but as targeted tools suitable for narrow, well-defined legal use cases. Their deployment must be integrated within robust legal and institutional architectures that preserve flexibility, oversight, and legitimacy in the public contracting process.

6.2. Non-deterministic Smart Administrative Contracts

In contrast, non-deterministic smart administrative contracts depend on external “oracles” to feed on-chain execution with off-chain data (e.g., macroeconomic indicators, FX rates for public finance, weather or logistics data) that trigger or qualify on-chain execution.⁴⁸ While this expands administrative use cases (e.g., index-linked payments or disaster-response procurement), it introduces the oracle problem: the legal and technical risks that arise when contract performance hinges on external data sources, raising questions about reliability, security, auditability, and liability allocation among contracting authorities, oracle providers, and vendors.⁴⁹ These risks are not hypothetical: market-manipulation cases exploiting price feeds (oracle/manipulation dynamics) have resulted in significant losses, underscoring the need for robust governance and dispute-resolution fallbacks rather than purely automated execution.⁵⁰

From a legal-regulatory perspective, several jurisdictions have begun to frame smart-contract (and oracle) governance: the EU Data Act sets essential requirements for smart contracts used in data-sharing, including robustness, safe termination/kill-switch, and

46 ‘Seoul District Using Blockchain for Public Procurement’ (*Ledger Insights*, 21 January 2019) <<https://www.ledgerinsights.com/seoul-district-using-blockchain-for-public-procurement/>> accessed 3 October 2025.

47 ‘Estonia: Blockchain & Cryptocurrency Laws and Regulations 2025’ (*Global Legal Insights*, 25 October 2024) <<https://www.globallegalinsights.com/practice-areas/blockchain-cryptocurrency-laws-and-regulations/estonia>> accessed 4 October 2025; *Eesti Firma* (2025) <<https://www.eestifirma.ee/en/>> accessed 4 October 2025; *REI Systems* (2025) <<https://www.reisystems.com/>> accessed 4 October 2025.

48 Zhang, Xue and Liu (n 4).

49 Channele Duley and others, *The Oracle Problem and the Future of DeFi* (BIS Bulletin no 76, Bank for International Settlements 2023).

50 Jonathan Stempel, ‘Trader Convicted of Mango Markets Fraud in First US Crypto Manipulation Case’ (*Reuters*, 18 April 2024) <<https://www.reuters.com/legal/trader-convicted-mango-markets-fraud-first-us-crypto-manipulation-case-2024-04-18/>> accessed 3 October 2025.

logging—principles directly relevant to public-sector oracle use where erroneous feeds must be halted and reviewed.⁵¹ In England & Wales, the Law Commission confirmed smart legal contracts are generally supportable under existing law, but parties must address interpretation, variation, and remediation—points that become pivotal when off-chain data controls on-chain performance.⁵²

In the UAE, sectoral instruments provide a complementary framework: DIFC Digital Assets Law (No. 2 of 2024) recognises digital-asset arrangements and supports smart-contract-based operations within a clear property and control framework;⁵³ VARA's 2023 Regulations in Dubai introduce licensing, governance and risk-management duties over virtual-asset activities that would encompass oracle-dependent services;⁵⁴ and ADGM's 2023 DLT Foundations Regulations enable regulated structures (e.g., foundations/DAOs) to operate oracle networks or middleware with clearer accountability.⁵⁵ Privacy and data-governance constraints also apply: the UAE Federal Personal Data Protection Law (PDPL) 45/2021 sets principles for processing personal data (noting special rules/exclusions for government data), which is critical when oracle feeds include identifiable or sensitive information.⁵⁶

For public procurement, non-deterministic designs should therefore: (i) document oracle governance (sources, decentralisation/multi-source aggregation, service-level remedies); (ii) embed safe-termination and human-in-the-loop review for contested feeds; (iii) allocate liability and dispute-resolution for faulty or manipulated data; and (iv) align with budgetary and stakeholder constraints, learning from EU public-sector blockchain pilots (EBSI) that emphasise interoperability and administrative oversight rather than full automation.⁵⁷ In short, non-deterministic contracts can solve narrow, well-specified administrative problems, but only when paired with explicit legal guardrails and operational controls on the oracle layer.⁵⁸

51 EU Data Act (13 December 2023) art 36 <https://www.eu-data-act.com/Data_Act_Articles.html> accessed 4 October 2025.

52 Law Commission of England and Wales, *Smart Legal Contracts* (Law Commission 2021) <<https://lawcom.gov.uk/project/smart-contracts/>> accessed 4 October 2025.

53 DIFC (n 30); DIFC Law No 2 of 2024 'Digital Assets Law' (1 March 2024) <<https://www.difc.com/business/laws-and-regulations/legal-database?path=business&path=laws-and-regulations&path=legal-database&path=difc-laws>> accessed 3 October 2025.

54 Virtual Assets Regulatory Authority (VARA), *Virtual Assets and Related Activities Regulations 2023* (VARA Dubai 2023).

55 'ADGM Introduces the Worlds First DLT Foundations Regime' (*Abu Dhabi Global Market (ADGM)*, 2 November 2023) <<https://www.adgm.com/media/announcements/adgm-introduces-the-worlds-first-dlt-foundations-regime>> accessed 3 October 2025.

56 Federal Decree-Law No 45 of 2021 'Concerning the Protection of Personal Data' [2021] Official Gazette 712 <<https://uaelegislation.gov.ae/en/legislations/1972>> accessed 3 October 2025.

57 'European Blockchain Services Infrastructure' (*European Commission*, 2025) <<https://digital-strategy.ec.europa.eu/en/policies/european-blockchain-services-infrastructure>> accessed 3 October 2025.

58 EU Data Act (n 51); Law Commission of England and Wales (n 52).

7 CONTRACT LANGUAGE AND DOCUMENTATION

In traditional administrative contracts, the agreement is written in a natural language, such as Arabic or English, and documented through specialised authorities, including notaries or relevant administrative bodies. In contrast, in smart administrative contracts, the contract is drafted using coding languages. Programmers develop the coded contract to be automatically executed and documented on the blockchain platform. The contract is distributed across all network-connected devices in an encrypted form, ensuring it cannot be altered, damaged, or forged. Unlike traditional paper contracts, which may be prone to loss or damage, smart administrative contracts provide automatic, secure documentation without complex procedures or additional costs, thereby saving time and effort and better protecting the rights of the contracting parties.⁵⁹

Because they are electronic, smart administrative contracts are converted into programmable code, eliminating the need for paper documents or intermediaries and thereby enhancing transparency and efficiency. Their conditional nature ensures the automatic, precise execution of terms, accelerating administrative procedures and reducing the need for human intervention. Self-verification strengthens trust among parties by automatically enforcing conditions without centralised supervision. Furthermore, the use of coding languages and automatic documentation protects contracts from damage or forgery compared to traditional paper contracts.⁶⁰

Nevertheless, these advantages raise essential challenges. The use of coding languages may create a “language gap” between legal practitioners and programmers, limiting accessibility and hindering judicial oversight. Some comparative legislative experiences have begun to address this challenge. For example, the United Arab Emirates Federal Law No. 46 of 2021 on Electronic Transactions and Trust Services recognises the evidentiary value of electronic contracts. It provides a legal framework for digital signatures,⁶¹ thereby facilitating their adoption in administrative contexts. Similarly, the European Union’s Regulation (EU) No 910/2014 on electronic identification and trust services (eIDAS) establishes the legal validity of electronic documents and smart contracts across member states. These frameworks demonstrate a gradual recognition by legislators that, while smart contracts can replace traditional documentation methods, legal safeguards remain necessary to ensure transparency, accessibility, and effective dispute resolution.

59 Christopher D Clack, Vikram A Bakshi and Lee Braine, ‘Smart Contract Templates: Foundations, Design Landscape and Research Directions’ (*arXiv*, 15 March 2017) arXiv:1608.00771v3 [cs.CY] <<https://arxiv.org/abs/1608.00771>> accessed 3 October 2025.

60 Eliza Mik, ‘Smart Contracts: Terminology, Technical Limitations and Real World Complexity’ (2017) 9(2) *Law, Innovation and Technology* 269. doi:10.2139/ssrn.3038406.

61 Emad Abdel Rahim Dahiyat, ‘The Legal Recognition of Electronic Signatures in Jordan: Some Remarks on the Electronic Transactions Law’ (2011) 25(3) *Arab Law Quarterly* 297. doi:10.1163/157302511X568538.

8 MECHANISM OF SMART CONTRACTS OPERATION VIA BLOCKCHAIN TECHNOLOGY

To ensure the accurate application of smart contracts within the administrative contract lifecycle using blockchain technology, specific steps must be followed in alignment with the requirements of administrative agreements in terms of precision and reliability, as detailed below:

Step 1: Agreement on Terms

The first step involves determining the contractual terms, which means reaching a mutual agreement on the agreed-upon conditions. These might include, for example, the type of goods to be delivered, the payment timelines if delivery meets the required conditions, and the discount rates if the delivered goods fail to meet specific criteria. Naturally, these terms must be comprehensively identified, and each party's approval must be final after fulfilling all the internal approvals required for contracting on each side. This is particularly critical if an administrative agency seeks to enter into a contract and must meet all internal policy requirements to avoid any punitive measures from oversight authorities.⁶²

The conditions vary and can cover various topics such as specifications of goods, delivery dates, price and amount of each payment instalment, and mechanisms for resolving disputes between the parties. The parties might also set a specific outcome for some disputes that may arise and leave other conflicts, which may require judges' discretion, to be resolved in court.

Moreover, this step is critical in administrative contracts under UAE law, particularly Federal Law No. 46 of 2021 on Electronic Transactions and Trust Services, which establishes the legal recognition of electronic agreements and sets requirements for internal approvals and auditability. Comparative experience, such as the UK Jurisdiction Taskforce (2019) statement on smart contracts, confirms that while blockchain automation can enhance efficiency, judicial oversight remains essential for disputes or modifications that cannot be encoded into the contract. These examples highlight that smart contracts must be implemented alongside clear legal and institutional frameworks to ensure enforceability, accountability, and protection of the public interest.

62 Gehad Mohamed AbdelAziz and Alaa Abouahmed, 'The Punitive Power of Independent Administrative Authorities: Focus on Financial and Tax Violations: A Comparative Study' (2024) 7(2) Access to Justice in Eastern Europe 301. doi:10.33327/AJEE-18-7.2-n000216; Abed Fayed, Aliaa Zakaria and Alaa Abouahmed, 'Innovations of Artificial Intelligence in Light of the Applicable Copyright Law: Realistic Solutions and Future Prospects. A Comparative Study of UAE, Egyptian, and French Laws' (2025) 8(1) Access to Justice in Eastern Europe 241. doi:10.33327/AJEE-18-8.1-a000116; Nicholas T Solosky and Diana Lyn Curtis Shutzer, 'Contractor Compliance and Internal Investigations: New Practical Strategies for Unpredictable Times' (2025) 60(4) The Procurement Lawyer 20.

Step 2: Conversion of Terms into Programming Code

The second step involves programming and encoding the terms agreed upon by the parties in the first step. This requires specialised software that relies on programming languages designed for smart contracts, which convert the contractual terms into encrypted programming code. This code outlines the rights and obligations of each party, detailing each obligation related to execution and linking them to the specific instructions for that execution. The aim is to monitor compliance during execution intelligently without human intervention. For example, a condition can be programmed so that if the delivered goods match the agreed-upon specifications, an automatic authorisation is issued to pay a specific portion of the contract value.

However, it is important to note that full automation cannot address all legal contingencies. Errors in programming or unforeseen circumstances (e.g., force majeure, disputes requiring judicial discretion) may still require human intervention. Under UAE Federal Law No. 46 of 2021 on Electronic Transactions and Trust Services, electronic agreements must comply with legal standards and include mechanisms for audit and verification. Similarly, the UK Jurisdiction Taskforce (2019) emphasised that smart contracts are enforceable under law, but parties should ensure that off-chain issues and coding errors do not compromise contractual obligations or rights.

Step 3: Deployment on a Blockchain Network

The third step involves uploading and deploying the smart contract onto a blockchain network that meets the specifications agreed upon by the parties. Naturally, this blockchain network must be licensed, meaning an authority has confirmed that it meets specific standards and has issued certification authorising the parties to use it.

Furthermore, the blockchain must be technically capable of interacting with the encrypted programming language in which the contract conditions were written. Each contracting party then receives keys and data that enable them to interact with the blockchain throughout the execution of the smart contract.

However, deployment does not eliminate legal accountability. Under UAE Federal Law No. 46 of 2021 on Electronic Transactions and Trust Services, parties remain responsible for compliance with contractual obligations and administrative approvals. Additionally, certification and licensing do not entirely prevent technical errors, security breaches, or unforeseen contingencies, which may require human intervention or corrective measures. Regulatory frameworks in jurisdictions such as ADGM and DIFC emphasise that smart contracts must include auditability, dispute-resolution mechanisms, and fail-safes to maintain legal and operational reliability.

Step 4: Automatic Execution upon Condition Fulfilment

This step refers to the network's ability to ensure that obligations are fulfilled and that corresponding obligations are executed. As previously explained, once goods that meet the conditions are delivered, the agreed payment amount is automatically transferred. This could also work in a different direction: if one party fails to perform their obligation, the agreed-upon terms may specify a sanction to be enforced, such as a penalty that the breaching party must pay.⁶³

Nevertheless, automatic execution does not eliminate legal responsibility or the need for oversight. According to UAE Federal Law No. 46 of 2021 on Electronic Transactions and Trust Services, electronic agreements must comply with legal standards, allow for audit and verification, and maintain accountability of the contracting parties.⁶⁴ Errors in programming, unexpected contingencies, or inaccurate external data (e.g., from oracles) may still require human intervention or corrective measures.⁶⁵

Transparent verification via immutable blockchain records enhances procedural efficiency, reduces time spent on monitoring compliance, and strengthens trust among parties. However, jurisdictions such as ADGM and DIFC emphasise that smart contracts must incorporate dispute-resolution mechanisms, fail-safes, and compliance checks to ensure enforceability and mitigate operational or legal risks.⁶⁶ Comparative studies further highlight that while smart contracts accelerate execution and reduce intermediaries, they cannot fully replace legal oversight in administrative contracts where human judgment, discretionary decisions, or unforeseen external events may affect outcomes.⁶⁷ Therefore, a hybrid approach combining automated execution with legal safeguards and auditability is recommended for public sector implementations.

It is essential to recognise the importance of transparent verification: each action taken by a party results in a record entered into the blockchain, which is immutable and simultaneously visible to the other authorised party. This achieves procedural efficiency and significantly reduces the time usually spent verifying each party's fulfilment of their contractual obligations.

63 Gehad Mohamed Abdelaziz and Adham Hashish, 'Using Sanctions in Enforcing Digital Markets Act in the EU' in Rim El Khoury and Nohade Nasrallah (eds), *Intelligent Systems, Business, and Innovation Research* (Springer Cham 2024) 775. doi:10.1007/978-3-031-36895-0_65.

64 Federal Decree-Law No 46 of 2021 'On Electronic Transactions and Trust Services' [2021] Official Gazette 712 <<https://uaelegislation.gov.ae/en/legislations/1539>> accessed 3 October 2025.

65 Zhang, Xue and Liu (n 4); Mik (n 60).

66 ADGM (n 55).

67 Clack, Bakshi and Braine (n 59); Fayed, Zakaria and Abouahmed (n 62).

9 PRACTICAL APPLICATION OF A SMART ADMINISTRATIVE CONTRACT BASED ON BLOCKCHAIN TECHNOLOGY

A practical application can be illustrated through an administrative contract for the supply of equipment to a governmental facility, where the technical and administrative efficiency of utilising innovative contract technology via blockchain becomes evident. The process proceeds as follows:

Step 1: Agreement on Contractual Terms

The governmental party (the buyer) and the supplier (the seller) define the contractual terms, including details of the equipment supply—such as type, quantity, specifications, and delivery deadlines—as well as payment obligations. The governmental party may unilaterally draft the detailed terms based on specific administrative requirements and then send the contract electronically to the supplier. The supplier must review and approve the terms through the smart contract platform. This approval constitutes the "offer and acceptance" traditionally found in contract law but is now achieved through modern digital means, ensuring clarity of obligations and transparency in the contracting process.⁶⁸

It is understood that all actions remain subject to applicable legal standards and administrative approvals.

Step 2: Coding the Agreed Terms

Once the terms are agreed upon, they are translated into programming code using a language specialised for smart contracts, such as Solidity. This process is crucial for incorporating the agreed-upon terms into the mechanism through which the contract will be enforced. The code specifies the conditions required for the contract's execution; for example, "If the equipment is delivered on the specified date, payment is automatically transferred to the supplier." This transformation renders the contract into a self-executing mechanism that eliminates the need for continuous human monitoring.⁶⁹

Step 3: Deployment on a Blockchain Network

After coding, the contract is deployed on a blockchain network, such as Ethereum, which ensures that the contract cannot be altered or tampered with. The network's nodes verify the accuracy of the contract and confirm compliance with all technical and legal conditions.

68 Abdelaziz and Hashish (n 63); Max Raskin, 'The Law and Legality of Smart Contracts' (2017) 1(2) *Georgetown Law Technology Review* 305. doi:10.2139/ssrn.2842258; Iyad Mohammad Jadalhaq and Mohammed El Hadi El Maknouzi, 'Reading UAE Contract Law Through the Lens of Islamic Jurisprudence: A Case Study on the "Extraneous Cause" Exception in the UAE Civil Code' (2019) 19(2) *Global Jurist* 20180045. doi:10.1515/gj-2018-0045.

69 Clack, Bakshi and Braine (n 59).

The contract is then permanently stored on the blockchain, enhancing its security and transparency, making tampering practically impossible.⁷⁰

Step 4: Automatic Execution Upon Fulfilment of Conditions

When the predetermined conditions are fulfilled—for instance, when the governmental party receives and inspects the equipment according to agreed-upon specifications—the network nodes verify the successful delivery. Upon confirmation, the smart contract automatically executes the corresponding obligation, such as transferring the agreed payment to the supplier. This automatic execution ensures precise and highly transparent fulfilment of commitments, reducing the likelihood of disputes or payment delays. In cases where the assets are physical, the settlement may occur off-chain. At the same time, documentation and follow-up remain on the blockchain network, thereby ensuring execution reliability and compliance with contractual terms.⁷¹

It is important to note that automatic execution of smart administrative contracts does not eliminate legal responsibility. Parties remain accountable for compliance with applicable legal standards and administrative approvals. In the UAE, this is governed by Federal Law No. 46 of 2021 on Electronic Transactions and Trust Services, which requires auditability and accountability for all electronic agreements.⁷² Similarly, international frameworks, such as the UK Jurisdiction Taskforce (2019), recognise smart contracts legally but emphasise that human oversight may still be necessary in cases of coding errors, inaccurate oracle data, or unforeseen circumstances.

Operational limitations must also be considered: automatic execution may not cover force majeure events or other contingencies beyond the system's control. For contracts involving physical assets, settlements may occur off-chain while still being documented on the blockchain for transparency and auditability. Regulatory authorities like ADGM and DIFC recommend incorporating fail-safes, dispute-resolution mechanisms, and auditability features to ensure both legal enforceability and operational reliability.⁷³

Comparative experiences from Europe, the United States, and Singapore show that while smart contracts improve efficiency and reduce intermediaries, human intervention remains essential for resolving complex disputes, addressing exceptional circumstances, and ensuring compliance with legal and administrative requirements.

70 Aaron Wright and Primavera De Filippi, 'Decentralized Blockchain Technology and the Rise of Lex Cryptographia' (2015) 34 Social Science Research Network 41. doi:10.2139/ssrn.2580664.

71 Zhang, Xue and Liu (n 4).

72 Federal Decree-Law No 46 of 2021 (n 64).

73 ADGM (n 55); DIFC (n 30).

10 CHALLENGES FACING SMART ADMINISTRATIVE CONTRACTS BASED ON BLOCKCHAIN TECHNOLOGY

While applying smart administrative contracts offers prominent administrative and legal advantages, several challenges persist.

10.1. Legal Challenges

The legal landscape for smart contracts faces several significant challenges, primarily due to the lack of a comprehensive, unified regulatory framework. Currently, no legislation explicitly governs all aspects of smart contracts, creating uncertainty about their legal recognition and enforceability. In the UAE, partial guidance is provided through Federal Law No. 46 of 2021 and the regulatory frameworks established by the Abu Dhabi Global Market (ADGM) and the Dubai International Financial Centre (DIFC), which aim to ensure that parties remain legally accountable despite the lack of a fully unified legal regime⁷⁴. Another prominent challenge concerns issues of capacity and identity. Decentralised systems often struggle to verify participants' legal capacity to enter into contracts and confirm their identities.⁷⁵ To mitigate these risks, best practices now recommend incorporating robust Know Your Customer (KYC) and identity verification mechanisms to ensure that parties are legitimate and legally competent.⁷⁶ The interpretation of smart contracts further complicates their legal treatment. Since contractual obligations are encoded in programming languages, courts and administrators may face difficulties in translating these coded terms into enforceable legal obligations. Human intervention is often required, particularly in complex cases or situations involving force majeure and other exceptional circumstances.⁷⁷

Relatedly, the inherent rigidity of smart contracts poses challenges in adapting to unforeseen events or changed circumstances. Because the contract logic is automated and deterministic, it may not accommodate deviations or contingencies without pre-coded exception mechanisms.⁷⁸ Off-chain intervention protocols and exception-handling measures are therefore recommended to maintain contractual compliance while ensuring fairness and practicality.⁷⁹

74 *ibid*; Federal Decree-Law No 46 of 2021 (n 64).

75 Wright and De Filippi (n 70).

76 ADGM (n 55); DIFC (n 30); Federal Decree-Law No 46 of 2021 (n 64).

77 Raskin (n 68).

78 Kevin Werbach, 'Trust, But Verify: Why the Blockchain Needs the Law' (2018) 33(2) *Berkeley Technology Law Journal* 487.

79 UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts* (LawTech Delivery Panel 2019) <https://technation.io/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf> accessed 3 October 2025.

Finally, state supervision and regulatory oversight remain areas of ambiguity. The integration of blockchain-based smart contracts into administrative and legal frameworks is still evolving, with regulatory authorities emphasising the need for auditability, fail-safe mechanisms, and dispute resolution procedures. These safeguards are essential to ensure that smart contracts operate reliably within the broader legal and institutional context.

10.2. Technical Challenges

Smart contracts and blockchain technologies face several interrelated technical challenges that may affect their functionality, scalability, and reliability. One of the primary limitations concerns storage capacity.⁸⁰ Current blockchain infrastructures, particularly public and hybrid models, may encounter scalability constraints and data storage issues as transaction volumes increase, which can impact performance and network efficiency.

Another critical issue is private key management. The security of blockchain systems depends on cryptographic keys, and the loss of a private key can result in permanent loss of access to the associated smart contract, raising concerns about reliability and risk management.

Interoperability and standardisation present additional obstacles. Diverse blockchain platforms often lack unified technical standards, complicating cross-network smart contract execution. International initiatives such as ISO/TC 307 and the EU Blockchain Observatory, are actively working to establish standardised protocols to enhance compatibility and ensure seamless interaction between different blockchain networks. Smart contracts that depend on external data sources, commonly referred to as oracles, also face challenges related to data reliability. If the information provided by oracles is inaccurate or delayed, the automated execution of contracts may produce unintended or incorrect outcomes. Moreover, the financial and operational feasibility of establishing and maintaining blockchain networks, particularly within governmental contexts, involves substantial investment, technical expertise, and political coordination. Implementing such systems requires careful planning to balance technological capability with institutional readiness. Comparative lessons from Europe, the United States, and Singapore demonstrate that, while smart contracts can enhance efficiency and reduce the need for intermediaries, human intervention remains indispensable. Complex disputes, exceptional circumstances, and legal or administrative compliance issues still require oversight, highlighting that blockchain is a tool for augmentation rather than a fully autonomous solution.⁸¹

80 Zhang, Xue and Liu (n 4).

81 Jamie Berryhill, Théo Bourgery and Angela Hanson, *Blockchains Unchained: Blockchain Technology and its Use in the Public Sector* (Working Papers on Public Governance no 28, OECD 2018); Wright and De Filippi (n 70).

11 CONCLUSION

This study demonstrates that blockchain-based smart contracts, particularly in public procurement, offer transformative potential to enhance transparency, operational efficiency, and accountability in public sector contracting. By embedding contractual obligations into self-executing code and distributing immutable records across decentralised nodes, blockchain reduces procedural bottlenecks, minimises human error, and strengthens trust in administrative processes. These contracts improve speed, traceability, and procedural fairness, while upholding administrative law principles such as transparency, equality of bidders, and safeguarding public funds.

The comparative analysis highlights a significant gap in adapting blockchain contracting models to civil law jurisdictions in the MENA region. While advanced economies have begun regulating smart contracts for administrative purposes, judicial and administrative intervention remains essential to address exceptional circumstances and ensure compliance with local administrative law. Successful adoption, therefore, requires not only technological deployment but also institutional adaptation, legal safeguards, and human oversight to address liability, dispute resolution, and enforceability issues.

To overcome these challenges and enable successful implementation, governments should develop a hybrid regulatory-technical framework combining statutory provisions with mandatory technical standards, ensuring enforceability and interoperability across platforms, while explicitly addressing liability allocation, dispute resolution mechanisms, off-chain settlements, and compliance with UAE Federal Law No. 46 of 2021 and international smart contract guidelines.

Institutional capacity building and change management are essential to fostering trust in automation, reducing resistance among public officials, and encouraging collaboration across departments. Establishing a national blockchain infrastructure specifically for public procurement, with role-based access controls, audit trails, and integration with national identity systems, would create a secure, unified ecosystem. Pilot programs should begin with low-risk, high-volume procurement areas, gradually scaling to strategic projects, while incorporating real-time monitoring of compliance, error handling, and data validation.

This approach ensures that blockchain adoption aligns with a sustainable digital transformation strategy, reinforcing administrative law values, including equity, accountability, and protection of public interest, while providing clear guidance for policymakers, academics, and public procurement agencies.

REFERENCES

1. Abdelaziz GM and Abouahmed A, 'The Punitive Power of Independent Administrative Authorities: Focus on Financial and Tax Violations: A Comparative Study' (2024) 7(2) Access to Justice in Eastern Europe 301. doi:10.33327/AJEE-18-7.2-n000216
2. Abdelaziz GM and Hashish A, 'Using Sanctions in Enforcing Digital Markets Act in the EU' in El Khoury R and Nasrallah N (eds), *Intelligent Systems, Business, and Innovation Research* (Springer Cham 2024) 775. doi:10.1007/978-3-031-36895-0_65
3. Abouahmed A, Eldakak A and Zakaria A, 'Using Electronic Auctions for Contracting in the UAE Federal Government Procurements' in Alareeni BAM and Elgedawy I (eds), *Studies in Systems, Decision and Control* (Springer Cham 2023) 884. doi:10.1007/978-3-031-39158-3_82.
4. Afify AM and others, 'Unveiling the Right to Health in Egypt: Exploring the Transformations and Challenges in Egyptian Constitutional Law and Policy' (2023) 12 Academic Journal of Interdisciplinary Studies 95. doi:10.36941/ajis-2023-0156
5. Al Shamsi H, 'Enhancing Digital Transactions with Blockchain Technology: Descriptive-Analytical Study' (2024) 7(3) Access to Justice in Eastern Europe 485. doi:10.33327/AJEE-18-7.3-a000322
6. AlQodsi EM and Arenova L, 'Smart Contracts in Contract Law as an Auxiliary Tool or a Promising Substitute for Traditional Contracts' (2024) 16(3) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction. doi:10.1061/JLADAH.LADR-1132
7. AlQodsi EM, Jadalhaq IM and El-Maknouzi MEH, 'The Place of UAE's Food Security in the National Legislation and its Role in Supporting Global Food Security' (2024) 10(1) Cogent Social Sciences 2319379. doi:10.1080/23311886.2024.2319379
8. Al-Shawabkeh IK, 'Legal Guarantees for Objective Performance Evaluation of the Federal Public Employee in the UAE Legislation' (2020) 10(3) Lawyer Quarterly 217
9. Al-Shawabkeh IK, 'Using the Tax to Reduce Environmental Pollution in the United Arab Emirates: Possibility and Challenges' in AlQodsi EM and Abdallah AK (eds), *Legal Frameworks and Educational Strategies for Sustainable Development* (IGI Global Scientific Publishing 2025) 1. doi:10.4018/979-8-3693-2987-0.ch001
10. Al-Shawabkeh IK and Alqudah M, 'Independent Regulatory Bodies in the Jordanian Legal System: An Evaluative Review' (2023) 9 International Journal of Public Law and Policy 188. doi:10.1504/IJPLAP.2023.130014
11. Anglen J, 'Different Types of Blockchains: Public, Private, and Hybrid' (*Rapid Innovation*, 2025) <<https://www.rapidinnovation.io/post/different-types-of-blockchains-public-private-and-hybrid>> accessed 4 October 2025

12. Atzori M, 'Blockchain Technology and Decentralized Governance: Is the State Still Necessary?' (2017) 6(1) *Journal of Governance and Regulation* 45. doi:10.22495/jgr_v6_i1_p5
13. Bambara JJ and others, *Blockchain: A Practical Guide to Developing Business, Law, and Technology Solutions* (McGraw Hill 2018)
14. Berryhill J, Bourgerly T and Hanson A, *Blockchains Unchained: Blockchain Technology and its Use in the Public Sector* (Working Papers on Public Governance no 28, OECD 2018)
15. Buterin Vi, *A Next-Generation Smart Contract and Decentralized Application Platform* (Ethereum White Paper, 2014)
16. Casino F, Dasaklis TK and Patsakis C, 'A Systematic Literature Review of Blockchain-Based Applications: Current Status, Classification, and Open Issues' (2019) 36 *Telematics and Informatics* 55. doi:10.1016/j.tele.2018.11.006
17. Christidis K and Devetsikiotis M, 'Blockchains and Smart Contracts for the Internet of Things' (2016) 4 *IEEE Access* 2292. doi:10.1109/ACCESS.2016.2566339
18. Clack CD, Bakshi VA and Braine L, 'Smart Contract Templates: Foundations, Design Landscape and Research Directions' (*arXiv*, 15 March 2017) arXiv:1608.00771v3 [cs.CY]
19. Curry M, 'Blockchain Technology and the Legal Field' (*Moritz College of Law*, 2022) <<https://moritzlaw.osu.edu/sites/default/files/2022>> accessed 4 October 2025
20. Dahiyat EAR, 'The Legal Recognition of Electronic Signatures in Jordan: Some Remarks on the Electronic Transactions Law' (2011) 25(3) *Arab Law Quarterly* 297. doi:10.1163/157302511X568538
21. Dahiyat EAR, 'Towards New Recognition of Liability in the Digital World: Should we be More Creative?' (2011) 19(3) *International Journal of Law and Information Technology* 224. doi:10.1093/ijlit/ear006
22. Djamane D, 'Smart Contracts: Global Perspectives and Legal Realities', pt 2 (*Daily Jus*, 6 August 2025) <<https://dailyjus.com/legal-tech/2025/08/smart-contracts-global-perspectives-and-legal-realities-part-2>> accessed 3 October 2025
23. Duley C and others, *The Oracle Problem and the Future of DeFi* (BIS Bulletin no 76, Bank for International Settlements 2023)
24. El-Gheriani M and Hashish A, 'Egypt Amends its Competition Law to Establish a Pre-Merger Control System' (2023) 14(2) *Journal of European Competition Law & Practice* 106. doi:10.1093/jecolap/lpad014
25. El-Gheriani M and Hashish A, 'Harnessing the Crypto-Horse: Factors Affecting a Friendly Regulator of the Crypto-Industry: Dubai as a Test Case' (2025) 34(3) *Information & Communications Technology Law* 241. doi:10.1080/13600834.2025.2452718

26. El-Wafaa TA, Khalil A and Hashish A, 'Parliamentary Question: Insights from the Federal National Council in the UAE' (2024) 10(6) Heliyon e27671. doi:10.1016/j.heliyon.2024.e27671
27. Fayed A, Zakaria A and Abouahmed A, 'Innovations of Artificial Intelligence in Light of the Applicable Copyright Law: Realistic Solutions and Future Prospects. A Comparative Study of UAE, Egyptian, and French Laws' (2025) 8(1) Access to Justice in Eastern Europe 241. doi:10.33327/AJEE-18-8.1-a000116
28. Ghandour A and others, 'Legal Framework for Blockchain Contracts: An Analysis Under UAE Law' (SSRN, 14 December 2024) <<https://ssrn.com/abstract=5056550>> accessed 4 October 2025
29. Heaven I, Melnichenko A and Kamran Z, 'Blockchain 2025 – UAE – Global Practice Guides' (*Chambers and Partners*, 12 June 2025) <<https://practiceguides.chambers.com/practice-guides/blockchain-2025/uae>> accessed 3 October 2025
30. Jadalhaq IM and El Maknouzi MEH, 'Reading UAE Contract Law Through the Lens of Islamic Jurisprudence: A Case Study on the "Extraneous Cause" Exception in the UAE Civil Code" (2019) 19(2) Global Jurist 20180045. doi:10.1515/gj-2018-0045
31. Jadalhaq IM and others, 'A Systematic Reviews and Meta-Analyses of Interruption of the Statute of Limitations for Civil Claims: A Comparative Study of Arab Legislations' (2023) 9(6) Heliyon e16756. doi:10.1016/j.heliyon.2023.e16756.
32. Joshi R, 'Use Cases of Blockchain in Government and Public Sector' (*A3Logics*, 23 October 2024) <<https://www.a3logics.com/blog/blockchain-in-government/>> accessed 3 October 2025
33. Mik E, 'Smart Contracts: Terminology, Technical Limitations and Real World Complexity' (2017) 9(2) Law, Innovation and Technology 269. doi:10.2139/ssrn.3038406
34. Raskin M, 'The Law and Legality of Smart Contracts' (2017) 1(2) Georgetown Law Technology Review 305. doi:10.2139/ssrn.2842258
35. Sherman AT and others, 'On the Origins and Variations of Blockchain Technologies' (*arXiv*, 15 October 2018) arXiv:1810.06130 [cs.CR]
36. Solosky NT and Shutzer DLC, 'Contractor Compliance and Internal Investigations: New Practical Strategies for Unpredictable Times' (2025) 60(4) The Procurement Lawyer 20
37. Susnjara S and Smalley I, 'What is Blockchain Technology?' (*IBM*, 2020) <<https://www.ibm.com/topics/what-is-blockchain>> accessed 4 October 2025
38. Tapscott D and Tapscott A, *Blockchain Revolution: How the Technology Behind Bitcoin Is Changing Money, Business, and the World* (Penguin 2016)
39. Tjong Tjin Tai E, 'Force Majeure and Excuses in Smart Contracts' (2018) 26(6) European Review of Private Law 787.

40. Tsentsura K, 'How Governments Are Using Blockchain in 2025' (*Yellow.com*, 19 August 2025) <<https://yellow.com/research/how-governments-are-using-blockchain-in-2025-from-digital-identity-to-cbdcs-and-voting>> accessed 3 October 2025
41. Werbach K, 'Trust, But Verify: Why the Blockchain Needs the Law' (2018) 33(2) *Berkeley Technology Law Journal* 487
42. Werbach K and Cornell N, 'Contracts Ex Machina' (2017) 67(2) *Duke Law Journal* 313
43. Wright A and De Filippi P, 'Decentralized Blockchain Technology and the Rise of Lex Cryptographia' (2015) 34 *Social Science Research Network* 41. doi:10.2139/ssrn.2580664
44. Yermack D, 'Corporate Governance and Blockchains' (2017) 21(1) *Review of Finance* 7. doi:10.1093/rof/rfw074
45. Yu H, Deng X and Zhang N, 'To What Extent Can Smart Contracts Replace Traditional Contracts in Construction Projects?' (2023) 32(3) *Engineering, Construction and Architectural Management* 1393. doi:10.1108/ECAM-04-2023-0379
46. Zetsche DA, Buckley RP and Arner DW, 'The Distributed Liability of Distributed Ledgers: Legal Risks of Blockchain' (2018) 4 *University of Illinois Law Review* 1361
47. Zhang R, Xue R and Liu L, 'Security and Privacy on Blockchain' (*arXiv*, 16 August 2019) arXiv:1903.07602v2 [cs.CR]

AUTHORS INFORMATION

Author contributions

All authors contributed to the conceptualization of the research and manuscript, including defining the study scope, designing the methodology, conducting analyses, and extracting results. They supervised the study. Additionally, all authors participated in drafting the manuscript and approved the final version.

Mohammed Abdelsalam

PhD, Associate Professor, Public Law Department, University College of Applied Science, Kingdom of Bahrain.

mohamed.abdelsalam@asu.edu.bh

<https://orcid.org/0009-0005-3701-6393>

Co-author, responsible for conceptualization, methodology, formal analyses, supervision, writing- original draft, writing- review and editing.

Alaa Abouahmed

PhD, Associate Professor, Public Law Department, United Arab Emirates University, United Arab Emirates.

alaa.m@uaeu.ac.ae

<https://orcid.org/0000-0002-2276-260X>

Co-author, responsible for conceptualization, methodology, formal analyses, supervision, writing- original draft, writing- review and editing.

Abdallah Shatat

Associate Professor of Management Information Systems, Bahrain Polytechnic, Kingdom of Bahrain

abdallah.shatat@polytechnic.bh

<https://orcid.org/0000-0002-2605-6358>

Co-author, responsible for conceptualization, methodology, formal analyses, supervision, writing- original draft, writing- review and editing.

Adham Hashish

PhD, assistant professor, Justice Diwan Law Firm

ahashish@gwmail.gwu.edu

<https://orcid.org/0000-0002-2547-8284>

Co-author, responsible for conceptualization, methodology, formal analyses, supervision, writing- original draft, writing- review and editing.

Enas AlQodsi*

PhD, Associate Professor, Private Law Department, United Arab Emirates University, United Arab Emirates.

enas.alqodsi@uaeu.ac.ae

<https://orcid.org/0000-0003-4643-9660>

Corresponding author, responsible for conceptualization, methodology, formal analyses, supervision, writing- original draft, writing- review and editing.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Mohammed Abdelsalam, Alaa Abouahmed, Abdallah Shatat, Adham Hashish and Enas AlQodsi This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Abdelsalam M, Abouahmed A, Shatat A, Hashish A and AlQodsi E, 'Blockchain and Smart Public Procurement Contracts: A Comparative Legal Analysis of Digital Transformation in the Public Sector' (2025) 8(4) Access to Justice in Eastern Europe 242-74 <<https://doi.org/10.33327/AJEE-18-8.4-a000137>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000137>

Summary: 1. Introduction. – 2. Methodology. – 3. The Concept of Blockchain Technology. – 3.1. *Jurisprudential Concept of Blockchain Technology.* – 3.2. *Legislative Approaches to Defining Blockchain Technology.* – 4. Types of Blockchain Technology. – 4.1. *Public Blockchain.* – 4.2. *Private Blockchain.* – 4.3. *Hybrid Blockchain.* – 5. The Concept of Smart Administrative Contracts. – 6. Types of Smart Administrative Contracts. – 6.1. *Deterministic Smart Administrative Contracts.* – 6.2. *Non-Deterministic Smart Administrative Contracts.* – 7. Contract Language and Documentation. – 8. Mechanism of Smart Contracts Operation Via Blockchain Technology. – 9. Practical Application of a Smart Administrative Contract Based on Blockchain Technology. – 10. Challenges Facing Smart Administrative Contracts Based on Blockchain Technology. – 10.1. *Legal Challenges.* – 10.2. *Technical Challenges.* – 11. Conclusion.

Keywords: *Blockchain technology, smart contracts, public procurement, technical challenges, digital transformation, comparative law.*

DETAILS FOR PUBLICATION

Date of submission: 12 Aug 2025

Date of acceptance: 04 Oct 2025

Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 3 rounds: 2 major revisions and 1 minor revision

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The authors declare that no artificial intelligence tools were used in the writing, translation, or editing of this manuscript. The research and the content of the article represent the authors' own original work. The corresponding author confirms that all co-authors complied with this declaration.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

БЛОКЧЕЙН ТА СМАРТ-ДОГОВОРИ ПРО ДЕРЖАВНІ ЗАКУПІВЛІ: ПОРІВНЯЛЬНО-ПРАВОВИЙ АНАЛІЗ ЦИФРОВОЇ ТРАНСФОРМАЦІЇ В ДЕРЖАВНОМУ СЕКТОРІ

Мохаммед Абдельсалам, Алаа Абуахмед, Абдалла Шатат Адхам Хашиш та Енас Аль-Кодсі*

АНОТАЦІЯ

Вступ. Швидкий розвиток цифрових технологій представив блокчейн як потенційний інструмент у договорах про державні закупівлі в державному секторі. Смарт-договори, особливо в межах цивільного права, отримали законодавче визнання в таких юрисдикціях, як Франція та кілька штатів США. У цій статті порушено важливі питання щодо інтеграції смарт-договорів на основі блокчейну в державні системи закупівель з метою підвищення процедурної прозорості та операційної ефективності, водночас визнаючи обмеження та залежність від інституційних рамок.

Головне питання полягає у з'ясуванні правових та технічних наслідків смарт-договорів про закупівлі на основі блокчейну. У дослідженні було з'ясовано їхній потенціал для оптимізації управління державними закупівлями та підвищення процедурної ефективності, водночас визнаючи необхідність правових гарантій, які підтримують принципи адміністративного права та враховують інституційні обмеження.

Методи. Це дослідження використовує порівняльно-аналітичний підхід, розглядаючи відповідні правові положення, технічні вимоги та адміністративну практику в різних юрисдикціях. Різні моделі блокчейну — державні, приватні, гібридні та консорціальні — було розглянуто для того, щоб оцінити їхню результативність в процесах закупівель. Проаналізовано законодавчий досвід регулювання смарт-договорів, щоб виділити найкращі практики та сформувану обґрунтовану основу для впровадження в державному секторі.

Результати та висновки. Аналіз показує, що смарт-договори на основі блокчейну можуть зменшити бюрократичні затримки та мінімізувати людські помилки, водночас забезпечуючи незмінні записи, які можуть підтримувати підзвітність. Однак успішне впровадження вимагає правових та інституційних коригувань для вирішення питань щодо можливості забезпечити виконання, розподіл відповідальності, сумісність та захист даних. Запропоновано практичну модель, що ілюструє кожен операційний крок — від складання до автоматизованого виконання — з наголосом на доцільності та дотриманні законодавства, а не на передбачуваних трансформаційних ефектах. Дослідження підкреслює необхідність адаптованого законодавства, стандартизованих протоколів та цілеспрямованого навчання державних службовців для підтримки поступової інтеграції блокчейну в укладання договорів про державні закупівлі. Ці заходи спрямовані на керівництво юридично обґрунтованим та контекстно-залежним впровадженням смарт-договорів, сприяючи сталому цифровому перетворенню в управлінні державним сектором.

Ключові слова: технологія блокчейн, смарт-договори, державні закупівлі, технічні виклики, цифрова трансформація, порівняльне право.

Research Article

FORCED SEXUAL STERILISATION OF PERSONS WITH DISABILITIES: BETWEEN INTERNATIONAL OBLIGATIONS AND NATIONAL IMPLEMENTATION: A COMPARATIVE STUDY

***Mohammed Nour Eldeen Sayed, Karem Aboelazm*,
Saleh Al Shraideh and Khalid Mohamed Dganni***

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000138>

Date of submission: 14 Jul 2025

Date of acceptance: 07 Oct 2025

Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Mohammed Nour Eldeen Sayed,
Karem Aboelazm, Saleh Al Shraideh
and Khalid Mohamed Dganni

ABSTRACT

Background: This study investigates the legal regulation of forced sterilisation of persons with disabilities through a comparative analysis of the United Arab Emirates, the Czech Republic, and the United States, evaluated against international human rights norms, particularly the Convention on the Rights of Persons with Disabilities (CRPD). Unlike much of the existing literature, which reiterates established prohibitions, this research highlights the persistence of legal loopholes that enable sterilisation without personal consent, including third-party authorisation in the UAE, guardianship and judicial approval in the Czech Republic, and significant disparities across U.S. states.

Methods: Employing a descriptive-analytical comparative methodology, the study systematically examines constitutional, legislative, and judicial texts, integrates human rights

jurisprudence, and draws on UN and NGO reports to assess practical enforcement. The findings demonstrate three original contributions: (1) mapping the causal link between guardianship regimes and the continuation of forced sterilisation practices; (2) exposing the inadequacy of partial remedies, such as the Czech Victims' Compensation Act, in addressing systemic violations; and (3) proposing a concrete policy framework comprising cooling-off periods, substituted consent, simplified consent procedures, a national registry, and redress mechanisms.

Results and Conclusions: The research advances the debate by moving beyond normative condemnation to offer an actionable reform blueprint. It argues that protecting reproductive autonomy requires universal and explicit prohibition of sterilisation without free and informed personal consent, the replacement of guardianship with decision-support systems, and the removal of sterilisation requirements from administrative processes such as legal gender recognition. By integrating comparative evidence with practical policy tools, the study contributes a novel pathway for aligning domestic laws with the CRPD and strengthening accountability in the protection of reproductive rights.

1 INTRODUCTION

The practice of forcibly sterilising persons with disabilities is among the gravest violations of human rights. It deprives the individual of the ability to make personal decisions regarding procreation and is often carried out under the pretext of “care” or “the best interests.” International bodies have condemned this practice for decades. In 2014, United Nations agencies, including the World Health Organization, affirmed that sterilisation must never be performed except on the basis of free, fully informed consent, and that forced sterilisation violates a constellation of fundamental rights—among them the rights to health, information, privacy, decision-making about the number and spacing of children, family formation, and non-discrimination, as well as the right not to be subjected to torture or cruel treatment. The joint statement by UN agencies further characterises the practice as a form of violence against women and persons with disabilities.¹

Within international human rights law, both the International Covenant on Civil and Political Rights² and the Convention on the Elimination of All Forms of Discrimination against Women³ protect bodily integrity and freedom from torture or inhuman

1 World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement*, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO (WHO 2014) <<https://iris.who.int/handle/10665/112848>> accessed 20 June 2025.

2 UNGA Res 2200A (XXI) ‘International Covenant on Civil and Political Rights’ (16 December 1966) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> accessed 20 June 2025.

3 UNGA Res 34/180 ‘Convention on the Elimination of All Forms of Discrimination against Women’ (18 December 1979) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>> accessed 20 June 2025.

treatment. This is made explicit in the Convention on the Rights of Persons with Disabilities (CRPD),⁴ which affirms that every person with a disability has the right to respect for his or her physical and mental integrity on an equal basis with others.⁵ The CRPD further recognises the right to marry and found a family based on free and full consent, to decide freely and responsibly on the number and spacing of children, and to retain fertility on an equal basis.⁶

Forced sterilisation is therefore in direct conflict with states' international obligations, as it strips the individual of reproductive freedom and interferes with bodily and mental integrity.

National constitutions likewise contain guarantees that reinforce these rights. The Constitution of the United Arab Emirates⁷ (UAE) affirms equality, social justice, security, and equal opportunities for all citizens;⁸ obliges society to care for those unable to care for themselves because of illness or incapacity;⁹ guarantees equality before the law without discrimination;¹⁰ and protects personal liberty while prohibiting torture and degrading treatment.¹¹ Read together, these provisions ground a constitutional right of persons with disabilities to protection from degrading treatment and require their free, informed consent for any medical intervention affecting fertility.

In the Czech Republic, the Charter of Fundamental Rights and Freedoms¹²—part of the constitutional order—declares that all people are free and equal in dignity and rights¹³ (prohibits discrimination on grounds such as sex or race “and other statuses”;¹⁴ protects the inviolability of the person and private life, and prohibits torture or inhuman treatment;¹⁵ and guarantees protection of personal dignity and bodily integrity.¹⁶ Forced sterilisation conflicts with these provisions by violating bodily sanctity and human dignity and by relying on disability-based discrimination.

Coercing persons with disabilities into sterilisation—whether through guardianship, medical decisions, or judicial orders—constitutes a multi-layered violation of constitutional

4 UNGA Res 61/106 'Convention on the Rights of Persons with Disabilities' (12 December 2007) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>> accessed 20 June 2025.

5 *ibid*, art 17.

6 *ibid*, art 23.

7 Constitution of the United Arab Emirates (1971) <https://www.constituteproject.org/constitution/United_Arab_Emirates_2009> accessed 20 June 2025.

8 *ibid*, art 14.

9 *ibid*, art 16.

10 *ibid*, art 25.

11 *ibid*, arts 26–28.

12 Resolution of the Presidium of the Czech National Council No 2/1993 Coll 'On the proclamation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic' (16 December 1992) <<https://lawcat.berkeley.edu/record/175215>> accessed 20 June 2025.

13 *ibid*, art 1.

14 *ibid*, arts 4–7.

15 *ibid*, art 3.

16 *ibid*, art 10.

and international rights.¹⁷ It harms equality and personal dignity and undermines the rights to bodily integrity, privacy, and family life.¹⁸ Consequently, this practice squarely breaches state obligations, whether in the UAE or the Czech Republic, to enable persons with disabilities to make their own decisions freely and to respect their humanity, and it calls for legislative and policy reforms that prohibit forced sterilisation, guarantee decision-making support, and protect reproductive rights.

The core problem is the tension between international commitments to protect bodily integrity for persons with disabilities and the persistence of some domestic rules that allow forced sterilisation or empower guardians and third parties to consent on another's behalf. In the Czech Republic, the Civil Code and health-care legislation allow guardians to consent to sterilisation without the person's free and informed consent.¹⁹ Current procedures also permit expert committees and courts to authorise sterilisation where a person is deemed unable to express his or her will.²⁰ In the UAE, although the Government has stated that forced sterilisation is prohibited,²¹ Article 13 of Federal Law No. 10 of 2008 allows sterilisation with third-party consent,²² raising concerns about alignment with the right of persons with disabilities to make their own reproductive choices.

In the United States, the issue is somewhat complex due to the federal system of government. Some states legalised and regulated forced sterilisation, such as Indiana in 1907, with the number of states enacting such laws reaching 32 by the mid-20th century. The U.S. Supreme Court's ruling in *Buck v. Bell* (1927), which upheld the constitutionality of forced sterilisation, remains a binding legal precedent and has not been overturned. This legal framework facilitated the sterilisation of a large number of people. However, some states, such as Alaska and North Carolina, completely prohibit forced sterilisation.²³

- 17 Karem Sayed Aboelazm, 'Supreme Constitutional Court Review of the Legislative Omission in Egypt in Light of International Experiences' (2024) 10(17) *Heliyon* e37269. doi:10.1016/j.heliyon.2024.e37269.
- 18 Karem Sayed Aboelazm, 'The Constitutional Framework for Public Policy in the Middle East and North Africa (MENA) Countries' (2021) 7(3) *International Journal of Public Law and Policy* 187. doi:10.1504/IJPLAP.2021.118325; Paul R Friedman, 'Human and Legal Rights of Mentally Retarded Persons' (1977) 6(1) *International Journal of Mental Health* 50.
- 19 'Respect, Protect, and Fulfill the Right to Bodily Autonomy! Ending Forced Sterilization of Women and Girls with Disabilities' (*International Disability Alliance*, 6 June 2024) <<https://www.internationaldisabilityalliance.org/blog/respect-protect-and-fulfill-right-bodily-autonomy-ending-forced-sterilization-women-and-girls>> accessed 20 June 2025.
- 20 Act of the Czech Republic No 372/2011 Coll 'On Health Services and Conditions of their Provision (Health Services Act)' (6 November 2011) <<https://www.zakonyprolidi.cz/translation/cs/2011-372?langid=1033>> accessed 20 June 2025; Act of the Czech Republic No 89/2012 Coll 'Civil Code' (3 February 2012) <<https://www.zakonyprolidi.cz/cs/2012-89>> accessed 20 June 2025.
- 21 Committee on the Rights of Persons with Disabilities, 'The Initial Report of the United Arab Emirates on its Implementation of the CRPD' (2024).
- 22 Respect, Protect, and Fulfill the Right to Bodily Autonomy (n 19).
- 23 Zixuan Wang and others, *In Communities We Trust: Institutional Failures and Sustained Solutions for Vaccine Hesitancy* (Gerald R Ford School of Public Policy University of Michigan 2021) doi:10.7302/21935.

Studying this subject is especially important because it addresses one of the most serious human rights violations faced by persons with disabilities, reveals the gap between international obligations and domestic implementation,²⁴ and highlights the ethical and legal dimensions of these practices and their psychosocial impacts. Czech statistics indicate that 889 individuals had been compensated by April 2025 under the Czech compensation law for victims of unlawful sterilisation,²⁵ underscoring the scale of the problem and the need for broad-based reform. The perceived tension between official statements in the UAE and reports by international organisations, likewise, provides a window into implementation challenges and compliance monitoring.

1.1. Research Objectives

This research analyses the regulatory frameworks governing the sterilisation of persons with disabilities in the UAE and the Czech Republic and assesses their conformity with international human rights treaties—especially the CRPD.²⁶ It also offers legislative and policy recommendations to safeguard bodily integrity and free decision-making. Additionally, the paper aims to the following:

- a) Analyse treaty provisions (CRPD; CEDAW) that prohibit forced sterilisation and protect bodily integrity for persons with disabilities.
- b) Review relevant provisions in Federal Law No. 10 of 2008²⁷ and Federal Law No. 29 of 2006²⁸ and interpret the clause allowing third-party consent to sterilisation in the UAE in light of official statements prohibiting the practice.

24 Hilali Abdullah Ahmed, *Obligations of the Pregnant Woman Towards the Fetus between Criminalization and Preamble* (Dar Al-Nahda Al-Arabiya 1996) 32; Judith A Baer, 'The Rights of the Disabled' in Judith A Baer, *Equality under the Constitution: Reclaiming the Fourteenth Amendment* (Cornell UP 1983) 190.

25 Act of the Czech Republic No 48/1997 Coll 'On Public Health Insurance and on Amendments and Additions to Certain Related Acts' (7 March 1997) <<https://www.zakonyprolidi.cz/translation/cs/1997-48?langid=1033>> accessed 20 June 2025; Act of the Czech Republic No 371/2021 Coll 'Act Amending Act No 48/1997 Coll "On Public Health Insurance and on Amendments and Supplements to Certain Related Acts, as amended, and certain other acts"' (14 September 2021) <<https://www.zakonyprolidi.cz/cs/2021-371>> accessed 20 June 2025.

26 Karem Sayed Aboelazm, 'The Judicial Constitutional Review for the Legislative Omission: A Comparative Study' (2025) 17(1) Krytyka Prawa: Niezależne Studia nad Prawem 316. doi:10.7206/kp.2080-1084.766; Muhammad Ali Al-Baz, *Birth Control Policy and Methods in the Past and Present* (Modern Age for Publishing and Distribution 1991) 361–373.

27 Federal Decree-Law of UAE No (4) of 2016 'Concerning Medical Liability' [2016] Official Gazette 601 <<https://uaelegislation.gov.ae/en/legislations/1192>> accessed 20 June 2025.

28 Federal Law of UAE No (29) of 2006 'Concerning the Rights of Persons with Special Needs' [2006] Official Gazette 453 <<https://uaelegislation.gov.ae/en/legislations/1172>> accessed 20 June 2025.

- c) Examine Civil Code and health-care provisions in the Czech²⁹ authorising guardians to consent to sterilisation; review CRPD Committee recommendations urging repeal; and cover the compensation statute for victims between 1966 and 2012 (applications accepted until 2 January 2027).
- d) Judicial developments: Discuss the European Court of Human Rights judgment in *T.H. v. Czechia* (12 June 2025),³⁰ which held that imposing sterilisation as a condition for legal gender recognition violates the right to private life, and analyse its implications for Czech law.
- e) Compare the UAE, USA and Czech frameworks regarding the protection of free consent and the availability of preventive and remedial safeguards.
- f) Propose legal and policy reforms to prevent forced sterilisation, ensure supported decision-making, and provide effective remedies and reparations.

1.2. The Research Question

To what extent do national and international laws protect persons with disabilities from forced sexual sterilisation?

In addition to the main question, the paper seeks to answer the following questions:

- a) What international standards govern the forced sterilisation of persons with disabilities and define the right to bodily integrity and free consent?
- b) How does UAE law regulate the sterilisation of persons with disabilities, and are there tensions between legal texts and practice?
- c) What Czech provisions allow sterilisation without the person's consent, and how does the state justify these measures?
- d) How do recent judgments and legislation—such as the ECtHR's *T.H. v. Czechia* and the Czech compensation law—shape the present and future of forced sterilisation?
- e) Where do the UAE, USA and Czech approaches converge and diverge in protecting persons with disabilities from forced sterilisation?
- f) What reforms would align states' laws with international standards on bodily integrity and free consent?

29 Act of the Czech Republic No 89/2012 Coll (n 20); Act of the Czech Republic No 372/2011 Coll (n 20); Act of the Czech Republic No 48/1997 Coll (n 25).

30 *TH v the Czech Republic* App no 33037/22 (ECtHR, 12 June 2025) <<https://hudoc.echr.coe.int/eng?i=001-243567>> accessed 20 June 2025.

2 METHODOLOGY

To conduct a comprehensive study on the regulation of forced sterilisation of persons with disabilities through a human-rights lens, this research adopts two main approaches: comparative legal analysis and analysis of human-rights recommendations and reports. The study employs a descriptive-analytical legal method, which involves collecting and examining statutory texts, international instruments, and case law, then comparing them across the UAE and the Czech Republic. This method includes analysing the content of legal provisions, identifying tensions with international standards, and using human-rights reporting to evaluate implementation, through the following procedures and methods:

- Primary legal texts – including constitutional provisions, statutory frameworks, and laws on medical liability or guardianship in the UAE, the Czech Republic, and the United States.
- Case law – leading decisions of the European Court of Human Rights (ECtHR), national constitutional and supreme courts, and relevant appellate judgments.
- International instruments – provisions of the Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR), together with General Comments and UN guidance.
- Scholarly and NGO reports – peer-reviewed legal scholarship, official reports, and civil society monitoring documents that interpret or evaluate the practice of sterilisation.

The temporal scope emphasised developments from 2000 to 2025, with particular focus on recent reforms and case law between 2023 and 2025, including the Constitutional Court of Czechia's 2024 decision and the ECtHR's *T.H. v. Czech Republic* (2025).

The UAE represents a MENA jurisdiction that has modernised disability-rights policy, ratified the CRPD, and enacted a non-discrimination framework. UN reporting nonetheless notes health-law clauses allowing sterilisation based on third-party consent, raising questions about adherence to free consent. The Czech Republic, a civil-law EU state with a long history of forced sterilisation, maintains Civil Code and health-care provisions that allow guardians or courts to authorise sterilisation without the person's consent, despite CRPD Committee recommendations to repeal them. The Czech Republic also adopted a compensation law in 2021 for victims sterilised between 1966 and 2012, reflecting official acknowledgement of past wrongs. Comparing these culturally and legally distinct jurisdictions helps illuminate how religion, history, and legal structure influence regulation, and supports tailored, rights-consistent recommendations.

Regarding the United States, only one aspect will be discussed, but a very important one: the origins and development of the concept of forced sterilisation, as well as the landmark court case of 1927, which forms the basis for the legal justification of forced sterilisation.

The selection of the UAE, the Czech Republic, and the United States as case studies is deliberate and grounded in comparative logic. The UAE represents a jurisdiction in the Global South with developing statutory frameworks on medical liability and guardianship, offering insight into how international norms like the CRPD are interpreted in emerging legal systems. The Czech Republic is a European Union member state that has undergone recent and significant judicial developments, including the Constitutional Court's 2024 ruling and the ECtHR's judgment in *T.H. v. Czech Republic* (2025), making it a pivotal test case for CRPD–ECHR interaction. The United States illustrates a contrasting common law system with a long and problematic history of eugenics legislation, where state-level diversity (31 states permitting, others prohibiting substituted consent) allows for a rich doctrinal comparison. Together, these jurisdictions capture a spectrum of legal traditions—civil law, common law, and hybrid systems—and provide a basis for evaluating how international standards on bodily integrity and substituted consent interact with diverse domestic frameworks.

3 CONCEPTUAL FRAMEWORK

3.1. Definition of Persons with Disabilities

The CRPD recognises “persons with disabilities” as those who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.³¹ This definition emphasises the social model of disability, connecting disability to environmental barriers rather than reducing it to a medical condition.

Federal Law No. 29 of 2006 in UAE concerning the Rights of Persons of Determination defines a “person with a disability” as anyone with a total or partial deficiency or disorder in physical, sensory, mental, communicative, educational, or psychological abilities—permanent or temporary—to a degree that reduces his or her ability to meet ordinary life requirements compared with peers without disabilities.³² The definition focuses on the impact of impairment on daily functioning.³³

In the Czech Republic, there is no single, cross-cutting statutory definition; the term is defined contextually. Governmental guidance indicates that recognition as “disabled” often requires a long-term illness or condition lasting more than one year that significantly limits physical, sensory, or mental capacity, constraining the ability to work or pursue qualifications; minor impairments generally do not qualify.³⁴

31 UNGA Res 61/106 (n 4) art 1.

32 Federal Law of UAE No (29) of 2006 (n 28) art 1.

33 Maya Khater and others, ‘The Role of Assistive Technology in Reinforcing the Rights of Persons with Disabilities to Employment from a Legal Perspective’ [2025] *International Journal of Law and Management*. doi:10.1108/IJLMA-04-2025-0151

34 Act of the Czech Republic No 89/2012 Coll (n 20); Act of the Czech Republic No 372/2011 Coll (n 20)

Some specialists define a person with a disability as “any person with a sensory, significant, or mental, psychological, or social disability that limits his ability to perform his roles at work and in life in a normal and independent manner, thereby creating a need for services, care, and specialized rehabilitation to enable him to achieve the maximum possible potential.”³⁵ Another definition describes the person “who has one or more impediments that weaken capacity and therefore needs informed external assistance—grounded in scientific and technological methods—to restore functionality to normal, or as close as possible to it.”³⁶

The Americans with Disabilities Act of 1990 (ADA) defines a person with a disability as someone who: (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a history or record of such an impairment; or (c) is perceived by others as having such an impairment.

3.2. Defining Forced Sexual Sterilisation

Mosby's Medical Dictionary defines sterilisation as “a process or procedure that renders an individual unable to reproduce,” including permanent surgical procedures such as tubal ligation or hysterectomy in women and vasectomy in men.

Sterilisation is “forced” when performed after the person has refused, or without their knowledge, or without providing a genuine opportunity for free and informed consent. In many cases, decisions are taken by a guardian, physician, or court without the participation of the person concerned. The term “coerced sterilisation” is also used where consent is extracted through pressure, misinformation, or conditionality—e.g., tying access to services or benefits to acceptance of sterilisation.

The World Health Organisation (WHO) maintains that sterilisation as a family-planning method must be available, acceptable, and of good quality, and free from discrimination and violence. It further emphasises that laws and policies must guarantee provision solely based on free and informed decision-making. UN bodies have characterised forced sterilisation as a systemic form of violence against women and girls with disabilities, noting that it may amount to torture when performed without their knowledge or consent, or in defiance of their refusal.

35 Medhat Muhammad Abu Al-Nasr, *Disability and the Disabled: A Modern Perspective* (2nd edn, Arab Group for Training and Publishing 2014) 26; Hatim Amin Muhammad Abada, *Birth Control, Birth Control, and the Extent of the State's Authority to Prevent Birth: A Jurisprudential Study* (Dar Al-Fikr Al-Jami'i 2011) 21-3; Elizabeth S Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy' (1986) 5 Duke Law Journal 806. doi:10.2307/1372669.

36 Muhammad Abdul Moneim Nour, *Medical Social Work and Rehabilitation* (Cairo Modern Library 1973) 157; Ammar Abbas Al-Husseini, *The State of Necessity and Its Impact on Criminal Liability: A Comparative Study* (Al-Halabi Legal Publications 2011).

Sexual sterilisation is a medical procedure that can be performed on both men and women. It does not entail removal or destruction of the reproductive glands; rather, it aims to permanently deprive a person of fertility and the ability to reproduce. Forced sexual sterilisation refers to a medical procedure intended to permanently prevent fertility without the individual's consent, or with defective consent—for example, where the person lacks adequate information about the nature and consequences of the procedure, misunderstands their medical condition, or where purported consent is the product of coercion, deception, or fraud.³⁷

Czech courts have defined sterilisation performed without proper (i.e., free and informed) consent as an unjustified, deeply harmful, and almost irreparable intervention that can cause profound changes in an individual's overall personality development.³⁸ This aligns with the legislator's definition of illegal sexual sterilisation in *Act on the Payment of a Specific Financial Amount to Persons Victims of Illegal Sterilisation*, which provides: "For the purposes of this law, illegal sterilisation means any fertility-preventing medical procedure to which the authorized person did not consent, or for which consent was given in violation of the legal regulations governing such procedures at the relevant time, or under conditions that seriously impede or impair the freedom and simplicity of consent."³⁹ The law adds that violations include exerting pressure, coercion, or persuasion; failing to inform the person clearly and adequately about their condition, the purpose and nature of the procedure, expected benefits, potential consequences and risks; and failing to discuss alternatives, their suitability, benefits, and risks.

4 HISTORICAL AND IDEOLOGICAL FOUNDATIONS OF FORCED STERILISATION

This section examines two emblematic cases—the United States and (Czecho) Slovakia/Czechia—to trace the phenomenon's roots and evolution.

Eugenics refers to the belief that promoting "good genes" and eliminating "bad genes" would strengthen national health by improving upbringing. Derived from the Greek *eugenes* ("well-born"), the concept was formulated in the late 19th century by Francis Galton. It gained significant traction in the early 20th century following the rediscovery (in 1900) of Gregor Mendel's 1865 research on inheritance. As heredity emerged as a foundational science, eugenicists argued that so-called "social undesirables"—including alcoholics,

37 Lukáš Novotný, 'Illegal Sterilisation in the Czech Republic' (2024) 76(8) *Europe-Asia Studies* 1187.

38 *ibid* 1188; Sayed Fahmy Ali, *Psychology of People with Motor, Hearing, Visual, and Mental Disabilities* (Dar Al-Jami'a Al-Jadida 2010) 12-8.

39 Act of the Czech Republic No 297/2021 Coll 'On the Payment of a Specific Financial Amount to Persons Victims of Illegal Sterilization' (22 July 2021) art 3 <<https://www.zakonyprolidi.cz/cs/2021-297>> accessed 20 June 2025.

prostitutes, and persons with disabilities—would reproduce more of the same, passing their supposed defects to children.⁴⁰

4.1. The Role of Eugenics in Normalizing Sexual Sterilisation

Eugenics normalised sexual sterilisation through three intertwined mechanisms: (1) politicising science by positing heredity of “feeble-mindedness” and “deviance,” thereby granting ethical and political license to eliminate the fertility of groups labeled “socially burdensome”; (2) welfare bureaucracies linking institutional cost-reduction and overcrowding to sterilisation; and (3) legislative and judicial codification that translated these claims into enduring law.

Indiana enacted the first U.S. sterilisation statute in 1907, targeting “confirmed criminals, idiots, and imbeciles.” By mid-century, 32 states had legalised forced sterilisation.⁴¹ Victims were often labelled “feeble-minded,” a capacious category that could include minor sensory impairments.⁴² California led these programs, performing about 20,000 sterilisations between 1909 and 1979—roughly one-third of all U.S. procedures.⁴³ A later federal inquiry found that, in the 1970s, federally funded programs sterilised between 100,000 and 150,000 poor people annually.⁴⁴

By 1936, despite emerging scientific criticism, more than 60,000 people had been sterilised in the U.S., disproportionately poor and often Black or Latina women.⁴⁵ The U.S. Supreme

40 Christian Malatesta, 'America's Sterilization Laws: An Essential Guide' (MA thesis, Rutgers, State University of New Jersey 2017) 6. doi:doi:10.7282/T3ZS309W; Fouad Muhammad Al Kubaisi, *Childbirth (Defining, Regulating, Increasing): A Comparative Study in Sharia and Law* (Dar Al Nawader 2012) 119.

41 Abdul Moneim Abdul Qader Al-Miladi, *From People with Special Needs: The Mentally Disabled* (University Youth Foundation 2006) 31; Camilla Ida Ravnbøl, 'The Human Rights of Minority Women: Romani Women's Rights from a Perspective on International Human Rights Law and Politics' (2010) 17(1) *International Journal on Minority and Group Rights* 1; Priti Patel, 'Forced Sterilization of Women as Discrimination' (2017) 15(38) *Public Health Reviews* 1. doi:10.1186/s40985-017-0060-9.

42 Fattouh Abdullah Al-Shazly, 'Legal Protection of Women's Right to Reproduction' (2009) 2(2) *Journal of Law and Economic Research* 129. doi:10.21608/lalexu.2009.272217; Randall Hansen and Desmond King, *Sterilized by the State: Eugenics, Race, and the Population Scare in Twentieth-Century North America* (CUP 2013) 3.

43 Novotný (n 37) 1188; Amnesty International, 'Submission to Standing Senate Committee on Human Rights Study on Sterilization without Consent' (1 April 2019) <https://sencanada.ca/content/sen/committee/421/RIDR/Briefs/AmnestyInternational_Brief_e.pdf> accessed 20 June 2025.

44 Hansen and King (n 42) 4; Muhammad Atwaif, 'Criminal Protection for the Disabled Child in Moroccan Legislation' (2015) 1(1) *Criminal Justice Journal, Morocco* 123; Ronli Sifris, 'Involuntary Sterilization of HIV-Positive Women: An Example of Intersectional Discrimination' (2015) 37(2) *Human Rights Quarterly* 464.

45 Malatesta (n 40) 6; Nadhbar Muhammad Awhab, 'Protection of the Disabled, Fetal and Adult: A Jurisprudential Study, Sterilization of the Disabled as a Model' (2017) 34(2) *Journal of the College of Islamic and Arabic Studies for Boys, Al-Azhar University* 3025.

Court's decision in *Buck v. Bell* (1927) upheld compulsory sterilisation of institutionalised persons, entrenching a legal framework under which over 60,000 people were sterilised across more than 30 states into the 1970s.⁴⁶ California alone conducted 20,108 procedures before 1964, with marked bias against those labelled mentally ill and women of Mexican or African-American origin.⁴⁷ U.S. laws influenced Nazi Germany's far more expansive program (approximately 350,000 forced sterilisations between 1934 and 1945) before eugenics waned post-war.⁴⁸

Harry Laughlin's 1922 model sterilisation statute—published in *Eugenical Sterilisation in the United States*—became a template that many states adopted.⁴⁹ *Buck v. Bell* (1927) then declared Virginia's law constitutional, with Justice Holmes's notorious line, "Three generations of imbeciles are enough," catalysing around 65,000 sterilisations.⁵⁰ Nazi officials later cited California's success to justify Germany's 1933 Law for the Prevention of Hereditarily Diseased Offspring, which resulted in 360,000 and 375,000 sterilisations.⁵¹

Although *Buck v. Bell*⁵² has never been expressly overturned by the U.S. Supreme Court, its precedential value has been substantially eroded by subsequent constitutional jurisprudence on privacy, autonomy, and equal protection. Decisions such as *Skinner v. Oklahoma*⁵³ reframed procreation as a fundamental right under the Equal Protection Clause, while later cases on reproductive autonomy (e.g., *Griswold v. Connecticut*, *Roe v. Wade*, and more recently *Obergefell v. Hodges*)⁵⁴ reinforced bodily autonomy and decisional privacy under the Due Process Clause. Despite this jurisprudential shift, the persistence of state-level sterilisation statutes for persons with disabilities reveals a doctrinal gap between

46 Karen Stote, 'The Coercive Sterilization of Aboriginal Women in Canada' (2012) 36(3) American Indian Culture and Research Journal 120. doi:10.17953; Khiara M Bridges, 'White Privilege and White Disadvantage' (2019) 105(2) Virginia Law Review 449.

47 Lucy-Ann Buckley, *Combating Disability Harassment at Work: Human Rights in Practice* (Bristol UP 2022) 21-58. doi:10.2307/j.ctv2x00vrm.11.

48 Cynthia Soohoo and Farah Diaz-Tello, 'Torture and Ill-Treatment: Forced Sterilization and Criminalization of Self-Induced Abortion' in Center for Human Rights and Humanitarian Law, *Gender Perspectives on Law and Torture: Law and Practice* (American University Washington College of Law 2021) 279; Novotný (n 37) 1188.

49 Harry Hamilton Laughlin, *Eugenical Sterilization in the United States* (Psychopathic Laboratory of the Municipal Court of Chicago 1922); Malatesta (n 40) 7; Spiro Fakhoury, *Pregnancy Regulation Using Modern Scientific Means* (Dar Al Ilm Lil Malayeen 1984) 207-8.

50 Hansen and King (n 42) 79; Carolyn Frohmader and Stephanie Ortoleva, 'The Sexual and Reproductive Rights of Women and Girls with Disabilities' (ICPD International Conference on Population and Development Beyond 2014, July 2012) <<https://ssrn.com/abstract=2444170>> accessed 20 June 2025.

51 Abdul Fattah Ali Ghazal, *The Psychology of Disabilities: Theories and Treatment Programs* (Dar Al-Ma'rifa Al-Jami'a 2016) 15; Malatesta (n 40) 3.

52 *Buck v Bell*, 274 US 200 (1927).

53 *Skinner v Oklahoma ex rel Williamson*, 316 US 535 (1942).

54 *Griswold v Connecticut*, 381 US 479 (1965); *Roe v Wade*, 410 US 113 (1973); *Obergefell v Hodges*, 576 US 644 (2015).

constitutional principles and guardianship practices, where substituted consent continues to be invoked in ways inconsistent with CRPD standards.

In Czechia, policies took on an ethnic dimension, with European bodies documenting forced sterilisations of Roma women and later efforts toward redress. Some Czech provisions and practices persisted into the 1990s. The current Czech framework still permits guardian/court-authorised sterilisation with committee and judicial oversight, including a 7–14 day consultation period.⁵⁵ The 2021 law provides compensation for women sterilised between 1966 and 2012, yet does not itself repeal third-party authorisation mechanisms.⁵⁶ In 2009, the Government issued an apology, but legislative proposals to abolish guardian authorisation did not pass.⁵⁷

In the U.S., although most eugenic statutes were repealed in the 1970s, many states replaced them with guardianship-based provisions allowing judges to authorise sterilisation for individuals deemed unable to consent. A 2021 report by the National Women's Law Centre indicated that 31 states plus the District of Columbia still allow some form of court- or guardian-authorised sterilisation, while only two—Alaska and North Carolina—broadly prohibit it, albeit with restrictions that may impede access to voluntary sterilisation.⁵⁸

5 LAWS AND CASE LAW IN SELECTED JURISDICTIONS

In the UAE, Federal Law No. 29 of 2006 enshrines the rights of Persons of Determination in education, employment, and dignified life and prohibits disability-based discrimination. Federal Law No. 10 of 2008 on Medical Liability (as amended) provides in Article 13 for sterilisation with third-party consent (e.g., family member or guardian). Although the UAE reporting to international bodies has affirmed that forced sterilisation and forced abortion are prohibited and criminalised, the third-party consent clause raises concerns about free and informed consent.⁵⁹

The UAE's Federal Decree-Law No. 4 of 2016 on Medical Liability,⁶⁰ complemented by Cabinet Resolution No. 40 of 2019,⁶¹ establishes patient consent as a cornerstone of medical

55 Patel (n 41) 6.

56 Claude Cahn, 'Justice Delayed: The Right to Effective Remedy for Victims of Coercive Sterilization in the Czech Republic' (2017) 19(2) Health and Human Rights Journal 9.

57 Novotný (n 37) 1185-202.

58 ibid 1189-90; Omar Sultan Haque and Michael Ashley Stein, 'COVID-19 Clinical Bias, Persons with Disabilities, and Human Rights' (2020) 22(2) Health and Human Rights 285.

59 Hanan bint Muhammad bin Hussein Jastaniyeh, 'Medical Precautions for Marriage: A Jurisprudential Study' (2016) 33 Journal of the Saudi Jurisprudence Association 347-8.

60 Federal Decree-Law of UAE No (4) of 2016 (n 27).

61 *Cabinet Resolution No (40) of 2019 Concerning the Executive Regulations of Federal Decree-Law No (40) of 2016 Concerning Medical Liability* [2019] Official Gazette 658 <<https://uaelegislation.gov.ae/legislations/1191>> accessed 20 June 2025.

practice, permitting exceptions only in emergencies. Legislative intent, reflected in the travaux préparatoires and official commentaries, emphasises protecting patients from non-consensual treatment and aligning medical practice with international ethics. However, ambiguities in practice arise where guardianship laws intersect with medical liability provisions, potentially allowing third-party consent for irreversible procedures such as sterilisation. Judicial interpretation remains limited, but cases concerning medical negligence and informed consent in the UAE courts suggest a cautious approach that privileges patient autonomy. This tension highlights the need for clearer jurisprudential guidance to ensure conformity with CRPD Articles 12, 17, and 25, particularly in safeguarding the reproductive rights of persons with disabilities.

In Czechia, the Civil Code and health-care law allow a guardian or court to consent to sterilisation for persons unable to consent, subject to expert committee review and judicial approval, with a 7–14 day cooling-off period and consultation.⁶² Human-rights organisations have criticised this framework for lacking sufficient safeguards to free consent and for relying on substituted consent instead of supported decision-making. The 2021 compensation law provides lump-sum payments to women sterilised between 1966 and 2012⁶³ but does not, in itself, abolish guardian-based authorisation. In *T.H. v. Czechia*,⁶⁴ the ECtHR held that requiring sterilisation as a condition for legal gender recognition violates the right to private life, adding pressure for reform.

In the U.S, because of the federal structure, the landscape varies widely by state. There is no single federal statute explicitly banning forced sterilisation across all contexts. Many states maintain provisions allowing court- or guardian-authorised sterilisation of persons with disabilities who cannot consent.⁶⁵ Some states retain legacy doctrines in guardianship codes; others (e.g., Alaska, North Carolina) prohibit forced sterilisation but in ways that may inadvertently burden access to voluntary procedures. The Supreme Court's *Buck v. Bell* decision—never formally overturned—remains a troubling precedent, notwithstanding widespread condemnation and evolving constitutional doctrine.

62 Laura Elliott, 'Victims of Violence: The Forced Sterilization of Women and Girls with Disabilities in Australia' (2017) 6(3) *Laws* 8. doi:10.3390/laws6030008.

63 Abdul Raouf Mahdi, *Explanation of the General Rules of the UAE Penal Code Compared to Egyptian Law* (UAE University Publications 1989) 501.

64 *TH v the Czech Republic* (n 30).

65 Charles W Murdock, 'Sterilization of the Retarded: A Problem or a Solution?' (1974) 62(3) *California Law Review* 917. doi:10.2307/3479751.

Table 1. State Approaches to Consent for Sterilisation of Persons with Disabilities⁶⁶

State	Rule	Substituted Consent Allowed?	Source
Texas	Guardians/courts cannot authorise sterilisation; only the individual may consent	No	Tex Health & Safety Code §592.041
New York (bill pending)	Seeks to prohibit substituted consent, requiring informed consent only	Moving to ban	NY Senate Bill S3357 (2025)
31 states + DC	Allow sterilisation under court-approval procedures	Yes	National Women's Law Center (2022)

The UAE publicly affirms adherence to free consent but retains a third-party consent pathway in medical-liability law. The Czech Republic has apologised and created compensation mechanisms, but still permits substituted consent via guardianship. The U.S. shows substantial state-level variation, with many jurisdictions retaining court-authorised sterilisation under guardianship regimes despite repudiation of eugenics. Durable protection of bodily integrity requires comprehensive reform: prohibiting forced sterilisation, embedding supported decision-making, and ensuring effective remedies.

In the UAE, Federal Decree-Law No. 4 of 2016 on Medical Liability (Article 5) requires patient consent, with narrow exceptions in emergencies. Cabinet Resolution No. 40 of 2019 further clarifies the standards for consent. However, ambiguity remains where guardians or family members give substituted consent on behalf of persons with disabilities. This tension necessitates harmonisation with CRPD Articles 12, 17, and 25, which require SDM mechanisms and judicial safeguards.

In Czechia, prior to reforms, the Civil Code (§ 29)⁶⁷ and the Specific Health Services Act (§ 21)⁶⁸ permitted third-party or judicial consent for sterilisation. The Constitutional

66 Source: Authors.
Texas Health and Safety Code - Health & Safety § 286.041 <<https://statutes.capitol.texas.gov/Docs/HS/htm/HS.286.htm#286>> accessed 20 June 2025; NY Senate Bill S3357 (2025) <<https://www.nysenate.gov/legislation/bills/2025/S3357>> accessed 20 June 2025; National Women's Law Center (2022) <<https://nwlc.org/>> accessed 20 June 2025.

67 Act of the Czech Republic No 89/2012 Coll (n 20) § 29(1).

68 Act of the Czech Republic No 373/2011 Coll 'On Specific Health Services' (6 November 2011) § 21 <<https://www.zakonyprolidi.cz/cs/2011-373>> accessed 20 June 2025.

Court, in Pl, ÚS 52/23 (2024),⁶⁹ struck down these provisions as unconstitutional, aligning national law with CRPD standards. The ECtHR's *T.H. v. Czech Republic* (2025) reinforced this trajectory, narrowing the margin of appreciation and mandating robust protections for bodily integrity.⁷⁰

6 INTERNATIONAL LAW AND HUMAN RIGHTS

What is forced sterilisation? A permanent loss of fertility imposed without free, prior, and informed consent, or by coercion, deception, exploitation, or legal conditionality (e.g., requiring sterilisation for legal gender recognition). UN practice treats “consent” obtained during severe pain, emergency, or via misinformation as coercive.

Forced sterilisation is not a discrete, isolated violation; it triggers a chain of harms—from bodily violation to enduring psychosocial and economic consequences. Under human-rights law, causation entails (1) factual “but-for” causation between the act and the harm, and (2) legal proximity (foreseeability) linking a deliberate, unlawful act to serious and direct consequences. This framing clarifies states’ positive obligations and the responsibility of public and private actors exercising state authority. The UN Special Rapporteur on Torture has repeatedly recognised that violations of sexual and reproductive health—including forced sterilisation—can amount to torture or ill-treatment when the elements of intent, severity, discriminatory purpose, and state involvement are present.⁷¹

6.1. From Act to Violation: The Core Causal Chain

For the lack of free, informed consent ⇒ violation of bodily integrity, privacy, autonomy; Consent is a communicative process requiring real capacity to understand and choose, sufficient time, and absence of pressure. Extracted “consent” (e.g., during labour, under anaesthesia, or based on misinformation) fails this standard.⁷²

Additionally, severe pain + discriminatory purpose ⇒ inhuman treatment/torture; Performing an irreversible procedure to control fertility in stigmatised groups—without urgent therapeutic need and within public institutions—may meet the threshold of ECHR.⁷³

69 Case No Pl. ÚS 52/23 (Constitutional Court of the Czech Republic, 24 April 2024) <https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/2024/Pl-52-23_AN_s_disenty.pdf> accessed 20 June 2025.

70 *TH v the Czech Republic* (n 30).

71 Mahmoud Ahmed Taha, *Childbirth between Legitimacy and Criminalization* (Dar Al-Fikr wal-Qanoon 2015) 19-20; Nathalie Antonios, ‘Sterilization Act of 1924’ *Embryo Project Encyclopedia* (2011) <<https://embryo.asu.edu/pages/sterilization-act-1924>> accessed 20 June 2025.

72 UNGA Res 61/106 (n 4) arts 17, 25; European Convention on Human Rights (ECHR), art 8 <<https://www.echr.coe.int/european-convention-on-human-rights>> accessed 20 June 2025.

73 UNGA Res 61/106 (n 4) art 3; ECHR (n 72) art 15.

Permanent loss of fertility $\Rightarrow$ violation of family life; Sterilisation permanently constrains decisions about marriage and family life.⁷⁴

Discriminatory legal frameworks (guardianship; sterilisation requirements) $\Rightarrow$ inequality; Laws that allow substituted consent or require sterility for legal recognition are themselves causal agents of violation.⁷⁵

Furthermore, deficient or concealed records $\Rightarrow$ denial of effective remedy; Without records, proving lack of consent is nearly impossible, engaging the right to access medical files.⁷⁶

Articles 12, 17, 23, 25, 15, and 5 of the CRPD collectively create a mutually reinforcing framework that outlaws forced sterilisation and rejects substituted decision-making in favour of supported decision-making, reflecting both causal and operational readings of the Convention. Similarly, the CRC, through Articles 3, 12, 19, and 24 and General Comment No. 9 on children with disabilities, condemns forced sterilisation of children and emphasises informed consent in line with the child's evolving capacities, while co-issued guidance with CEDAW (2014) explicitly frames forced sterilisation as a harmful practice. This normative framework is reinforced by ECHR jurisprudence: in *V.C. v. Slovakia* (2011) and *N.B. v. Slovakia* (2012), the European Court of Human Rights found violations of Articles 3 and 8 where sterilisation occurred without free, informed consent, in *K.H. and Others v. Slovakia* (2009) the Court recognized access to medical records as essential for private life and redress, and in *A.P., Garçon and Nicot v. France* (2017) the Court condemned sterilisation or irreversible treatment requirements for legal gender recognition under Article 8. Czech reforms and subsequent legislative adjustments illustrate how targeted legal measures can transform the causal pathway, shifting outcomes from abuse toward effective redress.

Convergence across systems:

Forced sterilisation is non-therapeutic—except in rare, immediate life-saving scenarios—and irreversibly destroys fertility, engaging CRPD Articles 15, 17, 23, and 25, CRC Articles 3, 12, 19, and 24, and ECHR Articles 3 and 8. Its common legislative cause lies in guardianship-based or court-ordered “consent” requirements and sterilisation preconditions for administrative recognition; its common procedural cause stems from deficient consent processes, including absence of cooling-off periods, pressure during labour, language barriers, and lack of alternatives; and its common structural cause arises from discriminatory stereotypes about capacity, sexuality, and social worth. Effective reform must explicitly identify and eliminate these legislative, procedural, and structural causes.

74 UNGA Res 61/106 (n 4) art 23; ECHR (n 72) art 8.

75 Committee on the Rights of Persons with Disabilities, 'General Comments' Nos 1, 3, 6 <<https://www.ohchr.org/en/treaty-bodies/crpd/general-comments>> accessed 20 June 2025.

76 *KH and Others v Slovakia* App 32881/04 (ECtHR, 28 April 2009) <<https://hudoc.echr.coe.int/eng?i=001-92418>> accessed 20 June 2025.

7 DISCUSSION

7.1. The Right of Persons with Disabilities to Marry and Found a Family

The right to marry and found a family is a pillar of human dignity. Persons with disabilities face legal, social, and clinical barriers—from capacity rules and forced medical interventions (including forced sterilisation) to stereotypes about parental fitness. Internationally, ICCPR and CRPD⁷⁷ guarantee equal rights in marriage, parenthood, and adoption, with duties to provide appropriate support to parents with disabilities. CRPD⁷⁸ requires a shift from guardianship/substituted decision-making to supported decision-making, including for marriage and reproductive choices. Regional instruments⁷⁹ reinforce free and full consent, minimum age, and protection from discrimination. Effective realisation entails negative duties (abstaining from coercion) and positive duties (access to sexual and reproductive health services, reasonable accommodation, and support). Empirical literature shows higher rates of child removal from parents with intellectual disabilities due to bias and lack of support, underscoring the need for family support programs and individualised assessments rather than categorical exclusion. ECtHR jurisprudence⁸⁰ highlights how declarations of incapacity and guardianship impact family life and marriage.

7.2. The Right to Manage One's Sexual and Reproductive Life

Managing one's sexual and reproductive life encompasses comprehensive sexuality education; access to accurate information; non-discriminatory access to contraception, infertility treatment, antenatal/postnatal care, and STI/HIV services; respect for privacy and confidentiality; freedom from violence and coercion (including forced sterilisation, abortion, or contraception); universal accessibility; accountability; and the meaningful participation of persons with disabilities—especially women and youth—in policy design. CRPD Arts. 12, 23, and 25, together with WHO and UNFPA guidance, set the substantive and procedural standards. Evidence shows elevated exposure to violence among persons with disabilities, service access gaps, and, for some groups, higher risks of adverse pregnancy outcomes, pointing to the necessity of tailored care—not exclusion. States' negative obligations (non-interference) and positive obligations (enabling environments and supports) are engaged throughout.

77 UNGA Res 61/106 (n 4) art 23.

78 *ibid*, art 12 (and General Comment No 1).

79 e.g., the Arab Charter on Human Rights; the African Charter and Maputo Protocol.

80 Rosalind Pollack Petchesky, 'Reproduction, Ethics, and Public Policy: The Federal Sterilization Regulations' (1979) 9(5) *The Hastings Center Report* 29. doi:10.2307/3561518.

8 CONCLUSIONS

This paper demonstrates that contemporary human-rights frameworks converge on a central principle: irreversible medical interventions, including sterilisation, are legally and ethically justified only when undertaken with a person's free, prior, and informed consent. Analysis across the UAE, the Czech Republic, and the United States—contextualised within the CRPD, CRC, and ECHR—reveals that while international norms increasingly emphasise consent and individual autonomy, national implementation exhibits considerable variation in legislative clarity, procedural safeguards, and enforcement mechanisms.

In particular, the research highlights persistent legal and structural pathways—such as guardianship-based or court-ordered “consent” and sterilisation as a precondition for administrative recognition—that continue to place persons with disabilities and marginalised groups at risk of non-therapeutic sterilisation. Procedural shortcomings, including inadequate consent processes, coercive practices during labour or medical treatment, language barriers, and the absence of alternative support mechanisms, further exacerbate vulnerability. These are reinforced by structural stereotypes regarding capacity, sexuality, and social worth that underpin systemic discrimination.

Conversely, comparative jurisprudence—most notably from the decisions of the European Court of Human Rights and the Czech Constitutional Court—demonstrates that targeted legislative and judicial interventions can effectively disrupt the causal chain from abuse to redress, illustrating the potential for law to both prevent and remedy violations. Taken together, these findings underscore that safeguarding reproductive autonomy requires not only codified consent standards but also robust procedural protections, support for decision-making aligned with CRPD Article 12, and mechanisms to address historical harms, all grounded in empirical and doctrinal evidence.

The comparative analysis of the UAE, the Czech Republic, and the United States indicates that preventing non-therapeutic or coercive sterilisation demands the operationalisation of informed consent through a coherent combination of substantive, procedural, and institutional safeguards. Evidence from international instruments and domestic reforms demonstrates that jurisdictions articulating explicit prohibitions, specifying procedural conditions, and recognising supported rather than substituted decision-making achieve greater alignment with contemporary human-rights standards.

Across all jurisdictions, clarity of legal definition emerges as a key determinant of protection. Criminal and civil frameworks that explicitly define non-consensual sterilisation as unlawful, and that restrict any substituted consent to narrowly defined, immediately life-saving circumstances, correlate with stronger compliance with CRPD and ECHR standards—comparative experience, especially in the Czech Republic following

T.H. v. Czechia and Pl. ÚS 52/23 shows that legislative precision and transparent redress mechanisms enhance deterrence and victim access to remedies.

The study also finds that procedural safeguards—including standardised consent documentation, mandatory reflection periods, language and accessibility accommodations, and protection from coercive circumstances such as labour or anaesthesia—are critical in ensuring the validity of consent. Jurisdictions that institutionalise such measures, supported by data protection and privacy guarantees, tend to report a lower incidence of contested sterilisations.

Decision-making models remain a central axis of divergence. Systems that retain plenary guardianship or broad substituted-consent powers are associated with a higher risk of abuse. In contrast, frameworks implementing supported decision-making and communication facilitation, as endorsed under CRPD Article 12 and General Comment No. 1, more effectively preserve individual autonomy while maintaining medical integrity. The evidence thus supports a gradual transition from guardianship regimes toward supported decision-making structures, accompanied by appropriate training for health and judicial personnel.

The role of oversight and transparency also appears pivotal. Adequate protection is associated with registries for irreversible medical procedures, multidisciplinary ethics committees, and accessible complaint mechanisms. The Czech redress framework further illustrates that burden-shifting presumptions and extended limitation periods can facilitate accountability in cases where medical documentation is incomplete or withheld.

Finally, context-specific observations highlight the diversity of reform trajectories. In the UAE, existing general provisions on medical consent and criminal liability may evolve toward a dedicated sterilisation framework that integrates procedural guarantees and prohibits third-party consent, except in strictly defined emergencies. In the Czech Republic, ongoing harmonisation, informed by both European and domestic jurisprudence, reinforces the shift toward supported decision-making and transparent reporting of compensation outcomes. In the United States, the persistence of state-level variation underscores the need for a federal baseline on informed consent and procedural safeguards in all institutional contexts, including prisons, immigration facilities, and long-term care facilities.

Overall, the findings suggest that legal reform in this domain is most effective when it integrates explicit statutory prohibitions, procedurally robust consent mechanisms, independent oversight, and individualised support in decision-making, rather than relying solely on general principles of medical liability or professional ethics.

REFERENCES

1. Abada HAM, *Birth Control, Birth Control, and the Extent of the State's Authority to Prevent Birth: A Jurisprudential Study* (Dar Al-Fikr Al-Jami'i 2011)
2. Aboelazm KS, 'Supreme Constitutional Court Review of the Legislative Omission in Egypt in Light of International Experiences' (2024) 10(17) Heliyon e37269. doi:10.1016/j.heliyon.2024.e37269
3. Aboelazm KS, 'The Constitutional Framework for Public Policy in the Middle East and North Africa (MENA) Countries' (2021) 7(3) International Journal of Public Law and Policy 187. doi:10.1504/IJPLAP.2021.118325
4. Aboelazm KS, 'The Judicial Constitutional Review for the Legislative Omission: A Comparative Study' (2025) 17(1) 'Krytyka Prawa: Niezależne Studia nad Prawem 316. doi:10.7206/kp.2080-1084.766
5. Abu Al-Nasr MM, *Disability and the Disabled: A Modern Perspective* (Arab Group for Training and Publishing 2014)
6. Ahmed HA, *Obligations of the Pregnant Woman Towards the Fetus between Criminalization and Preamble* (Dar Al-Nahda Al-Arabiya 1996)
7. Al Kubaisi FM, *Childbirth (Defining, Regulating, Increasing): A Comparative Study in Sharia and Law* (Dar Al Nawader 2012)
8. Al-Baz MA, *Birth Control Policy and Methods in the Past and Present* (Modern Age for Publishing and Distribution 1991)
9. Al-Husseini AA, *The State of Necessity and Its Impact on Criminal Liability: A Comparative Study* (Al-Halabi Legal Publications 2011)
10. Al-Miladi AMAQ, *From People with Special Needs: The Mentally Disabled* (University Youth Foundation 2006)
11. Al-Shazly FA, 'Legal Protection of Women's Right to Reproduction' (2009) 2(2) Journal of Law and Economic Research 129. doi: 10.21608/lalexu.2009.272217
12. Ali SF, *Psychology of People with Motor, Hearing, Visual, and Mental Disabilities* (Dar Al-Jami'a Al-Jadida 2010)
13. Antonios N, 'Sterilization Act of 1924' *Embryo Project Encyclopedia* (2011) <<https://embryo.asu.edu/pages/sterilization-act-1924>> accessed 20 June 2025
14. Atwaif M, 'Criminal Protection for the Disabled Child in Moroccan Legislation' (2015) 1(1) Criminal Justice Journal, Morocco 123
15. Awhab NM, 'Protection of the Disabled, Fetal and Adult: A Jurisprudential Study, Sterilization of the Disabled as a Model' (2017) 34(2) Journal of the College of Islamic and Arabic Studies for Boys, Al-Azhar University 2990

16. Baer JA, 'The Rights of the Disabled' in Baer JA, *Equality under the Constitution: Reclaiming the Fourteenth Amendment* (Cornell UP 1983)
17. Bridges KM, 'White Privilege and White Disadvantage' (2019) 105(2) Virginia Law Review 449
18. Buckley LA, *Combatting Disability Harassment at Work: Human Rights in Practice* (Bristol UP 2022) 21. doi:10.2307/j.ctv2x00vrm.11
19. Cahn C, 'Justice Delayed: The Right to Effective Remedy for Victims of Coercive Sterilization in the Czech Republic' (2017) 19(2) Health and Human Rights Journal 9
20. Elliott L, 'Victims of Violence: The Forced Sterilization of Women and Girls with Disabilities in Australia' (2017) 6(3) Laws 8. doi:10.3390/laws6030008
21. Fakhoury S, *Pregnancy Regulation Using Modern Scientific Means* (Dar Al Ilm Lil Malayeen 1984)
22. Friedman PR, 'Human and Legal Rights of Mentally Retarded Persons' (1977) 6(1) International Journal of Mental Health 50.
23. Frohmader C and Ortoleva S, 'The Sexual and Reproductive Rights of Women and Girls with Disabilities' (ICPD International Conference on Population and Development Beyond 2014, July 2012)
24. Ghazal AFA, *The Psychology of Disabilities: Theories and Treatment Programs* (Dar Al-Ma'rifa Al-Jami'a 2016)
25. Hansen R and King D, *Sterilized by the State: Eugenics, Race, and the Population Scare in Twentieth-Century North America* (CUP 2013)
26. Haque OS and Stein MA, 'COVID-19 Clinical Bias, Persons with Disabilities, and Human Rights' (2020) 22(2) Health and Human Rights 285
27. Jastaniyeh HMH, 'Medical Precautions for Marriage: A Jurisprudential Study' (2016) 33 Journal of the Saudi Jurisprudence Association 257
28. Khater M and others, 'The Role of Assistive Technology in Reinforcing the Rights of Persons with Disabilities to Employment from a Legal Perspective' [2025] International Journal of Law and Management. doi:10.1108/IJLMA-04-2025-0151
29. Laughlin HH, *Eugenical Sterilization in the United States* (Psychopathic Laboratory of the Municipal Court of Chicago 1922)
30. Mahdi AR, *Explanation of the General Rules of the UAE Penal Code Compared to Egyptian Law* (UAE University Publications 1989)
31. Malatesta C, 'America's Sterilization Laws: An Essential Guide' (MA thesis, Rutgers, State University of New Jersey 2017). doi:doi:10.7282/T3ZS309W
32. Moneim Nour MA, *Medical Social Work and Rehabilitation* (Cairo Modern Library 1973)

33. Murdock CW, 'Sterilization of the Retarded: A Problem or a Solution?' (1974) 62(3) California Law Review 917. doi:10.2307/3479751
34. Novotný L, 'Illegal Sterilisation in the Czech Republic' (2024) 76(8) Europe-Asia Studies 1185
35. Patel P, 'Forced Sterilization of Women as Discrimination' (2017) 15(38) Public Health Reviews 1. doi:10.1186/s40985-017-0060-9
36. Petchesky RP, 'Reproduction, Ethics, and Public Policy: The Federal Sterilization Regulations' (1979) 9(5) The Hastings Center Report 29. doi:10.2307/3561518
37. Ravnbøl CI, 'The Human Rights of Minority Women: Romani Women's Rights from a Perspective on International Human Rights Law and Politics' (2010) 17(1) International Journal on Minority and Group Rights 1
38. Scott ES, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy' (1986) 5 Duke Law Journal 806. doi:10.2307/1372669
39. Sifris R, 'Involuntary Sterilization of HIV-Positive Women: An Example of Intersectional Discrimination' (2015) 37(2) Human Rights Quarterly 464
40. Soohoo C and Diaz-Tello F, 'Torture and Ill-Treatment: Forced Sterilization and Criminalization of Self-Induced Abortion' in Center for Human Rights and Humanitarian Law, *Gender Perspectives on Law and Torture: Law and Practice* (American University Washington College of Law 2021) 279
41. Stote K, 'The Coercive Sterilization of Aboriginal Women in Canada' (2012) 36(3) American Indian Culture and Research Journal 117. doi:10.17953
42. Taha MA, *Childbirth between Legitimacy and Criminalization* (Dar Al-Fikr wal-Qanoon 2015)
43. Wang Z and others, *In Communities We Trust: Institutional Failures and Sustained Solutions for Vaccine Hesitancy* (Gerald R Ford School of Public Policy University of Michigan 2021) doi:10.7302/21935

AUTHORS INFORMATION

Mohammed Nour Eldeen Sayed

PhD (Law), Associate Professor in Criminal Law, College of Law, University of Kalba, United Arab Emirates

mohammed.sayed@ukb.ac.ae

<https://orcid.org/0009-0003-8952-3552>

Co-author, responsible for Conceptualization, Data curation, Formal Analysis, Investigation, Methodology, Resources, Validation, Writing – original draft

Karem Aboelazm*

PhD (Law), Assistant Professor, College of Law, United Arab Emirates University, United Arab Emirates

karem.s.aboelazm@gmail.com

<https://orcid.org/0000-0001-6126-1114>

Corresponding author, responsible for Conceptualization, Data curation, Formal Analysis, Investigation, Methodology, Project administration, Resources, Supervision, Validation, Visualization, Writing – original draft, and Writing – review & editing

Saleh Al Shraideh

PhD (Law), Associate Professor, College of Law, University of Kalba, United Arab Emirates
saleh.shraideh@ukb.ac.ae

<https://orcid.org/0009-0001-5325-9927>

Co-author, responsible for Conceptualization, Data curation, Formal Analysis, Investigation, Methodology, Resources, Validation, Writing – original draft

Khalid Mohamed Dganni

PhD (Law), Associate Professor College of Law, University of Sharjah, United Arab Emirates
kdganni@sharjah.ac.ae

<https://orcid.org/0000-0003-1139-2495>

Co-author, responsible for Conceptualization, Data curation, Formal Analysis, Investigation, Methodology, Resources, Validation, Writing – original draft

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Mohammed Nour Eldeen Sayed, Karem Aboelazm, Saleh Al Shraideh and Khalid Mohamed Dganni. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Eldeen Sayed MN, Aboelazm K, Al Shraideh S and Dganni KM, 'Forced Sexual Sterilisation of Persons with Disabilities: Between International Obligations and National Implementation: A Comparative Study' (2025) 8(4) Access to Justice in Eastern Europe 275-300 <<https://doi.org/10.33327/AJEE-18-8.4-a000138>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000138>

Summary: 1. Introduction. – 1.1. *Research Objectives*. – 1.2. *The Research Question*. – 2. Methodology. – 3. Conceptual Framework. – 3.1. *Definition Of Persons With Disabilities*. – 3.2. *Defining Forced Sexual Sterilisation*. – 4. Historical And Ideological Foundations Of Forced Sterilisation. – 4.1. *The Role Of Eugenics In Normalising Sexual Sterilisation*. – 5. Laws And Case Law In Selected Jurisdictions. – 6. International Law And Human Rights. – 6.1. *From Act To Violation: The Core Causal Chain*. – 7. Discussion – 7.1. *The Right Of Persons With Disabilities To Marry And Found A Family*. – 7.2. *The Right To Manage One's Sexual And Reproductive Life*. – 8. Conclusions.

Keywords: *Forced sterilisation; people with disabilities; substituted consent; bodily integrity; guardianship.*

DETAILS FOR PUBLICATION

Date of submission: 14 Jul 2025

Date of acceptance: 07 Oct 2025

Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 2 rounds with major revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The authors declare that no artificial intelligence tools were used in the writing, translation, or editing of this manuscript. The research and the content of the article represent the authors' own original work. The corresponding author confirms that all co-authors complied with this declaration.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРИМУСОВА СТЕРИЛІЗАЦІЯ ОСІБ З ІНВАЛІДНІСТЮ: МІЖНАРОДНІ ЗОБОВ'ЯЗАННЯ ТА НАЦІОНАЛЬНА ПРАКТИКА – ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ

Могаммед Нур Ельдін Саїд, Карем Абоелазм*, Салез Аль Шрайдез та Халід Могаммед Дганні

АНОТАЦІЯ

Вступ. Це дослідження, що присвячене вивченню правового регулювання примусової стерилізації осіб з інвалідністю, здійснене на основі порівняльного аналізу ситуації в Об'єднаних Арабських Еміратах, Чеській Республіці та Сполучених Штатах Америки, а також оцінене відповідно до міжнародних норм у сфері прав людини, зокрема Конвенції про права осіб з інвалідністю (CRPD). На відміну від більшої частини наявної літератури, яка повторює встановлені заборони, ця стаття підкреслює існування правових прогалів, які дозволяють проводити стерилізацію без особистої згоди, зокрема зважаючи на дозвіл третьої сторони в ОАЕ, згоду опікунів та судове схвалення в Чеській Республіці, а також значні розбіжності між штатами США.

Методи. Використовуючи описово-аналітичну порівняльну методологію, у дослідженні системно розглядаються конституційні, законодавчі та судові тексти, також було інтегровано судову практику з прав людини. Стаття спирається на звіти ООН та неурядових організацій для оцінки практичного застосування. Результати демонструють три оригінальні внески: (1) визначення причинно-наслідкового зв'язку між режимами опіки та продовженням практики примусової стерилізації; (2) викриття часткової невідповідності засобів правового захисту, таких як Закон Чехії про компенсацію жертвам, у вирішенні системних порушень; та (3) пропозиція конкретної політичної бази, що передбачає період відстрочки, надання згоди представником, спрощені процедури отримання згоди, національний реєстр та механізми відшкодування.

Результати та висновки. У дослідженні було розвинуто дискусію, яка виходить за межі нормативного осуду, щоб запропонувати дієвий план реформ. У ньому стверджується, що захист репродуктивної автономії вимагає універсальної та чіткої заборони стерилізації без вільної та усвідомленої особистої згоди, заміни опіки системами підтримки рішень та виключення вимог щодо стерилізації з адміністративних процесів, таких як юридичне визнання статі. Інтегруючи порівняльні дані з практичними інструментами політики, дослідження пропонує новий шлях для узгодження національного законодавства з Конвенцією про права осіб з інвалідністю та посилення підзвітності у захисті репродуктивних прав.

Ключові слова. Примусова стерилізація; люди з інвалідністю; надання згоди представником; тілесна недоторканність; опіка.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-a000142>

Date of submission: 10 Aug 2025

Date of acceptance: 08 Oct 2025

Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Dinh The Hung

Research Article

THE LEGAL FRAMEWORK OF ELECTRONIC EVIDENCE IN VIETNAMESE CRIMINAL PROCEDURE: FROM THE BUDAPEST CONVENTION TO DOMESTIC LEGISLATION

Dinh The Hung

ABSTRACT

Background: *Electronic evidence constitutes a critical and sensitive subject addressed in international instruments on crime prevention, most notably the Budapest Convention on Cybercrime, and the Treaty on Cybercrime – UN (the Hanoi Convention), which was newly signed in Hanoi, Vietnam, in October 2025. The legal treatment of electronic evidence has emerged as one of the most vigorously debated topics within academic circles, particularly in discussions concerning the domestic incorporation of international treaty obligations.*

Vietnam's Criminal Procedure Code of 2015 represents a significant development by formally recognising electronic data as a legitimate form of evidence, equivalent in probative value to other traditional sources. As electronic evidence is becoming increasingly prevalent across a wide spectrum of criminal offences, this recognition is timely. However, with the rise of cybercrime, Vietnam's current legal framework falls short of European standards, particularly in terms of conceptual clarity,

procedural safeguards for the collection and evaluation of electronic evidence, protection of human rights, and adherence to adversarial principles.

Accordingly, this article aims to clarify the theoretical and legal framework for electronic evidence under European standards, compare it with Vietnam's approach, and identify the theoretical and legal gaps that must be addressed—such as the need for clearer definitions, stronger procedural guarantees in evidence collection and assessment, human rights protections, and the reinforcement of adversarial principles.

Methods: To conduct a comparative analysis of electronic evidence within Vietnam's criminal procedure law and international legal frameworks, the study draws on methodologies rooted in comparative legal studies. The analysis focuses on the comparative examination of international and domestic legal provisions concerning electronic evidence. Accordingly, the author makes extensive use of comparative legal methods, including normative comparison and functional comparison, to identify both similarities and differences between Vietnam's regulations on sources of evidence in criminal procedure and those found in international instruments and the legal systems of other jurisdictions.

Results and conclusions: The article concludes that Vietnam's legal provisions and practical implementation regarding electronic evidence must draw upon international experience in several key respects: the accurate conceptualisation of electronic evidence, the development of standardised procedures for its collection, and the refinement of legal mechanisms governing the duty to produce evidence, forensic examination, and the application of special investigative measures. Such reforms are essential to ensure the authenticity and legality of electronic evidence while safeguarding human rights within the criminal justice process.

1 INTRODUCTION

Statistical data, academic literature, and practical experience in combating cybercrime worldwide have demonstrated that cybercrime is a transnational issue of global concern. Policymakers widely agree that cybercrime constitutes a core priority requiring immediate action at the EU level, ranging from public-private cooperation to the exchange of best practices among stakeholders.¹

1 See amongst others: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Agenda on Security (COM (2015) 185 final, 28 April 2015) 13, 19-20 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015DC0185>> accessed 10 August 2025; Commission Services, 'Improving Cross-Border Access to Electronic Evidence: Findings from the Expert Process and Suggested Way Forward' (European Commission, 22 May 2017) <https://home-affairs.ec.europa.eu/system/files/2017-05/20170522_non-paper_electronic_evidence_en.pdf> accessed 10 August 2025.

Unlike traditional crimes, which typically leave physical traces in the material world, cybercrimes occur not only in the physical realm but also within cyberspace. Naturally, the traces left behind in this environment are called digital traces.² In other words, although communication in cyberspace is mediated through electronic devices, it remains a form of interaction that inevitably generates traces, thus giving rise to electronic evidence.³

Due to the unique *modus operandi* of cybercriminals and the inherent characteristics of the digital environment, the traces they leave differ significantly from conventional forms of evidence and are now recognised as electronic evidence. Electronic evidence has already begun to reshape and will continue to transform the criminal procedure frameworks of national jurisdictions. While procedural systems may vary across countries, they must nonetheless adhere to universal standards governing evidence, particularly the principles of integrity, authenticity and legality in the treatment of electronic evidence.

Vietnam's Criminal Procedure Law is currently under pressure to reform to keep pace with the rapid advancement of science and technology and the evolving nature of cybercrime. Since 2015, Vietnam has undertaken procedural reforms to adapt to technological developments, notably by establishing a general legal framework to regulate criminal investigations in the digital era. This includes the formal recognition of electronic data as a legitimate source of evidence, the introduction of basic procedures for the collection and processing of electronic evidence, and the authorisation of various digital investigative techniques under existing legal mandates (e.g., computer searches, data access, electronic surveillance). However, in practice, these procedures remain largely indistinguishable from those applied to traditional forms of evidence. Compounding this issue is the limited technical expertise among law enforcement personnel and the lack of specialised training in digital forensics. These deficiencies have led to scepticism regarding the authenticity and legality of electronic evidence, as well as concerns over the protection of human rights in criminal proceedings.

This situation underscores Vietnam's pressing need to assimilate the successes and advancements of international legal frameworks, particularly the standards in the European Treaty Series (ETS) and the legal systems of countries within its sphere of influence, to enhance its domestic legislation. The Budapest Convention,⁴ for instance, is widely regarded as having transcended its European origins, with several signatory and ratifying states outside the Council of Europe, including the United States, Japan, and

2 Bart Custers and Lonneke Stevens, 'The Use of Data as Evidence in Dutch Criminal Courts' (2021) 29(1) *European Journal of Crime, Criminal Law and Criminal Justice* 25. doi:10.1163/15718174-bja10015.

3 Ken Zatyko and John Bay, 'The Digital Forensics Cyber Exchange Principle' (*Villanova University, College of Liberal Arts and Sciences*, 22 April 2013) <http://www.csc.villanova.edu/~dprice/9010sp14/extra_handouts/The_Digital_Forensics_Cyber_Exchange_Principle_-_2013-04-22.pdf> accessed 10 August 2025.

4 Convention on Cybercrime (Budapest Convention) (23 November 2001) ETS 185.

Australia.⁵ Although Vietnam is not yet a member of the Convention, it has engaged in cooperative efforts with countries operating under its influence in the transnational fight against cybercrime, particularly in the field of electronic evidence investigation. Furthermore, research indicates that Europe ranks highest in the adequacy of national laws governing cybercrime investigations: approximately 70% of surveyed European countries reported that their investigative powers are sufficient, 25% deemed them partially sufficient, and 5% considered them insufficient.⁶

Compared to European standards, Vietnam's legal framework still contains several gaps that need to be addressed, including: (i) the conceptualisation of electronic evidence and electronic data; (ii) the procedural gaps in the digital investigation workflow; (iii) obligations and mechanisms for cooperation with service provider; (iv) standards for assessing admissibility and technological reliability; (v) protection of human rights and judicial oversight; and (vi) digital forensic capacity and the integrity of the chain of custody. To address these issues, this article will examine the theoretical framework for electronic evidence, compare European standards with Vietnamese law, and identify areas where legal and conceptual development is needed.

A comparative study of electronic evidence in Vietnam may offer valuable insights for other legal jurisdictions and contribute practical experience to countries in the process of integrating international and foreign legal standards on this issue. This research is particularly relevant given the forthcoming signing of an international convention on cybercrime in Hanoi, as well as the growing imperative for international cooperation to combat cybercrime.

2 METHODOLOGY AND RESEARCH METHODS

The study adopts a comparative law approach to examine and address the issue of electronic evidence within the context of Vietnamese law and European legal systems. For a meaningful comparison, it is essential to establish a common analytical basis; without such a foundation, identifying similarities and differences or formulating recommendations for legal harmonisation and adoption would be impossible. Comparative analysis also requires a thorough understanding of the legal systems under examination—namely, the Budapest

5 Deliverable 3.2 of the E-CRIME project (Grant Agreement Number 607775): E-CRIME Deliverable 3.2 final report on countermeasure including policy and enforcement responses, March 2015 for more information on cybercrimes and the Cybercrime Convention. See: 'Economic Impacts of Cybercrime (E-CRIME, Grant agreement ID 607775)' (European Commission, 27 May 2024) <<https://cordis.europa.eu/project/id/607775/reporting>> accessed 10 August 2025.

6 Jeanne Pia Mifsud Bonnici, Melania Tudorica and Joseph A Cannataci, 'The European Legal Framework on Electronic Evidence' in Maria Angela Biasiotti and others, *Handling and Exchanging Electronic Evidence Across Europe* (Springer 2018) 189. doi:10.1007/978-3-319-74872-6_11.

Convention and the legal frameworks of selected European countries—while the comparative system is represented by Vietnam's legal regime.

The objective of this comparison is to identify similarities and differences between Vietnam's national law and those of other jurisdictions worldwide. The comparative content focuses on core issues related to electronic evidence, including procedures for its collection and preservation, as well as the protection of human rights in criminal proceedings.

To assess the compatibility between European legal systems and Vietnamese law regarding electronic evidence, the analysis begins by identifying key similarities between the two frameworks. Establishing such similarities is a prerequisite for assessing the extent to which Vietnam's criminal procedure law can assimilate European legal standards. The similarities highlighted include the underlying models of criminal procedure and the theory of evidence, both of which exert significant influence on the regulation of electronic evidence in each system. Vietnam shares notable parallels with European law in both foundational aspects.

This study also employs the theory of legal transplantation to identify international best practices that Vietnam should consider adopting. Legal transplantation refers to the horizontal transfer of laws and legal institutions from one country to another, or the vertical transfer from international organisations to national jurisdictions. Such transplantation may occur through imposition or voluntary adoption and may encompass an entire legal system, specific statutes, selected legal principles, or doctrinal frameworks.⁷ Scholars have examined the foundations, influencing factors, modalities, and processes involved in legal transplantation. Vietnam currently possesses the necessary political and legal foundations to incorporate international norms on electronic evidence into its domestic legal system. Moreover, the country has acceded to international conventions on transnational and cybercrime. However, once a state becomes a signatory and ratifies such conventions, the legislative obligations arising therefrom must be implemented in ways that reflect the specific conditions and characteristics of each jurisdiction.⁸

The study employs the method of legal analysis, focusing on studies related to electronic evidence and the relevant provisions of international law, national laws of selected European countries, and Vietnam's Criminal Procedure Law. The comparative method is applied to identify similarities and differences between these two legal systems. The comparative framework centers on the current international legal regime, with particular reference to the ETS; the Second Additional Protocol to the Cybercrime Convention on enhanced co-operation and the disclosure of electronic evidence of the European Council;⁹

7 John Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2008) 40(3) *NYU Journal of International Law and Politics* 657.

8 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/Res/39/46, 10 December 1984) [1996] UNTS 1465/85, art 11.

9 Second Additional Protocol to the Convention on Cybercrime on Enhanced Cooperation and Disclosure of Electronic Evidence (12 May 2022) CETS 224.

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (repealing Council Framework Decision 2008/977/JHA),¹⁰ and Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.¹¹

The analysis also considers the legal frameworks of several European and Eastern European countries, including the Netherlands, Poland, Ukraine, and Germany. Vietnam's current legal framework is examined through the Criminal Procedure Code of 2015¹² and the Law on Electronic Data.¹³

This study proceeds on the assumption that the legal framework for electronic evidence established by the European Convention on Cybercrime has significantly advanced beyond that of Vietnam. In contrast, Vietnam's current legal provisions on this matter still exhibit notable gaps in meeting those international standards. Consequently, Vietnam's legal system stands to benefit from the experiences and best practices of European jurisdictions in developing a more robust and coherent legal framework for electronic evidence.

3 THEORETICAL FRAMEWORK ON ELECTRONIC EVIDENCE

To compare European and Vietnamese standards on electronic evidence in criminal procedure, a theoretical framework on electronic evidence is required as a point of reference. Such a framework should cover its core elements, namely: terminology and definitions; the characteristic features of electronic evidence; the fundamental principles governing electronic evidence; the processes for collection; and the criteria for the assessment and admissibility of electronic evidence. The following sections examine these issues in greater detail.

10 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data, and Repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89.

11 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 Regarding the European Investigation Order in Criminal Matters [2014] OJ L 130/1.

12 Law of Vietnam No 101/2015/QH13 'Criminal Procedure Code' (27 November 2015) <<https://vanban.chinhphu.vn/default.aspx?pageid=27160&docid=183217>> accessed 10 August 2025. [in Vietnamese]

13 Law of Vietnam No 60/2024/QH15 'On Data' (30 November 2024) <<https://chinhphu.vn/?pageid=27160&docid=212488&classid=1&typegroupid=3>> accessed 10 August 2025. [in Vietnamese]

3.1. Concept of Electronic Evidence

The emergence of electronic evidence poses one of the greatest challenges to the traditional doctrine of evidence. Unlike physical evidence, which is tangible, electronic evidence consists of information that is generated, transmitted, or stored by electronic means. Accordingly, the first issue that needs to be addressed concerns the terminology and concept of electronic evidence. The definition of electronic evidence depends on both the general theory of evidence and its specific characteristics. The following section examines these two aspects and, on that basis, proposes a definition of electronic evidence.

Currently, two distinct approaches to terminology are in use: *electronic evidence* và *digital evidence*. One prevailing viewpoint asserts that the term electronic evidence “better reflects the cybernetic aspect of information transmission, processing and preservation in view of the processes of information transformation using a binary code,” and that “devices and machines processing and saving digital information should be called electronic.”¹⁴

From a theoretical perspective, the concept of digital evidence remains a subject of vigorous debate in both European countries and Vietnam. Such debate is entirely justified, as the term “digital evidence” appears frequently in legal texts, yet its precise meaning requires further theoretical clarification. Electronic evidence and evidence collected via information and communication technology also introduce new work practices and tools, necessitating a coherent and supportive normative framework. When seeking to achieve such a framework, it is first necessary to determine what should be considered electronic evidence.¹⁵ To date, there is no evidence to suggest that the absence of a unified definition of electronic evidence has hindered cooperation among Member States in the collection, preservation, and use of such evidence. However, a standardised definition could facilitate the exchange of electronic evidence, an indispensable component of international cooperation, and is regarded as a useful starting point for engaging with electronic evidence frameworks.¹⁶ A shared understanding of the concept of electronic evidence, therefore, constitutes a foundational element, alongside other components such as procedures for collection, preservation, and evaluation, within a common legal framework governing electronic evidence.

14 N Zozulia, ‘Electronic or Digital Evidence: Improving Amendments in Procedural Legislation’ (Ukrainian Law, 8 May 2018) <https://www.bitlex.ua/uk/blog/news/post/elektronni_chy_tsyfrov_i_dokazy_udoskonalennya_zmin_do_protseasnogo_zakonodavstva> accessed 10 August 2025. [in Ukrainian]; Galina Avdeeva and Elzbieta Żywucka-Kozłowska, ‘Problems of Using Digital Evidence in Criminal Justice of Ukraine and the USA’ (2023) 1(30) Theory and Practice of Forensic Science and Criminalistics 131. doi:10.32353/khrife.1.2023.07 [in Ukrainian].

15 Elena Alina Onțanu, ‘Normalising the Use of Electronic Evidence: Bringing Technology Use into a familiar Normative Path in Civil Procedure’ (2022) 12(3) Oñati Socio-Legal Series 582. doi:10.35295/osls.iisl/0000-0000-0000-1304.

16 Mifsud Bonnici, Tudorica and Cannataci (n 6).

To date, no universally accepted definition of electronic evidence exists,¹⁷ and a clear distinction remains between theoretical perspectives and codified law on the subject. This research indicates that, in theory, there are two main conceptual approaches. The first approach equates electronic evidence with the data itself—such as subscriber data, traffic data, or content data—stored within electronic systems. The second approach views electronic evidence as the information contained in electronic data, while the data itself serves merely as a repository. This perspective reflects a fundamental principle: data becomes evidence only when it meets the legal thresholds of relevance, authenticity, and admissibility.

The first equates electronic evidence with the medium that carries it, namely, electronic or computer data. Specifically, electronic evidence is understood to include subscriber data, traffic data, or content stored electronically by service providers,¹⁸ as well as any digital data through which a crime may be proven or the relationship between the offender, the offence, and the victim may be established. Digital data is defined as a collection of numerical representations derived from various documents, encompassing text, graphics, maps, audio, and drawings.¹⁹ This view is also reflected in the following definitions: “Electronic evidence is factual data presented in digital (discrete) form, recorded on any type of medium, and accessible to humans after being processed by a computer”²⁰ or “electronic evidence is any data resulting from the output of an analogue device and/or a digital device of potential value that are generated, processed, stored, or transmitted using any electronic device.”²¹ Another perspective defines electronic evidence as *any evidence with potential probative value that is manipulated, generated, stored, or transmitted by any electronic device*.²²

The second school of thought draws a clear distinction between electronic evidence as “information” and the medium that contains it: electronic data. This perspective holds that electronic Evidence is any information generated, stored or transmitted using electronic devices that may be relied upon in court.²³ Meanwhile, legal and forensic communities in

-
- 17 Sergi Vazquez Maymir, ‘Anchoring the Need to Revise Cross-Border Access to eEvidence’ (2019) 9(3) Internet Policy Review 1. doi:10.14763/2020.3.1495
 - 18 Adam Juszcak and Elisa Sason, ‘The Use of Electronic Evidence in the European Area of Freedom, Security, and Justice: An Introduction to the New EU Package on E-evidence’ (2023) 2 Euclid 182.
 - 19 Eoghan Casey, *Digital Evidence and Computer Crime: Forensic Science, Computers, and the Internet* (3rd edn, Academic Press 2011).
 - 20 Dmytro M Tsekhan, ‘Digital Evidence: Concept, Features and Place in the Evidence System’ (2013) 5 Scientific Bulletin of the International Humanities University, Series: Jurisprudence 256. [in Ukrainian]
 - 21 Maria Angela Biasiotti and others, ‘Opportunities and Challenges for Electronic Evidence’ in Maria Angela Biasiotti and others (eds), *Handling and Exchanging Electronic Evidence Across Europe* (Springer 2018) 3. doi:10.1007/978-3-319-74872-6_1.
 - 22 Mifsud Bonnici, Tudorica and Cannataci (n 6).
 - 23 EVIDENCE, Project “European Informatics Data Exchange Framework for Courts and Evidence”: D2.1 - EVIDENCE Semantic Structure (Grant Agreement No 608185) (EU 2015) 18 <<https://s.evidenceproject.eu/p/e/v/evidence-ga-608185-d2-1-410.pdf>> accessed 10 August 2025.

Poland tend to align with international theoretical understandings of “digital evidence”, which is defined as any information with evidentiary value derived from electronically processed binary data (data in digital form).²⁴ In Ukraine, the Draft Law “Amendments to the Criminal Procedure Code of Ukraine” (Registration No. 4004 dated September 1, 2020)²⁵ proposes a definition of electronic evidence as information in electronic (digital) form that contains data capable of serving as proof of facts or circumstances established during criminal proceedings.²⁶

Europe has an alternative approach to electronic evidence. This approach includes both digitised physical or traditional evidence, such as a digital photograph of a murder weapon and evidence that is originally created in digital form by any digital device (a computer or computer-like equipment). All such forms of evidence are classified as “electronic evidence” because, upon completion of the evidentiary process, they can be labelled as electronic regardless of their original source.²⁷

As regards positive law, this research indicates that there is no formal definition of electronic evidence in the statutory laws of European countries, with the exception of Croatia. The Budapest Convention does not provide a definition of electronic evidence; instead, it refers to the concept of electronic data and outlines procedures for the collection, preservation, and processing of such evidence. The only existing definition of electronic evidence within the European legal framework appears in the recently updated guidelines of the Council of Europe. There, digital (or electronic) evidence is defined as: “any information created, stored, or transmitted in digital form that may subsequently be required to prove or disprove a disputed fact in legal proceedings.”²⁸

Thus, while some countries have adapted their legal frameworks to accommodate electronic evidence, others continue to rely on traditional criminal law provisions and apply them to digital contexts.²⁹ Evidentiary rules vary significantly, even among countries that share similar legal traditions.³⁰

24 Piotr Lewulis, ‘Collecting Digital Evidence from Online Sources: Deficiencies in Current Polish Criminal Law’ (2022) 33(1) Criminal Law Forum 39. doi:10.1007/s10609-021-09430-4.

25 Draft Law of Ukraine No 4004 ‘On Amendments to the Criminal Procedure Code of Ukraine to Increase the Efficiency of Combating Cybercrime and the Use of Electronic Evidence’ (1 September 2020) <<https://itd.rada.gov.ua/billinfo/Bills/Card/3765>> accessed 10 August 2025. [in Ukrainian]

26 Roman Blahuta, Anatolii Movchan and Maksym Movchan, ‘Use of Electronic Evidence in Criminal Proceedings in Ukraine’ (International Conference on Social Science, Psychology and Legal Regulation (SPL 2021), Kyiv, Ukraine, 22-24 December 2021) 196. doi:10.2991/assehr.k.211218.032.

27 Mifsud Bonnici, Tudorica and Cannataci (n 6).

28 Nigel Jones and others, *Electronic Evidence Guide: A Basic Guide for Police Officers, Prosecutors and Judges* (version 2.1, Council of Europe 2020) 12 <<https://rm.coe.int/c-proc-electronic-evidence-guide-2-1-en-june-2020-web2/16809ed4b4>> accessed 10 August 2025.

29 Mifsud Bonnici, Tudorica and Cannataci (n 6).

30 UNODC, *Comprehensive Study on Cybercrime: Draft* (UN 2013) 158 <https://www.unodc.org/e4j/data/_university_uni_/draft_comprehensive_study_on_cybercrime.html?lng=en> accessed 10 August 2025.

In Vietnam, there is currently no statutory definition of electronic evidence; however, theoretical discourse reveals two prevailing schools of thought, similar to those found in European jurisdictions. The first school equates electronic evidence with electronic data, treating them as one, while the other believes that all evidence is fundamentally similar in nature, differing only in its source, namely, digital data. One perspective asserts that: “Electronic data may be considered evidence or referred to as electronic evidence if it is collected in accordance with the procedures and formalities prescribed by law.”³¹ A more widely accepted view defines electronic evidence as: “Information stored in the form of electronic signals within computers or digital memory devices that is relevant to a criminal case.”³²

The legal framework governing electronic evidence in Vietnam is embedded within the general framework of evidentiary law, which is itself grounded in the evidentiary theory previously outlined. Thus, the Vietnamese Criminal Procedure Code does not explicitly recognise electronic evidence as a distinct category. This omission stems from Vietnam’s legal tradition, rooted in socialist jurisprudence, which clearly distinguishes between evidence and its sources. Under this theory, objective, factual events that constitute a criminal offence must be recorded and reflected in evidence sources as defined by criminal procedural law.³³ According to the Vietnamese Criminal Procedure Code, evidence is defined as factual information relevant to a criminal case that is collected lawfully.³⁴ A source of evidence is defined as “a place or medium from which the authorities or officials may obtain evidence in a criminal case.”³⁵ It is essential not to conflate evidence with its source, as not all information contained within a source qualifies as evidence unless it meets the criteria of truthfulness, relevance, and lawful collection. Each source of evidence reflects the lifecycle of evidentiary material, from its formation, existence, and potential disappearance. Based on this understanding, the law prescribes specific characteristics for each type of evidentiary source, along with distinct procedures for collecting and evaluating evidence derived from them. Thus, evidence is understood as “information”, while the source of evidence refers to the medium that contains such information.

Vietnam’s Criminal Procedure Code identifies seven categories of evidentiary sources, with the recent addition of a significant new source: electronic data. Electronic data constitutes the source of evidence, whereas the information contained within that data is considered the evidence itself. This aligns with the view that “data is merely the input,

31 Le Tan Quan, ‘Difficulties in Determining the Properties of Electronic Evidence’ (2024) 15 Tạp chí Kiểm sát 10. [in Vietnamese]

32 Tran Văn Hòa, ‘The Issue of Electronic Traces and Evidence in the Amended Criminal Procedure Code’ (2014) 12 Tạp chí Khoa học và Chiến lược. [in Vietnamese]

33 Nguyen Ngoc Chi and Le Lan Chi (eds), *Criminal Procedure Law Textbook* (Hanoi National University Press 2018) 222. [in Vietnamese]

34 Law of Vietnam No 101/2015/QH13 (n 12) art 86.

35 Tran Quang Tiep, *Evidence Regulation in Vietnamese Criminal Procedure Law* (National Political Publishing House 2011) 47. [in Vietnamese]

while 'evidence' is the outcome of a verified reasoning process",³⁶ and that "data only becomes evidence when placed within a legal context and meets thresholds of relevance, authenticity, and reliability."³⁷

In both scholarship and policy, various definitions of electronic evidence have been proposed. Nevertheless, regardless of how it is conceptualised, electronic evidence invariably possesses the following distinctive features:

First, unlike physical evidence—where alterations to its structure are difficult to conceal and typically leave traces—electronic evidence can be easily copied, disseminated, modified, updated, or deleted (with deletion in an electronic environment not necessarily meaning permanent erasure, as data may still be recoverable)³⁸. This characteristic not only increases the risk of loss but also poses a major challenge to ensuring integrity and authenticity. Research has demonstrated that electronic data can be altered without leaving clear traces; therefore, the application of digital forensic mechanisms is indispensable in modern criminal proceedings.³⁹

Second, electronic evidence is inherently technology-dependent. It cannot exist independently; rather, it is generated through electronic devices and application software. Electronic data requires interpretation in order to be displayed in a readable format. Users cannot create or manipulate electronic data without the appropriate hardware and software.⁴⁰ Consequently, the collection, preservation, and presentation of this type of evidence demand the support of technical tools, digital forensic experts, as well as adherence to international standards.

Third, electronic evidence may possess a cross-border character in terms of storage and retrieval: network data, logs, and backups are often distributed across multiple systems and jurisdictions, giving rise to challenges regarding access rights, international cooperation, and the protection of personal data during investigation.⁴¹

36 Alex Biedermann and Kyriakos N Kotsoglou, 'Digital Evidence Exceptionalism? A Review and Discussion of Conceptual Hurdles in Digital Evidence Transformation' (2020) 2 Forensic Science International: Synergy 262. doi:10.1016/j.fsisyn.2020.08.004.

37 Michal Gebicki, 'Cross-border Acquisition of Digital Data in Criminal Proceedings: State of Play and Measures Taken by the European Union and the Council of Europe' (2024) 1(29) Teisės apžvalga 3. doi:10.7220/2029-4239.29.1.

38 Stephen Mason and Daniel Seng (eds), *Electronic Evidence* (University of London Press 2017). doi:10.14296/517.9781911507079.

39 Brian D Carrier and Eugene H Spafford, 'An Event-Based Digital Forensic Investigation Framework' (DFRWS 2004 Digital Forensic Research Conference, USA, Baltimore, MD, 11-13 August 2004).

40 Bich Thao Nguyen, 'Improving Vietnam's Electronic Evidence Law in the Industry 4.0 Era: Experience from China' (2024) 16(1) Revista de Direito 1. doi:10.32361/2024160117322.

41 Wei Wang and Thomas E Daniels, 'Building Evidence Graphs for Network Forensics Analysis' (21st Annual Computer Security Applications Conference ACSAC 2005). doi:10.1109/CSAC.2005.14.

Finally, although electronic evidence has significant probative value, it is highly susceptible to dispute if the chain of custody or the collection process is not clearly documented and verifiable. Courts require proof of origin and integrity before admitting electronic data as evidence.⁴²

The next part of the discussion concerns the concept of electronic data in European and Vietnamese law. Clarifying this concept is essential for determining the scope of data that may contain evidence and, therefore, needs to be seized. The Budapest Convention does not use the term electronic data but instead refers to computer data. According to the Convention, computer data is any representation of facts, information, or concepts in a form suitable for processing by a computer system.⁴³ This definition is based on the ISO data standard, and the notion of “suitable for processing” is defined as follows: data is put in a form that can be processed directly by the computer system. To make clear that the data in this Convention must be understood as data in electronic or other directly processable form, the notion “computer data” is introduced.⁴⁴ Within the scope of computer data, the Convention categorises data into three main groups: (i) Stored data, (ii) Traffic data, and (iii) Content data.

In the criminal procedure laws of European countries today, the concept of electronic data is widely used. Vietnamese criminal procedure law also adopts the term electronic data, which is defined as symbols, text, numbers, images, sounds, or similar forms that are created, stored, transmitted, or received via electronic means.⁴⁵ Unlike traditional forms of evidence, the value of electronic evidence is assessed not only based on conventional criteria such as objectivity, relevance, and legality, but also on additional factors. These include the methods used to ensure and maintain the integrity of the electronic message, the identification of the message’s originator, and other relevant contextual elements.⁴⁶

However, this study aligns with the view that, in addition to computer data as defined at the time of the Convention’s adoption, new categories of data have since emerged—namely, electronic data and digital data. Electronic data means data recorded by an electronic device. From the category of electronic data, two further categories may be distinguished: data recorded in digital form (digital data) or in analogue form (analogue data). The criterion distinguishing them is not the type of device with which they are recorded or reproduced, but the nature of the signal carrying the information.⁴⁷ Recently, the Council of Europe and

42 Orin S Kerr, ‘Searches and Seizures in a Digital World’ (2005) 119(2) Harvard Law Review 531.

43 Convention on Cybercrime (n 4) art 1.

44 Council of Europe, ‘Explanatory Report to the Second Additional Protocol to the Convention on Cybercrime on Enhanced Co-operation and Disclosure of Electronic Evidence’ (12 May 2022) CETS 224.

45 Law of Vietnam No 101/2015/QH13 (n 12) art 99.

46 Nguyen Ngoc Khanh, ‘Source of Evidence is Electronic Data in Criminal Proceedings in Vietnam and Some Countries in the World’ (Master’s thesis, Vietnam National University 2024). [in Vietnamese]

47 Piotr Lewulis, *Dowody cyfrowe: teoria i praktyka kryminalistyczna w polskim postępowaniu karnym* (Wydawnictwo Uniwersytetu Warszawskiego 2021) 32.

the European Parliament issued a Directive on electronic evidence, which introduces a new category of data: “data requested for the sole purpose of identifying the user”. This category is defined as “IP addresses and, where necessary, the relevant source ports and time stamp, namely the date and time, or technical equivalents of those identifiers and related information, where requested by law enforcement authorities or by judicial authorities for the sole purpose of identifying the user in a specific criminal investigation.”⁴⁸

3.2. Fundamental Principles Governing Electronic Evidence

Given the characteristics of electronic evidence outlined above, the field of digital forensics has identified several fundamental principles as follows:

First, the principle of integrity. Unlike physical evidence, which leaves discernible traces when altered, electronic data may be modified without producing any visible signs. Therefore, without an appropriate preservation process, the probative value of electronic evidence will inevitably be called into question.⁴⁹ This principle is regarded as a prerequisite for electronic evidence to attain legal validity. It requires that information contained in digital data be considered lawful evidence only where the competent procedural authorities can demonstrate that, from the moment of collection until its presentation before the court, the content has remained intact, without alteration or loss. In other words, electronic data has probative value only if its integrity is preserved throughout the entire evidentiary process.

This principle entails full documentation of who accessed the data, when, how, and which technical steps were taken. Maintaining such transparent records enables the court and the parties concerned to verify that the data has not been tampered with outside of lawful procedures.⁵⁰ Accordingly, courts are called upon to emphasise technical standards and scientific processes to ensure the integrity of electronic evidence.

Second, the principle of authenticity requires proof that electronic data is indeed what it purports to be, originating from the claimed source, preserved, and unchanged from the moment of collection until its presentation in court.⁵¹ In U.S. legal practice, authentication is closely tied to the chain of custody, which demonstrates that the evidence has been maintained in its original state. Authenticity is therefore inseparably linked with integrity.⁵²

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.

49 Casey (n 19).

50 Carrier and Spafford (n 39).

51 Richard Kissel (ed), *Glossary of Key Information Security Terms* (Diane Publishing 2011).

52 Sean E Goodison, Robert C Davis and Brian A Jackson, ‘Digital Evidence and the US Criminal Justice System: Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence’ (RAND, 20 April 2015) <https://www.rand.org/pubs/research_reports/RR890.html> accessed 10 August 2025.

This principle entails two core requirements: (i) no action by law enforcement authorities, their personnel, or authorised agents may alter the data in any way that could undermine its reliability before the court; and (ii) where direct access to the original data is necessary, the individual concerned must possess adequate competence and be able to account for the meaning and consequences of their actions.

In practice, this principle is operationalised through a rigorous process of collecting, preserving, examining, and analysing data sources containing electronic evidence.

Third, the principle of legality. This principle requires that every operation involving electronic data—search, seizure, copying, analysis, or presentation—must have a clear legal basis, be carried out by a competent authority, and comply with the procedures and limits prescribed by law (for example, a search warrant, valid voluntary consent, or exigent circumstances). In the digital environment, this requirement is even more stringent, as operations are often conducted on a large scale (such as an entire hard drive or cloud storage) and can easily exceed the permissible scope if minimisation measures and precise descriptions of the search objects are not applied.

To ensure legality, when searching a computer or data repository, the warrant must specifically describe the target and scope (e.g., file types, time frames, or keywords) to avoid “general searches.” In practice, the process typically involves creating a forensically sound image of the data and then filtering it in a laboratory setting, thereby ensuring both legality and privacy protection.

This reflects the classic analytical framework governing the search and seizure of digital data. The principle also requires that the collection of electronic evidence respect the criteria of authority, scope, and proportionality. In addition, standardised procedures for collecting electronic evidence must be observed, including codified technical standards. Where legal grounds are absent, the scope of the warrant is exceeded, or procedural requirements are breached, the evidence may be excluded or assigned diminished probative weight by the court. Such violations may also undermine the admissibility of derivative findings under the *fruit-of-the-poisonous-tree* doctrine.

In addition, electronic evidence must also comply with principles such as verifiability. The steps of collecting and analysing electronic data must be capable of replication and independent verification. Wang and Daniels proposed the “evidence graph” model, which reconstructs the logic of the collection and analysis process so that other experts may review and confirm the results.⁵³

Finally, the principle of fairness and privacy. This principle emphasises that the use of electronic evidence must strike a balance between the demands of criminal prosecution and the protection of individual privacy, particularly in cross-border data contexts.⁵⁴

53 Wang and Daniels (n 41).

54 Mark Pollitt, ‘A History of Digital Forensics’ (6th IFIP WG 11.9 International Conference on Digital Forensics (DF), Hong Kong, China, Jan 2010) 3. doi:10.1007/978-3-642-15506-2_1.

4 EUROPEAN AND VIETNAMESE LEGAL FRAMEWORKS FOR ELECTRONIC EVIDENCE

European law approaches electronic evidence through the standardisation of procedural tools, the protection of human rights, and the strengthening of international cooperation. The cornerstone of this approach is the Budapest Convention on Cybercrime (2001), complemented by the legal framework of the European Union (EU) and the case law of the European Court of Human Rights (ECtHR). Thus, the European model establishes a dual standard: it seeks to enhance the effectiveness of investigating high-tech crime through modern procedural instruments, while at the same time emphasising the protection of human rights and adversarial guarantees. These aspects are elaborated on below.

4.1. The European Regulatory Framework on Electronic Evidence

European legislation contains no statutory definition of electronic evidence, with the sole exception of Croatia. The Budapest Convention likewise does not define electronic evidence; rather, it refers to electronic data and regulates procedures for its collection, preservation, and handling. The only explicit definition of electronic evidence appears in the recently updated guidelines of the Council of Europe, where digital (or electronic, as it is sometimes called) evidence is defined as “any information that is created, stored or transmitted in digital form which may be relied upon in court or needs to be preserved as potential evidence in legal proceedings.”⁵⁵

Accordingly, while some states have adapted their laws to address electronic evidence, others continue to rely on traditional rules of criminal law and apply them to digital contexts.⁵⁶ Rules of evidence thus vary considerably, even among countries with similar legal traditions.⁵⁷

4.2. Shared Procedural Aspects of Investigating and Using Electronic Evidence

As argued above, this study maintains that there is no distinct category of “electronic evidence” existing separately from traditional forms. All evidence is, at its core, information, and must satisfy the essential attributes of evidence: authenticity, relevance, and legality. The difference lies only in the manner of creation, existence, transformation, and form of such information.

In the context of today’s information technology, new types of information—digital traces left by offenders in cyberspace—have emerged. These traces are stored in electronic data and exhibit characteristics that differ significantly from physical sources of evidence.

55 Jones and others (n 28).

56 Mifsud Bonnici, Tudorica and Cannataci (n 6).

57 UNODC (n 30) 158.

Accordingly, for such information to qualify as evidence and be admitted before a court, its preservation, collection, and use must be governed by a legal framework that prescribes specific procedures and methods.

Developing such a framework has therefore become a matter of central importance for all states, including European countries and Vietnam. The following section thus turns to examine the points of convergence between these two jurisdictions.

4.2.1. European Legal Framework

To date, the most direct and comprehensive legal framework governing procedures for the investigation and prosecution of cybercrime, including the critical issue of electronic evidence, while ensuring respect for human rights and the rule of law, is the Budapest Convention.⁵⁸ Under this Convention, electronic evidence may be collected, preserved, used, and exchanged in the same manner as in criminal investigations concerning both cybercrime and traditional offences, while simultaneously safeguarding human rights and the principles of the rule of law. The Convention has been extensively commented upon and elaborated through various legal instruments, which provide practical guidance for the handling of electronic evidence, such as:

Regarding investigative procedures for identifying electronic evidence: Electronic evidence is a special category of evidence, and its collection must ensure integrity, authenticity, and legality in order to be admissible in court. This requires specialised procedures beyond those used for traditional forms of evidence. Accordingly, the Budapest Convention recommends that member states enact legislation and adopt measures to establish the necessary powers and procedures for conducting criminal investigations and prosecutions related to offences covered by the Convention, as well as other crimes committed through computer systems and the collection of electronic evidence.⁵⁹

These specialised procedures for investigating electronic evidence are further reflected in the application of special investigative measures, which include:

First, expedited preservation of stored computer data and partial disclosure of traffic data.⁶⁰ Preservation is an intrusive measure because it restricts the data owner's rights. The second characteristic is that preservation is merely a temporary measure designed to maintain the existing state of data for a maximum period of 90 days, subject to extension. Further legal authorisation is required for access and disclosure, accompanied by a confidentiality obligation to prevent compromising the investigation.⁶¹ Preservation of data differs from data storage, as it ensures the data remains unaffected by external factors that could alter or

58 Convention on Cybercrime (n 4) arts 11–21.

59 *ibid*, art 14.

60 *ibid*, arts 16, 17.

61 Council of Europe (n 44) para 156.

degrade its quality or condition, and prevents unauthorised disclosure. The preservation process emphasises maintaining data integrity and serves solely for criminal investigation or prosecution, without any other intent. Data protection begins upon issuance of an order by a competent authority, and at the time of preservation, the information has not yet been disclosed to law enforcement agencies. To proceed, a subsequent step of data disclosure must be carried out under strict procedural safeguards. Specific rules governing the prompt provision of traffic data are crucial for the continuation of criminal investigations while awaiting authorisation for full disclosure. Article 17, paragraph 1(a), permits the collection of traffic data regardless of whether one or multiple service providers are involved. Article 17, paragraph 2(b), requires the entity subject to the preservation order to disclose to competent authorities a sufficient volume of traffic data to enable the tracking of communications and identification of the perpetrator.

Second, production order.⁶² This measure may compel an individual or a service provider to submit specific stored information that they possess or control, including subscriber information under their custody. Subscriber information encompasses the type of communication service used, technical specifications, duration of service, and other data obtained by the provider through contractual or service agreements with the user (such as identity, address, contact details, payment information...).

Third, search and seizure of stored computer data.⁶³ This represents the next step in the process of investigating electronic evidence. It authorises law enforcement agencies to search computers or other data storage devices. This includes access to data stored on other networked or otherwise accessible computers from the device being searched. Additionally, it permits seizure, duplication, preservation, deletion, or disabling of access to such data. This is a highly technical operation aimed at ensuring the integrity of electronic evidence; thus, it may involve the participation of specialised experts at the request of law enforcement authorities.

Fourth, real-time collection of traffic data and Interception of content data.⁶⁴ These provisions authorise competent authorities to intercept communications /or request assistance from service providers, or directly collect traffic and content data. Such measures involve the interception of personal communications and pose a significant intrusion into the rights to privacy and freedom of communication. Therefore, they should be applied only in cases involving serious offences. Article 21 permits domestic legislation to determine which offences qualify for such measures. This classification is mandatory for the collection of content data, whereas traffic data collection remains optional. A State Party may choose to limit the collection of traffic data to a defined set

62 Convention on Cybercrime (n 4) art 18.

63 *ibid*, art 19.

64 *ibid*, arts 20, 21.

of criminal offences. However, this list must not be narrower than the list of serious offences for which the interception of content data is permitted.

The aforementioned measures provide sufficient legal basis and effective methods for the collection of electronic evidence. When implementing these measures, competent authorities must adhere to core requirements: ensuring the integrity, authenticity, and legality of electronic evidence; safeguarding human rights and freedoms; and upholding the principle of proportionality.⁶⁵ Article 15 of the Convention establishes a range of safeguards to ensure the legality of investigative procedures. These include judicial oversight or other forms of independent supervision, justification for the application of such measures, and limitations on the scope and duration of the powers or procedures involved.

In addition, the Council of Europe has issued the Electronic Evidence Guide (EEG) for law enforcement agencies and judicial authorities.⁶⁶ The EEG provides detailed guidance on on-site search and seizure procedures, methods for collecting evidence from the internet, and techniques for obtaining evidence from third parties. It also offers instructions on analysing electronic evidence and on preparing and presenting (or using) it in court proceedings. Recently, the Council and the European Parliament adopted Regulation (EU) 2023/1543 concerning the European Production Order and the European Preservation Order for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings.⁶⁷

Regarding the criteria for assessing the admissibility and integrity of electronic evidence, such evidence is presented before the court, which is responsible for its evaluation. Courts in Europe typically assess such evidence in accordance with the principles and standards applied to traditional evidence, while also taking into account its unique characteristics of electronic evidence. This involves consideration of specific criteria, including: (i) the legality of investigative measures under Article 15 of the Budapest Convention, and (ii) the reliability of the technical procedures employed (such as interception methods, data backup, preservation techniques), often with the involvement of expert professionals.

For example, under France's Electronic Documents Law of 2000, a document in electronic form is admissible as evidence if it possesses the attributes of evidence and satisfies conditions such as lawful creation, integrity, reliability, and compliance with authentication and identification requirements. Germany's Code of Criminal Procedure⁶⁸ devotes Chapter 4, comprising six articles, to regulating the procedures, forms, and rules for collecting and authenticating electronic data. These provisions aim to ensure legality, reasonableness,

65 Council of Europe (n 44).

66 Jones and others (n 28).

67 Regulation (EU) 2023/1543 (n 48).

68 German Code of Criminal Procedure 'Strafprozeßordnung – StPO' (7 April 1987) <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> accessed 10 August 2025.

authenticity, reliability, and demonstrable integrity, thereby allowing such data to be accepted as electronic evidence.

Regarding the protection of human rights in the collection of electronic evidence, the European legal framework requires that the collection and use of electronic evidence must adhere to principles derived from Article 8 of the European Convention on Human Rights (ECHR), which guarantees the right to respect for private life, family, and correspondence. The European Court of Human Rights (ECtHR) has developed a set of standards to safeguard these rights:

1. **Legality:** All measures involving the collection of electronic data must be grounded in clear, transparent, and foreseeable legal provisions. The law must specify the scope of data collection, the authority responsible, procedural requirements, and time limitations.⁶⁹
2. **Necessity and proportionality:** Data collection is permissible only when strictly necessary for a legitimate purpose (such as combating serious crime), and must be conducted in the least intrusive manner possible to achieve that objective.⁷⁰
3. **Independent judicial authorisation:** Access to electronic data (including subscriber information and traffic data) must be authorised by an independent judicial body (a court), rather than solely by prosecutorial or investigative authorities.⁷¹
4. **Data minimisation:** Investigative agencies are permitted to collect only data directly relevant to the case. They are also obligated to delete any data outside the scope of the investigation to protect the privacy rights of third parties.⁷²

The Convention thus sets forth only the fundamental principles. It consistently prioritises the autonomy of individual states in determining how to implement its provisions. Domestic legislation establishes both the conditions under which investigative powers may be exercised and the safeguards to protect against their misuse.⁷³ This approach has led to considerable diversity in the legal frameworks of member states, including those in Eastern Europe.

69 *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) <<https://hudoc.echr.coe.int/eng?i=001-57510>> accessed 10 August 2025.

70 *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 4 December 2015) <<https://hudoc.echr.coe.int/fre?i=001-159324>> accessed 10 August 2025.

71 *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) <<https://hudoc.echr.coe.int/fre?i=001-182455>> accessed 10 August 2025.

72 *S and Marper v the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) <<https://hudoc.echr.coe.int/fre?i=001-90051>> accessed 10 August 2025.

73 Francesco Calderoni, 'The European Legal Framework on Cybercrime: Striving for an Effective Implementation' (2010) 54(5) *Crime, Law and Social Change* 339. doi:10.1007/s10611-010-9261-6.

In this context, an overview of the legal frameworks of selected countries, such as Poland, the Netherlands, and Ukraine, helps clarify the potential basis for Vietnam's potential adoption. Notably, these countries do not possess a separate legal framework specifically governing the collection of electronic evidence; rather, such activities are regulated under the general provisions applicable to traditional evidence. For instance, in Poland, the collection of electronic evidence is conducted in the same manner as physical evidence, involving steps such as search, seizure, and visual examination.⁷⁴ Nonetheless, certain specific provisions do exist for electronic evidence.⁷⁵ Article 236a of the Polish Criminal Procedure Code, introduced in 2003,⁷⁶ provides for the corresponding application of procedural rules to individuals who possess or use devices containing electronic data or IT systems. This includes data stored on such devices, systems, or data storage media owned or used by them, including correspondence sent via email. The law does not prescribe specific techniques or methods for collecting physical evidence; instead, it delegates such tasks to experts in relevant forensic disciplines.⁷⁷ As a result, current guidelines on the handling of digital evidence remain non-binding in a formal legal sense.

Meanwhile, in the Netherlands, the collection of evidence is regulated under criminal procedure law, with several specialised measures in place. Many digital investigative methods are based on existing legal powers; for example, a seized computer may be searched in the same manner as a seized diary or firearm found in a residence.⁷⁸ In addition, new digital investigative techniques have been formally codified. The collection of electronic evidence in the Netherlands is also governed by the General Data Protection Regulation (GDPR).⁷⁹ The Police Data Act (*Wet politiegegevens*, Wpg)⁸⁰ regulates the use of personal data by police authorities, while the Judicial and Prosecution Data Act (*Wet*

74 Polish Criminal Procedure Code 'Kodeks postępowania karnego' (6 June 1997) ch 23, art 207 <<https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdm19970890555>> accessed 10 August 2025.

75 Piotr Lewulis, 'Digital Forensic Standards and Digital Evidence in Polish Criminal Proceedings: An Updated Definition of Digital Evidence in Forensic Science' (2021) 13(4) *International Journal of Electronic Security and Digital Forensics* 403. doi:10.1504/IJESDF.2021.10034988.

76 Law of Poland 'On Amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on Crown Witnesses, and the Act on the Protection of Classified Information' (10 January 2003) [2003] DzU 17/155, art 1, para 79.

77 Lewulis (n 24).

78 Bert-Jaap Koops and Jan-Jaap Oerlemans, 'Formeel strafrecht en ICT' in Bert-Jaap Koops and Jan-Jaap Oerlemans (eds), *Strafrecht en ICT* (Monografieën recht en informatietechnologie, SDU 2019) 117.

79 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.

80 *Wet politiegegevens* (Wpg) (21 July 2007) <<https://wetten.overheid.nl/BWBR0022463/2025-07-01>> accessed 10 August 2025.

justitiële en strafvorderlijke gegevens, Wjsg)⁸¹ governs the use of personal data by prosecutorial and judicial bodies.

Meanwhile, in Ukraine, electronic evidence appears to be more specifically regulated. The Ukrainian Criminal Procedure Code⁸² addresses the collection of subscriber information and subscriber identification (Articles 162, 248, 263, and 268), with certain concepts referencing the Telecommunications Law, for example, the term “subscription”. Special provisions concerning search and seizure, as outlined in Article 19 of the Budapest Convention, are incorporated into Ukraine’s general regulations on seizure procedures and the involvement of experts and specialists in criminal proceedings.

Ukraine has implemented Articles 20 and 21 of the Budapest Convention, which pertain to the real-time collection of traffic data and the interception of content data under a similar regulatory framework. Article 39(4) of the Telecommunications Law obliges telecommunications operators to bear the costs of “installing and maintaining the technical means necessary for search and investigative authorities, as well as cybersecurity monitoring bodies in Ukraine, to carry out their functions. Operators must also, within the scope of their authority, facilitate search and investigative activities, ensure operational oversight, and prevent the disclosure of organisational and tactical methods employed.”⁸³ Additionally, the law requires operators to protect these technical systems against unauthorised access.

In terms of procedural implementation, Articles 258 to 266 of Ukraine’s Criminal Procedure Code provide the legal basis for certain covert investigative actions (surveillance), including interference with individuals’ private communications. Within the context of Articles 20 and 21 of the Budapest Convention, the relevant activity primarily involves the “collection of information from telecommunications traffic networks” (Article 263 of the Criminal Procedure Code).

4.2.2. Vietnam’s Framework on Investigation of Electronic Evidence

The investigation of electronic evidence in Vietnam is currently governed under the general framework applicable to traditional evidence. According to the 2015 Criminal Procedure Code (CPC),⁸⁴ only three articles directly address electronic evidence. Specifically, Article 97 defines electronic data and electronic devices; Article 223 outlines special investigative measures; and Article 107 regulates the process of investigating electronic evidence, which includes the

81 Wet justitiële en strafvorderlijke gegevens (Wjsg) (7 November 2002) <<https://wetten.overheid.nl/BWBR0014194/2025-07-01>> accessed 10 August 2025.

82 Criminal Procedural Code of Ukraine No 4651-VI (13 April 2012) <<https://zakon.rada.gov.ua/go/4651-17>> accessed 10 August 2025. [in Ukrainian]

83 Law of Ukraine No 1280-IV ‘On Telecommunications’ (18 November 2003) <<https://zakon.rada.gov.ua/laws/show/1280-15>> accessed 10 August 2025. [in Ukrainian]

84 Law of Vietnam No 101/2015/QH13 (n 12).

following steps: seizure, backup, preservation, recovery, and forensic examination. Accordingly, the procedural authorities are required to carry out the following steps:

1. Identification of the source and scope of evidence: This includes devices (phones, computers, cameras), accounts/services (email, social media, cloud platforms), system logs, and data in transmission. Investigators must then plan and conduct searches based on procedural documents such as search warrants, seizure orders, or special investigative measures.
2. Preservation of the on-site status quo: This involves accurately documenting the condition of the device or account, capturing screenshots, recording system configurations and running applications, and sealing the storage medium (if seized).
3. Seizure or backup when physical seizure is not feasible: This includes confiscating the device and related accessories. If the device is fixed or cannot be removed, data must be backed up to a storage medium (e.g., a hard drive or a USB drive) and treated as physical evidence. Technical experts may be invited to assist.
4. Full documentation of extraction/interception/backup from networks or transmission channels (e.g., logs from service providers, servers, or cloud services), which must be included in the case file (Article 107 CPC).
5. Sealing and preservation as physical evidence: Immediate sealing after seizure, unsealing according to legal procedures, and maintaining a chain of custody.
6. Forensic duplication and integrity verification: Creating forensic images or copies, generating hash values for comparison; all recovery, decryption, and examination must be performed on the copy, not the original.
7. Examination, recovery, and decryption: Conducted under an official forensic order; results must be converted into readable, audible, or viewable formats for use in proceedings.
8. Evaluation and use as evidence: Assessment of legality, origin, integrity, and ability to identify the creator; evidence must be presented with the original storage medium or a valid copy.
9. Covert collection channel (if conditions are met): After prosecution is initiated, authorities may request the application of special procedural measures for “covert collection of electronic data,” subject to strict compliance with conditions, jurisdiction, duration, and document management.

From the above observation and analysis of Vietnamese law and European law, the following similarities have been identified:

First, while the concept of electronic evidence is not explicitly defined in law, both legal theory and statutory frameworks recognise electronic evidence as information, and the medium that carries such information is electronic data, which is also referred to in Vietnam

as a source of evidence. Although electronic data is not yet classified as a distinct evidentiary source, electronic evidence nonetheless satisfies the general requirements of admissible evidence: authenticity, relevance, and legality. Moreover, electronic evidence possesses unique characteristics arising from its digital environment, the nature of the tools used to commit crimes, and its transnational dimension.

Second, the legal framework governing evidence is grounded in the core principles of criminal procedure law, which apply uniformly to physical evidence, testimonial evidence, and electronic evidence. This approach is consistent with the traditions of continental European legal systems.

Third, based on these distinctive features, both the Budapest Convention and Vietnamese law have developed a legal framework for electronic evidence. This framework includes: identifying electronic data as the source of electronic evidence; establishing procedures for detecting, collecting, preserving, and presenting electronic evidence in court; and ensuring the admissibility and integrity of digital evidence extracted from electronic devices in criminal proceedings.

5 LEGAL GAPS IN ELECTRONIC EVIDENCE REGULATION IN VIETNAM COMPARED TO THE BUDAPEST CONVENTION

The differences in the legal framework governing electronic evidence across regions of the world are shaped by multiple factors, including the underlying theories of evidence adopted in each region and the prevailing model of criminal procedure. Therefore, before assessing the legal gaps in Vietnam's regulation of electronic evidence vis-à-vis European standards, a general account of the theoretical foundations of evidence law and the criminal procedure model in Vietnam is provided.

On the theory of evidence and proof. At present, the regulation of evidence is comprehensively contained within Vietnam's Criminal Procedure Code. The history of legal thought has witnessed several major theories of evidence, including the formal theory of evidence, the doctrine of free evaluation of evidence, the Anglo-Saxon evidentiary tradition, and the former Soviet evidentiary doctrine. As with other aspects of criminal procedure, the Vietnamese law of evidence has been profoundly shaped by the Soviet evidentiary doctrine, the main tenets of which are:

- (i) evidence must be authentic, requiring that the information contained therein correspond to what has occurred in objective reality, with its reliability depending largely on the competence, ethics, and professionalism of the investigative authorities;
- (ii) evidence must be lawful, requiring that it be collected in strict compliance with statutory procedures, with any violation of this standard rendering the evidence inadmissible; and

(iii) evidence must be probative, meaning it must be capable of proving the facts that require determination in the criminal case.

Taken as a whole, the current Vietnamese evidentiary doctrine is closely aligned with the theory of free evaluation of evidence based on the inner conviction of the judge, which is widely accepted in many European jurisdictions. This can be illustrated by a specific case adjudicated by a Vietnamese court.

In this case, a police investigator was accused of accepting a bribe in exchange for exonerating a suspect involved in repatriating citizens to Vietnam during the COVID-19 pandemic. Numerous pieces of evidence were presented against the defendant, including witness testimonies. A particularly significant piece of evidence was a surveillance camera recording showing the investigator receiving a suitcase from an individual at the entrance of his office. This image aligned with the testimonies of the alleged bribe-giver and other witnesses regarding the time and location of the transaction. However, during the trial, the investigator claimed that the suitcase contained bottles of wine, not money.

The central question became whether the suitcase held cash or wine. Despite the ambiguity, the court concluded that the investigator had accepted money and was guilty of bribery. This decision sparked considerable debate,⁸⁵ as the evidence appeared insufficient to dispel reasonable doubt. The judge's inner conviction was reportedly based on the reasoning: "No one gifts wine in a suitcase."

In adjudicating cases of this nature, judges in European legal systems typically apply the principle of proof beyond a reasonable doubt. This evidentiary standard requires that the prosecution's burden of proof reach a threshold sufficient to overcome the legal presumption of innocence, including, but not limited to, adherence to the principle of *in dubio pro reo*, whereby any unresolved doubt must be interpreted in favour of the accused. Where this threshold is not met, the adjudicator is obliged to acquit, as the presumption of innocence remains legally intact.

In the case under discussion, the central issue of reasonable doubt pertains to the nature of the item allegedly received: was it money or wine? This constitutes a material uncertainty that the prosecution and the court must resolve to lawfully convict. If the prosecution fails to establish that the item in question was money, then, in accordance with the spirit of the presumption of innocence, the doubt must be construed in favour of the defendant—i.e., the item should be considered wine. Nonetheless, the court appears to have rendered a guilty verdict for bribery without a sufficient evidentiary basis to overcome this doubt. This has

85 Xuan Nha, 'The Suitcase is Not the Only Evidence to Charge the Former Head of the Ministry of Public Security's Investigation Security Agency' *Báo điện tử Bảo vệ pháp luật* (Hanoi, 24 July 2023) <<https://baovephapluat.vn/phap-dinh/cau-chuyen-phap-luat/chiec-vali-khong-phai-chung-cu-duy-nhat-de-buoc-toi-cuu-truong-phong-thuoc-co-quan-an-ninh-dieu-tra-bo-cong-an-143192.html>> accessed 10 August 2025. [in Vietnamese]

generated ongoing legal and scholarly debate regarding the legitimacy of the conviction and the proper application of evidentiary standards in light of the presumption of innocence.⁸⁶

Any comparative analysis of criminal procedure must begin with an examination of the underlying procedural model. The criminal procedure model determines how truth is established in a criminal case, including the treatment of evidence. Vietnamese criminal law belongs to the legal tradition of former communist countries, similar to those in Eastern Europe. The influence of communist ideology on the legal systems of these nations has been widely studied.⁸⁷

Nonetheless, Vietnam's legal system is also considered to be shaped by the civil law tradition, owing to its history as a French colony for nearly a century.⁸⁸ Also, Vietnamese law shares notable similarities with China, which, despite its nationalist orientation, has relied on civil law principles to construct its criminal procedure framework. While substantive laws and procedural mechanisms may differ across jurisdictions, all legal systems share a fundamental objective: to ascertain the truth and apply legal principles to factual circumstances.

As a universal rule, human beings, regardless of nationality, strive to achieve a just outcome.⁸⁹ Vietnam's criminal procedure model remains fundamentally inquisitorial, shaped by the civil law tradition, enabling it to absorb elements from the procedural frameworks of continental European countries. Nonetheless, adversarial features have been gradually incorporated. The system does not reject adversarial principles; in fact, alongside foundational norms such as the presumption of innocence and the right to defence, the principle of adversarial proceedings has recently been formally recognised in Vietnam's Criminal Procedure Code.

A defining characteristic of Vietnam's current criminal procedure model is that it is not structured around distinct functional roles, such as prosecution, defence, and trial, but rather operates through a clearly delineated sequence of procedural stages: initiation, investigation, prosecution, and trial. This structure reflects the state's monopoly over criminal proceedings, wherein public resources are concentrated on detecting and adjudicating criminal offences, primarily through specialised state agencies.⁹⁰ While differences remain, Vietnam's reformed criminal procedure model now closely resembles the inquisitorial systems found in several Eastern European countries.

86 *ibid.*

87 Joseph M Snee, SJ and A Kenneth Pye, 'Due Process in Criminal Procedure: A Comparison of Two Systems' (1960) 21(4) *Ohio State Law Journal* 467.

88 LL Nemes, 'Hungarian Law of Criminal Procedure In the Light of the Mindzenti Trial' (1957) 17 *Jurist* 157.

89 Joseph M Snee and Kenneth A Pye, *Status of Forces Agreements and Criminal Jurisdiction* (Literary Licensing LLC 2013).

90 Nguyen Thi Thuy, 'Vietnam's Criminal Procedure Model and the Possibility of Applying the Adversarial Procedure Model' (PhD thesis, Vietnam National University 2014) 54. [in Vietnamese]

The following discussion examines the legal gaps in Vietnam's regulation of electronic evidence in comparison with European standards.

Regarding the investigation of electronic evidence, Vietnam still lacks several procedural components compared to the standards set by the Budapest Convention and European countries. Specifically, there is an absence of detailed legal provisions governing the necessary procedures for handling electronic evidence; no clear regulations or protocols exist for the seizure, preservation, and restoration of electronic data to ensure its safety, integrity, and evidentiary value; and there are no specialised rules for the management and use of this unique category of evidence. For example, searches of computers and electronic devices currently follow general search procedures, without dedicated protocols tailored to digital environments. The three articles in the Vietnamese Criminal Procedure Code that directly address electronic evidence are insufficient to establish a comprehensive legal framework. At present, specific procedures and technical measures are only outlined in internal operational guidelines issued by investigative and prosecutorial agencies. Under the principle of due process, evidence obtained through such unofficial procedures may not meet the standard of legality, as the investigative measures are not grounded in statutory law.

Moreover, several critical aspects of electronic evidence investigation are either omitted or only superficially addressed in Vietnam's criminal procedure law, including interception of content data and issuance of production orders. These remain classified as operational techniques rather than codified legal procedures.

The investigation of electronic evidence is closely tied to the entities that possess such data, including service providers. However, Vietnam's Criminal Procedure Code overlooks this category of actors and treats them in the same manner as traditional evidence holders, merely stating that "procedural authorities may request agencies or organisations to submit evidence". A recent high-profile case in Vietnam highlights this legal shortcoming: the Rikvip/Tip.Club online gambling ring, led by Phan Sào Nam and Nguyễn Văn Dư⁹¹, adjudicated by the People's Court of Phú Thọ Province,⁹¹ stands as one of the most prominent examples of electronic evidence usage in criminal investigation and prosecution. The online card game system operated from 2014 to 2017, attracting millions of user accounts and generating illicit revenues estimated in the trillions of Vietnamese đ⁹¹ng. During the investigation, authorities conducted searches and seizures of servers, system data, and transaction logs. The electronic data collected included user information, login records, and financial flows through agents and intermediary payment gateways. Investigators extracted data from the servers and cross-referenced it with financial transactions and witness statements, thereby reconstructing actual revenue figures and identifying the specific roles of the defendants. The court admitted these digital records as electronic evidence to substantiate charges of "organising gambling" and "money laundering."

91 Case No 68/2020/HS-ST [2020] People's Court of Phu Tho Province.

This case highlights a notable strength of Vietnamese law: its recognition of electronic data as admissible evidence, as stipulated in Article 87 of the 2015 Criminal Procedure Code. However, it also reveals critical gaps in the legal framework. Specifically, Vietnam has yet to establish a mechanism for issuing preservation orders to freeze data before it can be deleted, and lacks a production order system to compel service providers to promptly supply data in standardised technical formats. Compared to CETS standards,⁹² Vietnam is missing two essential legal instruments, thus increasing the risk of data loss and significantly hampering international cooperation in cybercrime investigations. Specifically, ETS clearly defines the rights and obligations of these entities through instruments such as the Production Order, which allows law enforcement authorities in one EU member state to request electronic data from service providers established or represented in another member state and compel its transfer.⁹³ Additionally, law enforcement agencies may issue a Preservation Order requiring service providers to retain electronic data for future production, thereby preventing its deletion or overwriting.

Regarding the authenticity of electronic evidence, comparative practice offers further insight. In Poland, electronic evidence is understood in two distinct senses. In the broad sense (*sensu largo*), digitally-originated data is entered into the case file in printed or summarised form and is primarily assessed based on its content. In this context, there is little to no technical processing aimed at verifying or preserving the data's integrity. In the narrow, technical sense (*sensu stricto*), data is collected, preserved, and analysed according to standardised forensic procedures. Its evidentiary value depends significantly on the ability to demonstrate its integrity, origin, and chain of custody.⁹⁴ This dual-layered approach reflects the practical operations of Polish courts and aligns with international legal trends that permit certain data to be self-authenticating, provided it meets requirements regarding origin and procedural handling. It enables courts to determine when full technical forensic analysis is necessary and when printed data from a reliable source may be reasonably accepted as evidence.

In contrast, due to limitations in technical capacity and in the expertise of investigators, prosecutors, and judges, electronic evidence in Vietnam is currently understood primarily in the broad sense. The most common and significant method of converting electronic evidence in Vietnam today involves printing all retrieved data onto paper. Police officers then prepare a written record documenting the seizure of all printed materials extracted from the suspect's hard drive or digital device.

The following case illustrates this legal gap. The *Nhật Cường Mobile* case, adjudicated by the Hanoi People's Court in 2022, serves as a notable example of the decisive role electronic evidence plays in economic and corruption-related proceedings. Investigative

92 Convention on Cybercrime (n 4) arts 16–21.

93 Thomas Wahl, 'E-evidence Regulation and Directive Published' (2023) 2 *Eucrim* 165.

94 Lewulis (n 75).

authorities collected and extracted electronic data from the company's internal enterprise resource planning (ERP) system, including sales records, illegal import orders, financial transactions, and electronic accounting documents. Based on this data, the prosecution reconstructed 2,502 import orders involving 254,364 smuggled products with a total value exceeding 3,000 billion VND, and identified illicit profits amounting to over 221 billion VND. The court recognised these extracted data records as electronic evidence with direct probative value in establishing acts of smuggling, money laundering, and violations of accounting regulations.⁹⁵

However, from a comparative legal perspective, this case highlights notable gaps in Vietnam's legal framework. Under European standards—specifically Article 18 of the Budapest Convention—requests for corporate data must be executed through a formal production order, which clearly defines the authority issuing the request, the scope of data, applicable time limits, and format requirements. Vietnam's 2015 Criminal Procedure Code has yet to establish a corresponding legal mechanism. As a result, the collection of electronic evidence in the *Nhật Cường* case relied primarily on manual procedures such as searches, seizures, and data extraction. This approach poses challenges for data standardisation and diminishes the adversarial value of the evidence during trial proceedings.

The need for specialists in computer science and information technology has become increasingly urgent for courts confronted with technologically advanced crime. Such specialists assist investigators in prosecuting offenders by analysing and deploying data processing systems and software tools. Their expertise and effectiveness play a crucial role in enabling investigators to access, organise, and interpret electronic evidence.⁹⁶ For example, in Italy, Article 244 (2) of the Code of Criminal Procedure (*Codice di Procedura Penale*) stipulates that in identifying digital evidence, the legislator must ensure that inspections and searches are carried out using “technical measures capable of ensuring preservation and preventing alteration of the original data.”⁹⁷

Currently, Vietnam's criminal procedure law does not distinguish between the process of collecting evidence through investigation, digital forensic procedures, and digital investigative workflows. Digital forensics is a discipline that applies computer science in conjunction with investigative techniques to meet legal requirements. When authorised by competent authorities, digital forensics involves the collection and analysis of electronic evidence, the establishment of a chain of custody, the preparation of expert reports, and the presentation of findings using legally sanctioned tools.⁹⁸ Digital forensics ensures the

95 Case No 144/2021/HS-ST [2022] People's Court of Hanoi.

96 Fredesvinda Insa, 'The Admissibility of Electronic Evidence in Court (AEEC): Fighting Against High-Tech Crime—Results of a European Study' (2007) 1(4) *Journal of Digital Forensic Practice* 285. doi:10.1080/15567280701418049.

97 *Codice di procedura penale* No 447 (22 September 1988) <<https://www.altalex.com/documents/codici-altalex/2014/10/30/codice-di-procedura-penale>> accessed 10 August 2025.

98 Le (n 31).

authenticity and integrity of electronic evidence. However, in Vietnam, digital forensics currently plays only a limited role as a post-investigation assessment tool. To guarantee the authenticity and integrity of electronic evidence, it must be integrated throughout the entire investigative process. The absence of digital forensic involvement and a dedicated procedural framework raises concerns about the reliability and integrity of electronic evidence. A proper digital investigation process requires operational precision at each stage; standardisation of procedural sequences; coordinated, synchronised, and efficient collaboration among investigative units; and systematic documentation of investigative activities to support the chain of custody and enable retrospective verification. Despite its importance, digital investigation in Vietnam remains classified as an internal operational technique rather than a formally codified legal procedure.

Regarding the evaluation of electronic evidence, Vietnam's Criminal Procedure Code does not yet provide specific criteria. Instead, it refers to standards found in the Law on Electronic Transactions, which include: (1) the reliability of the method used to create, store, and transmit the data; (2) the method used to ensure and maintain data integrity; and (3) the method used to identify the originator and related factors. By contrast, internationally accepted standards for evaluating electronic evidence typically include: (1) whether the technology has been tested; (2) whether it has undergone rigorous evaluation; (3) whether known error rates are associated with the technology; (4) whether operational control standards exist and are maintained; and (5) whether the technology is widely accepted by the scientific community.

The reliability of electronic evidence must be assessed on the basis of sound technological criteria.⁹⁹ The absence of such standards in Vietnam has led to uncertainty in judicial evaluations. In one criminal case, although both the victim and the defendant admitted that an email contained fraudulent content, the email's authenticity could not be verified through a proper electronic evidence investigation. Accepting the email risked violating evidentiary standards; rejecting it risked overlooking a criminal act.

In another case involving assault and damage to two motorcycles, the case file included printed images depicting one young man holding a hammer and a knife, and two others holding a metal chair in a threatening manner. The court nevertheless relied solely on these printed images to convict the defendants without verifying their authenticity through a digital forensic process.

A further illustration is the case involving Mr Cao Toan My and beauty queen Truong Ho Phuong Nga. Mr My accused Ms Nga of appropriating VND 16.5 billion through a fraudulent real estate contract that was never executed. She was prosecuted for "fraudulent appropriation of property". However, during trial proceedings, the defendant testified that the VND 16.5 billion was not payment for a house, but rather part of a seven-year "intimate

99 Zatyko and Bay (n 3).

relationship agreement” with Mr My. The defence submitted emails and electronic messages to support this claim. Yet the evidence consisted only of printed email copies that had not been verified by the service provider, leading to intense disputes over their authenticity and integrity. This case highlights a critical gap in Vietnamese law regarding the verification of electronic evidence: electronic communications provided by parties lacked forensic authentication and were not obtained through formal production orders. As a result, the evidentiary process failed to meet international standards for reliability and adversarial fairness. To address these deficiencies, Vietnam requires clear legal provisions governing the authenticity, integrity, and legality of electronic evidence, aligned with international norms, including the Budapest Convention and European Union standards.¹⁰⁰

Vietnam’s criminal procedure remains inquisitorial, with case files compiled by investigative and prosecutorial authorities from the moment a case is initiated. The court conducts its trial based primarily on this dossier, following the principle *Quod non est in acta, non est in mundo* (what is not in the record does not exist).¹⁰¹ As a result, adversarial proceedings for evaluating electronic evidence remain limited. In practice, electronic evidence derived from digital data is primarily presented as printed copies produced by investigative authorities, which raises concerns about its authenticity. The lack of adversarial scrutiny is further reflected in the disadvantaged position of defence counsel, who face significant restrictions in their rights and ability to collect electronic evidence. As a result, the determination of factual truth in criminal cases relies almost entirely on evidence submitted by the prosecution. For example, under Vietnam’s Criminal Procedure Code, any documents or objects obtained by the accused, defence counsel, or any other parties must be handed over to the investigative authority and only become evidence if that authority accepts them into the case file.

Protection of Human Rights remains a significant challenge for countries seeking to domesticate the Budapest Convention. The investigation of electronic evidence carries a high risk of infringing upon the right to privacy. European countries have established numerous safeguards to protect human rights, whereas Vietnam currently lacks a robust mechanism to ensure such protection during electronic evidence investigations. In Vietnam, the process is notably favourable to law enforcement authorities, as service providers are required to supply electronic evidence without any statutory limitations, especially during pre-prosecution surveillance activities conducted by police. However, this raises serious concerns from a human rights perspective. Investigative measures involving electronic evidence inherently restrict individual rights, and the authority to approve such measures should rest with the judiciary. Yet, as previously discussed, in Vietnam, the

100 Gia Minh, ‘Temporarily Suspend Investigation of Miss Phuong Nga Case’ (*Tuoi Tre Online*, 10 August 2017) <<https://tuoitre.vn/tam-dinh-chi-dieu-tra-vu-an-hoa-hau-phuong-nga-1366696.htm>> accessed 20 September 2025. [in Vietnamese]

101 Đào Trí Úc, ‘Principles of Criminal Procedure Vietnam’ (2011) 27(1) *Tạp chí Khoa học ĐHQGHN, Luật học* 10. [in Vietnamese]

approval for searches and seizures is granted by the prosecution, not the court. This raises doubts about the legitimacy, reasonableness, and legality of such actions, and fuels fears of arbitrary violations of fundamental human rights.

These concerns were evident in the Rikvip/Tip.Club case.¹⁰² First, mass data seizure without relevance filtering occurred: during the server data extraction process, investigative authorities seized comprehensive user information, including personal data from millions of accounts unrelated to the alleged criminal conduct. The 2015 Criminal Procedure Code lacks clear provisions regarding the scope, retention period, or deletion of data beyond the investigative remit, thereby creating risks of abuse and privacy violations. Second, judicial oversight was absent. Data seizure and extraction were conducted based on decisions by investigative bodies and Procuracy approvals, without an independent court-issued warrant. This stands in contrast to European legal practice, where any access to personal data requires judicial authorisation to ensure legality, necessity, and proportionality. Third, defence rights and adversarial principle were limited. Electronic evidence was primarily printed and included in the case file. Defence lawyers were not granted access to forensic copies for independent verification, undermining their ability to challenge the evidence and weakening the adversarial balance in proceedings.

Regarding international cooperation, cybercrime is inherently transnational, with digital traces often extending beyond national borders. As a result, international cooperation in the investigation of electronic evidence is critically important, yet remains complex and sensitive for many countries, including Vietnam. At present, Vietnam has not fully engaged in bilateral or multilateral cooperation frameworks on this issue, resulting in difficulties when investigating cross-border electronic evidence due to legal conflicts.

In the aforementioned fraud case involving beauty queen Phur²ng Nga, the defendant presented an email sent via Gmail to support her claim. The alleged sender denied having written the email. The court requested the investigative agency to verify the ownership of the Gmail account. The agency sought assistance from Interpol, as the Gmail server is located in the United States. However, the request was denied due to U.S. privacy laws, which prohibit service providers from disclosing account ownership information. This example illustrates the necessity for Vietnam to engage promptly with, and align its domestic legislation to, established international cooperation frameworks, so that cross-border requests for the collection and verification of electronic evidence do not fall into institutional deadlock, the consequences of which would significantly weaken the State's ability to address cybercrime in an effective and proportionate manner.

102 Case No 68/2020/HS-ST [2020] People's Court of Phu Tho Province.

6 CONCLUSIONS

The acknowledgement of electronic data as a source of evidence in Vietnam's 2015 Criminal Procedure Code marks a significant advancement in the country's adaptation to the rise of high-tech crime. However, when compared to international standards, particularly the Budapest Convention, the current legal framework still exhibits substantial gaps, including the absence of standardised procedures, insufficient human rights safeguards, ineffective mechanisms for international cooperation, and a lack of digital forensic standardisation. Based on comparative legal analysis, several reform directions emerge:

First, the process of investigating electronic evidence should be codified through a national standard procedure covering detection, documentation, seizure, preservation, and forensic examination of electronic data. This should include mandatory chain-of-custody protocols and standardised tools. Vietnam should incorporate procedural instruments recognised under the Budapest Convention, such as preservation orders, production orders, and search-and-seizure mechanisms.

Second, human rights protections and judicial oversight must be strengthened. The authority to approve intrusive electronic-data-collection measures should be transferred from the procuracy to the judiciary, reinforcing checks and balances and ensuring proportionality and necessity. The principle of data minimisation should be codified, along with mandatory deletion of data beyond the scope of investigation.

Third, the adversarial principle should be reinforced. Defence counsel must be guaranteed access to forensic copies of electronic evidence for independent verification. Courts must ensure that electronic data is presented in readable, audible, or viewable formats rather than solely as printed documents.

Fourth, service provider obligations must be clarified. Telecommunications, internet, and social media companies should be subject to regulations governing data retention, provision, and authentication of electronic data, accompanied by liability and compensation mechanisms for non-compliance.

Fifth, international cooperation should be expanded. Vietnam should expedite accession to the Budapest Convention and prepare to participate in the forthcoming United Nations Convention on Cybercrime. These instruments will provide a legal basis for cross-border data requests and help overcome conflicts of law.

Sixth, digital forensic capacity must be standardised. Minimum competency requirements for digital forensic examiners should be established, independent forensic centres should be developed, and collaboration with international forensic laboratories should be promoted.

In conclusion, electronic evidence has become an inevitable component of modern criminal proceedings. Reforming Vietnam's legal framework in accordance with the recommendations above will not only enhance investigative efficiency but also preserve the

balance between crime control and human-rights protection. Such reforms will bring Vietnam closer to international standards—particularly those of the Budapest Convention and European legal systems—thereby strengthening the legitimacy, transparency, and fairness of the criminal justice system.

REFERENCES

1. Avdeeva G and Żywucka-Kozłowska E, 'Problems of Using Digital Evidence in Criminal Justice of Ukraine and the USA' (2023) 1(30) Theory and Practice of Forensic Science and Criminalistics 126. doi:10.32353/khrife.1.2023.07
2. Biasiotti MA and others, 'Opportunities and Challenges for Electronic Evidence' in Biasiotti MA and others (eds), *Handling and Exchanging Electronic Evidence Across Europe* (Springer 2018) 3. doi:10.1007/978-3-319-74872-6_1
3. Biedermann A and Kotsoglou KN, 'Digital Evidence Exceptionalism? A Review and Discussion of Conceptual Hurdles in Digital Evidence Transformation' (2020) 2 Forensic Science International: Synergy 262. doi:10.1016/j.fsism.2020.08.004
4. Blahuta R, Movchan A and Movchan M, 'Use of Electronic Evidence in Criminal Proceedings in Ukraine' (International Conference on Social Science, Psychology and Legal Regulation (SPL 2021) Kyiv, Ukraine, 22-24 December 2021) 196. doi:10.2991/assehr.k.211218.032
5. Calderoni F, 'The European Legal Framework on Cybercrime: Striving for an Effective Implementation' (2010) 54(5) Crime, Law and Social Change 339. doi:10.1007/s10611-010-9261-6
6. Carrier BD and Spafford EH, 'An Event-Based Digital Forensic Investigation Framework' (DFRWS 2004 Digital Forensic Research Conference, USA, Baltimore, MD, 11-13 August 2004)
7. Casey E, *Digital Evidence and Computer Crime: Forensic Science, Computers, and the Internet* (3rd edn, Academic Press 2011)
8. Custers B and Stevens L, 'The Use of Data as Evidence in Dutch Criminal Courts' (2021) 29(1) European Journal of Crime, Criminal Law and Criminal Justice 25. doi:10.1163/15718174-bja10015
9. Dao TU, 'Principles of Criminal Procedure Vietnam' (2011) 27(1) Tạp chí Khoa học ĐHQGHN, Luật học 10. [in Vietnamese]
10. Gebicki M, 'Cross-border Acquisition of Digital Data in Criminal Proceedings: State of Play and Measures Taken by the European Union and the Council of Europe' (2024) 1(29) Teisės apžvalga 3. doi:10.7220/2029-4239.29.1

11. Gia M, 'Temporarily Suspend Investigation of Miss Phuong Nga Case' (*Tuoi Tre Online*, 10 August 2017) <<https://tuoitre.vn/tam-dinh-chi-dieu-tra-vu-an-hoa-hau-phuong-nga-1366696.htm>> accessed 20 September 2025. [in Vietnamese]
12. Gillespie J, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2008) 40(3) *NYU Journal of International Law and Politics* 657.
13. Goodison SE, Davis RC and Jackson BA, 'Digital Evidence and the US Criminal Justice System: Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence' (*RAND*, 20 April 2015) <https://www.rand.org/pubs/research_reports/RR890.html> accessed 10 August 2025
14. Insa F, 'The Admissibility of Electronic Evidence in Court (AEEC): Fighting Against High-Tech Crime—Results of a European Study' (2007) 1(4) *Journal of Digital Forensic Practice* 285. doi:10.1080/15567280701418049
15. Jones N and others, *Electronic Evidence Guide: A Basic Guide for Police Officers, Prosecutors and Judges* (version 2.1, Council of Europe 2020) <<https://rm.coe.int/c-proc-electronic-evidence-guide-2-1-en-june-2020-web2/16809ed4b4>> accessed 10 August 2025.
16. Juszczak A and Sason E, 'The Use of Electronic Evidence in the European Area of Freedom, Security, and Justice: An Introduction to the New EU Package on E-evidence' (2023) 2 *Eucrim* 182.
17. Kerr OS, 'Searches and Seizures in a Digital World' (2005) 119(2) *Harvard Law Review* 531.
18. Kissel R (ed), *Glossary of Key Information Security Terms* (Diane Publishing 2011)
19. Koops BJ and Oerlemans JJ, 'Formeel strafrecht en ICT' in Koops BJ and Oerlemans JJ (eds), *Strafrecht en ICT* (Monografieën recht en informatietechnologie, SDU 2019) 117
20. Le TQ, 'Difficulties in Determining the Properties of Electronic Evidence' (2024) 15 *Tạp chí Kiểm sát* 10. [in Vietnamese]
21. Lewulis P, 'Collecting Digital Evidence from Online Sources: Deficiencies in Current Polish Criminal Law' (2022) 33(1) *Criminal Law Forum* 39. doi:10.1007/s10609-021-09430-4
22. Lewulis P, 'Digital Forensic Standards and Digital Evidence in Polish Criminal Proceedings: An Updated Definition of Digital Evidence in Forensic Science' (2021) 13(4) *International Journal of Electronic Security and Digital Forensics* 403. doi:10.1504/IJESDF.2021.10034988
23. Lewulis P, *Dowody cyfrowe: teoria i praktyka kryminalistyczna w polskim postępowaniu karnym* (Wydawnictwo Uniwersytetu Warszawskiego 2021)
24. Mason S and Seng D (eds), *Electronic Evidence* (University of London Press 2017). doi:10.14296/517.9781911507079

25. Mifsud Bonnici JP, Tudorica M and Cannataci JA, 'The European Legal Framework on Electronic Evidence' in Maria Angela Biasiotti and others, *Handling and Exchanging Electronic Evidence Across Europe* (Springer 2018) 189. doi:10.1007/978-3-319-74872-6_11
26. Nemes LL, 'Hungarian Law of Criminal Procedure In the Light of the Mindzenti Trial' (1957) 17 *Jurist* 157
27. Nguyen BT, 'Improving Vietnam's Electronic Evidence Law in the Industry 4.0 Era: Experience from China' (2024) 16(1) *Revista de Direito* 1. doi:10.32361/2024160117322
28. Nguyen NC and Le LC (eds), *Criminal Procedure Law Textbook* (Hanoi National University Press 2018) [in Vietnamese]
29. Nguyen NK, 'Source of Evidence is Electronic Data in Criminal Proceedings in Vietnam and Some Countries in the World' (Master's thesis, Vietnam National University 2024) [in Vietnamese]
30. Nguyen TT, 'Vietnam's Criminal Procedure Model and the Possibility of Applying the Adversarial Procedure Model' (PhD thesis, Vietnam National University 2014) [in Vietnamese]
31. Onțanu EA, 'Normalising the Use of Electronic Evidence: Bringing Technology Use into a familiar Normative Path in Civil Procedure' (2022) 12(3) *Oñati Socio-Legal Series* 582. doi:10.35295/osls.iisl/0000-0000-0000-1304
32. Pollitt M, 'A History of Digital Forensics' (6th IFIP WG 11.9 International Conference on Digital Forensics (DF), Hong Kong, China, Jan 2010) 3. doi:10.1007/978-3-642-15506-2_1
33. Snee JM and Pye AK, 'Due Process in Criminal Procedure: A Comparison of Two Systems' (1960) 21(4) *Ohio State Law journal* 467
34. Snee JM and Pye AK, *Status of Forces Agreements and Criminal Jurisdiction* (Literary Licensing LLC 2013)
35. Tran QT, *Evidence Regulation in Vietnamese Criminal Procedure Law* (National Political Publishing House 2011) [in Vietnamese]
36. Tran VH, 'The Issue of Electronic Traces and Evidence in the Amended Criminal Procedure Code' (2014) 12 *Tạp chí Khoa học và Chiến lược*. [in Vietnamese]
37. Tsekhan DM, 'Digital Evidence: Concept, Features and Place in the Evidence System' (2013) 5 *Scientific Bulletin of the International Humanities University, Series: Jurisprudence* 256. [in Ukrainian]
38. Vazquez Maymir S, 'Anchoring the Need to Revise Cross-Border Access to eEvidence' (2019) 9(3) *Internet Policy Review* 1. doi:10.14763/2020.3.1495
39. Wahl T, 'E-evidence Regulation and Directive Published' (2023) 2 *Eucrim* 165

40. Wang W and Daniels TE, 'Building Evidence Graphs for Network Forensics Analysis' (21st Annual Computer Security Applications Conference ACSAC 2005). doi:10.1109/CSAC.2005.14
41. Xuan N, 'The Suitcase is Not the Only Evidence to Charge the Former Head of the Ministry of Public Security's Investigation Security Agency' *Báo điện tử Bảo vệ pháp luật* (Hanoi, 24 July 2023) <<https://baovephapluat.vn/phap-dinh/cau-chuyen-phap-luat/chiec-vali-khong-phai-chung-cu-duy-nhat-de-buoc-toi-cuu-truong-phong-thuoc-co-quan-an-ninh-dieu-tra-bo-cong-an-143192.html>> accessed 10 August 2025. [in Vietnamese]
42. Zatyko K and Bay J, 'The Digital Forensics Cyber Exchange Principle' (Villanova University, College of Liberal Arts and Sciences, 22 April 2013) <http://www.csc.villanova.edu/~dprice/9010sp14/extra_handouts/The_Digital_Forensics_Cyber_Exchange_Principle_-_2013-04-22.pdf> accessed 5 August 2025
43. Zozulia N, 'Electronic or Digital Evidence: Improving Amendments in Procedural Legislation' (*Ukrainian Law*, 8 May 2018) <https://www.bitlex.ua/uk/blog/news/post/elektronni_chy_tsyfrovi_dokazy_udoskonalennya_zmin_do_protsestualnogo_zakonodavstva> accessed 10 August 2025. [in Ukrainian]

AUTHORS INFORMATION

Dinh The Hung

PhD (Law), Faculty of Law, Hanoi Open University, Vietnam

dthung4@hou.edu.vn

<https://orcid.org/0009-0001-6700-1353>

Corresponding author, solely responsible for the manuscript preparing.

Competing interests: No competing interests were disclosed.

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Dinh The Hung. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.
Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Dinh TH, 'The Legal Framework of Electronic Evidence in Vietnamese Criminal Procedure: From the Budapest Convention to Domestic Legislation' (2025) 8(4) Access to Justice in Eastern Europe 301-39 <<https://doi.org/10.33327/AJEE-18-8.4-a000142>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-a000142>

Summary: 1. Introduction. – 2. Methodology and Research Methods. – 3. Theoretical Framework on Electronic Evidence. – 3.1. *Concept of Electronic Evidence*. – 3.2. *Fundamental Principles Governing Electronic Evidence*. – 4. European and Vietnamese Legal Frameworks for Electronic Evidence. – 4.1. *The European Regulatory Framework on Electronic Evidence*. – 4.2. *Shared Procedural Aspects of Investigating and Using Electronic Evidence*. – 4.2.1. *European Legal Framework*. – 4.2.2. *Vietnam's Framework on Investigation of Electronic Evidence*. – 5. Legal Gaps in Electronic Evidence Regulation in Vietnam Compared to the Budapest Convention. – 6. Conclusions.

Keywords: *Cybercrime, Electronic Evidence, Criminal Proceedings, Electronic Data, Legality of Electronic Evidence, Authenticity*

DETAILS FOR PUBLICATION

Date of submission: 10 Aug 2025

Date of acceptance: 08 Oct 2025

Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 2 rounds with major revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

The author declares that no artificial intelligence tools were used in the writing, translation, or editing of this manuscript. The research and the content of the article represent the authors' own original work.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВЕ РЕГУЛЮВАННЯ ЕЛЕКТРОННИХ ДОКАЗІВ У КРИМІНАЛЬНОМУ ПРОЦЕСІ В'ЄТНАМУ: ВІД БУДАПЕШТСЬКОЇ КОНВЕНЦІЇ ДО НАЦІОНАЛЬНОГО ЗАКОНОДАВСТВА

Дінь Тхе Хунг

АНОТАЦІЯ

Вступ. Електронні докази є критично важливою та делікатною темою, що розглядається в міжнародних документах щодо запобігання злочинам, зокрема в Будапештській конвенції та Договорі Організації Об'єднаних Націй про кіберзлочинність (Ханойська конвенція), що був нещодавно підписаний у Ханой, В'єтнам, у жовтні 2025 року. Правове регулювання електронних доказів стало однією з найбільш обговорюваних тем в академічних колах, особливо в дискусіях щодо інкорпорації зобов'язань за міжнародними договорами всередині країни.

Кримінально-процесуальний кодекс В'єтнаму 2015 року зробив значний крок вперед, офіційно визнавши електронні дані як законну форму доказів, еквівалентну за доказовою силою іншим традиційним джерелам доказів. Оскільки електронні докази стають дедалі поширенішими в спектрі кримінальних правопорушень, це визнання є своєчасним. Однак, зі зростанням кіберзлочинності, чинне законодавство В'єтнаму виявляє значні обмеження порівняно з європейськими стандартами, особливо, що стосується концептуальної ясності, процесуальних гарантій збору та оцінки електронних доказів, захисту прав людини та забезпечення дотримання принципів змагальності.

Таким чином, ця стаття має на меті уточнити теоретичну та правову базу для електронних доказів згідно з європейськими стандартами, порівняти її з підходом В'єтнаму та визначити теоретичні та правові прогалини, які необхідно усунути, такі як: потреба в чіткіших визначеннях, сильніших процесуальних гарантіях збору та оцінки доказів, потреба в захисті прав людини та посиленні принципів змагальності.

Методи. Для проведення порівняльного аналізу електронних доказів у рамках кримінально-процесуального права В'єтнаму та міжнародно-правового регулювання

автор статті використовує методологію, що ґрунтуються на порівняльно-правових дослідженнях. Аналіз зосереджений на порівняльному вивченні міжнародних та національних правових положень щодо електронних доказів. Відповідно, автор широко використовує порівняльно-правові методи, зокрема нормативне порівняння та функціональне порівняння, для виявлення як подібностей, так і відмінностей між нормативними актами В'єтнаму щодо джерел доказів у кримінальному процесі та тими, що містяться в міжнародних документах та правових системах інших юрисдикцій.

Результати та висновки. У статті було зроблено висновок, що правові положення В'єтнаму та їх практичне впровадження щодо електронних доказів повинні ґрунтуватися на міжнародному досвіді у кількох ключових аспектах: точна концептуалізація електронних доказів, розробка стандартизованих процедур їх збору та вдосконалення правових механізмів, що регулюють обов'язок подання доказів, судово-медичну експертизу та застосування спеціальних слідчих заходів. Такі реформи є важливими для забезпечення автентичності та законності електронних доказів, одночасно захищаючи права людини в рамках кримінального судочинства.

Ключові слова: кіберзлочинність, електронні докази, кримінальне провадження, електронні дані, законність електронних доказів, автентичність.

Review Article

DECENT PAY AND ACCESS TO JUSTICE
FOR LABOUR MIGRANTS IN THE EAEU:
COMPARATIVE LEGAL PERSPECTIVES

**Madina Yessirkepova, Nurbek Isabay, Mereke Zhurunova*
and Leila Amandykova**

ABSTRACT

Background: Labour migration remains a key driver of socio-economic development in the Eurasian Economic Union (EAEU), yet ensuring decent wages and access to justice for migrant workers is an under-addressed challenge. This gap in protection persists despite its direct relevance to international labour standards and the UN Sustainable Development Goal 8 on decent work.

Methods: The study employs a comparative legal analysis of the EAEU Treaty and national labour legislations of the EAEU countries against international standards (ILO, UN, EU). Empirical data include official wage statistics, government reports, and international publications. The analysis also incorporates case studies from Ireland, Finland, Poland, and the United Kingdom under the ILO “decent work” framework, with special emphasis on judicial mechanisms for rights protection.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-r000129>

Date of submission: 18 Aug 2025

Date of acceptance: 10 Sep 2025

Last Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Madina Yessirkepova, Nurbek Isabay,
Mereke Zhurunova and Leila Amandykova

Results and conclusions: *The findings reveal that statutory minimum wages in EAEU countries are very low (only 20–30% of the average wage, and around 10% in Kyrgyzstan) and are often not indexed to inflation. As a result, migrant workers consequently face high rates of in-work poverty and significant barriers to justice (linguistic, financial, and procedural), limiting their ability to claim rights. By contrast, European practices demonstrate the critical role of judicial enforcement: for example, case law of the European Court of Human Rights shows that access to courts can transform formal labour guarantees into effective rights.*

The study concludes that, to meet international decent work standards, the EAEU must combine strengthened minimum wage guarantees with enhanced judicial protection. Key recommendations include linking minimum wages to median income, introducing automatic indexation, and expanding the EAEU Court's jurisdiction over labour disputes. Such measures would bolster migrants' socio-economic security, ensure real access to justice, and align EAEU labour policy with global decent work commitments.

1 INTRODUCTION

Labour migration within the framework of the EAEU represents the active movement of the workforce between the Union's member states in search of employment and better living conditions. One of the primary motivations for migrants is the aspiration to obtain decent remuneration sufficient to meet their own needs and ensure the well-being of their families. Fundamental legal norms affirm the necessity of fair pay: for instance, the Universal Declaration of Human Rights (1948) proclaims the right of every person, without discrimination, to equal pay for equal work.¹

Similar guarantees are also enshrined in the national legal systems of the EAEU member states. For example, Article 24 of the Constitution of the Republic of Kazakhstan establishes the right of every person to remuneration for work without any discrimination, to working conditions that meet safety and hygiene requirements, as well as to protection against unemployment.²

This constitutional principle is also reaffirmed in the political and legal discourse. In his Address to the Nation, President of the Republic of Kazakhstan Kassym-Jomart Tokayev emphasised that the value of diligence and conscientious performance of duties must be preserved in society, and that honest labour should be fairly rewarded.

Decent remuneration implies not only covering the migrant's daily expenses, but also enabling them to save, invest in the education and health of their children, and support

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

2 Constitution of the Republic of Kazakhstan (adopted 30 August 1995) <https://adilet.zan.kz/eng/docs/K950001000_> accessed 10 August 2025.

their family back home. Wages perform a crucial socio-economic function: they are the worker's primary source of income, ensuring the reproduction of labour power and stimulating productivity. In a market economy, earnings form the population's effective demand, influencing both the pace and the direction of economic growth.

Wages rank among the most significant economic categories and possess a multifaceted nature, encompassing both economic, social, and political aspects. The state, therefore, plays a key role in regulating remuneration, building a system of guarantees designed to ensure fair standards of labour compensation.

The combination of the above-mentioned factors determines the relevance of studying the remuneration of labour migrants in the EAEU. The EAEU countries are striving for deeper integration of labour markets, which implies the convergence of conditions and guarantees of remuneration. In practice, migrants often face challenges such as low wages, a lack of social guarantees, and inadequate legal protection in the host country. They are frequently employed in low-paid jobs without formal employment contracts, leaving them vulnerable to exploitation by employers.³

Addressing these challenges requires coordinated efforts by states, international organisations, and NGOs: ensuring that labour migrants have access to minimum social standards (e.g., guaranteed minimum wage levels, social insurance) and adherence to the principles of decent work can significantly improve their working and living conditions.

In academic literature, considerable attention is devoted to the organisation and regulation of remuneration. Classical works (e.g., F. Taylor and others) laid the foundation for the theory of wage systems, while contemporary research explores issues of labour incentives and the regulation of wages for employees.⁴

The remuneration and incentive systems specifically for labour migrants in the EAEU have received virtually no scholarly attention in recent years. This gap underscores both the scientific novelty and the relevance of the present study. International research, including the works of D. Card (1990),⁵ J.M. Abowd and R.B. Freeman (1991),⁶ D. Card and A.B. Krueger (1995),⁷ shows that the impact of migration and minimum wage policies on the labour market is often less significant than commonly assumed in public discourse.

3 Reema Nanavaty and others, '7 Experts Explain Why It's Important to Pay Fairer Wages and How to Do It' (*World Economic Forum*, 3 June 2025) <https://www.weforum.org/stories/2022/06/seven-experts-explain-how-to-create-fairer-wages/?utm_source=chatgpt.com> accessed 10 August 2025.

4 Frederick W Taylor, *The Principles of Scientific Management* (Harper & Brothers 1911); 'The 5 Principles of Scientific Management Theory' (*TheMBains*, 22 July 2023) <<https://thembains.com/principles-of-scientific-management-theory/>> accessed 10 August 2025.

5 David Card, 'The Impact of the Mariel Boatlift on the Miami Labor Market' (1990) 43(2) *ILR Review* 245. doi:10.2307/2523702.

6 John M Abowd and Richard B Freeman (eds), *Immigration, Trade, and the Labor Market* (NBER 1991).

7 David Card and Alan B Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (20th-anniversary edn, Princeton UP 2015).

These findings are particularly important for the EAEU countries, where the development of minimum wage guarantees requires consideration of international experience and reliance on empirically grounded approaches.

Research Objective

The objective of this study is to conduct a comprehensive comparative legal analysis of wage regulation and labour migrant remuneration in the EAEU member states, taking into account international experience (EU, Ireland, Finland, and Poland). The aim is to identify key disparities and develop recommendations for shaping a unified model of decent remuneration and strengthening the socio-legal guarantees of migrants within the Union.

2 METHODOLOGY

The study employs a comparative legal analysis, encompassing both the provisions of the EAEU Treaty and the national legislation of its member states, as well as international standards established by the ILO, the UN, and the EU. The empirical basis includes official statistical data on minimum and average wages, government reports, and publications of international organisations.

The analysis employed systemic and structural-functional approaches, which enabled the identification of the relationship between formal guarantees of remuneration and their practical implementation. A comparison with foreign case studies (Ireland, Finland, Poland, and the United Kingdom) was conducted within the framework of the ILO's "decent work" concept, which enabled an assessment of the applicability of international practices in the EAEU context. In addition, an institutional-legal approach was used to examine judicial mechanisms for the protection of migrant rights (ECtHR, EAEU Court), along with elements of law and economics to assess the impact of minimum wage levels on labour markets and the social position of migrants.

3 RESEARCH FINDINGS: WAGE GUARANTEES AND MINIMUM WAGE IN THE EAEU

In all EAEU member states, national legislation establishes a comprehensive framework of wage guarantees, including the establishment of a statutory minimum wage, the obligation to make timely payments, enhanced remuneration for overtime work, requirements for transparency of employment contracts, and mechanisms for safeguarding workers' rights. Taken together, these provisions are intended to promote fair labour conditions consistent with internationally recognised standards of decent work, while also serving as an important indicator of socio-economic development and overall social welfare.

Nevertheless, wage regulation remains predominantly within the competence of individual member states, reflecting their specific socio-economic contexts.

The regulation and organisation of remuneration in the EAEU countries have their own specific features, shaped by both the general principles of the Union and the socio-economic conditions of each member state. Wage regulation is primarily governed by national legislation, reflecting the economic capacity and living standards of the population in each country. Employers are generally granted considerable discretion in selecting forms and systems of remuneration (such as wage scales, fixed salaries, or performance-based bonuses), provided that statutory minimum standards are respected. The fundamental prohibition is the payment of wages below the established minimum wage threshold.⁸

At the same time, significant disparities in living standards and levels of economic development among EAEU member states hinder the establishment of a unified minimum wage indicator for the Union as a whole. Each country determines the statutory minimum monthly wage through its national legislation. Despite gradual increases, minimum wages often remain substantially below the average wage level. As of 2025, for instance, the statutory minimum monthly wage in the Republic of Armenia is 75,000 Armenian drams, effective from 1 January 2023.⁹ In the Republic of Belarus, the minimum monthly wage was increased to 726 new Belarusian rubles by a resolution of the Council of Ministers, effective 1 January 2025.¹⁰ In the Republic of Kazakhstan, the statutory minimum wage was set at 85,000 tenge under the Law on the Republican Budget, effective 1 January 2025.¹¹ In the Kyrgyz Republic, the minimum monthly wage was set at 2,865 soms under the 2025 Budget Law, effective 1 January 2025.¹² In the Russian Federation, Federal Law No. 365-FZ of 29 October 2024 established the minimum wage at 22,440 rubles, effective 1 January 2025.¹³

In several EAEU countries, the statutory minimum wage remains significantly below the subsistence level, fueling ongoing debates about raising it to align more closely with the living wage. At the same time, it is important to recognise that a sharp increase in the minimum wage, if not accompanied by appropriate indexation mechanisms, may generate

-
- 8 Muslim Khassenov, 'Legal Regulation of the Labour Market of Kazakhstan: Problems and Solutions' in Konrad Adenauer Foundation, *Transformation of the Economy of Kazakhstan* (IndigoPrint 2019) 231.
 - 9 Law of the Republic of Armenia HO-66-N 'On the Minimum Monthly Wage' (amended 7 December 2022 NO-501-N) art 1 <<https://www.arlis.am/hy/acts/172160>> accessed 10 August 2025.
 - 10 Resolution of the Council of Ministers of the Republic of Belarus No 935 'On Establishing the Amount of the Monthly Minimum Wage' (10 December 2024) <<https://pravo.by/document/?guid=12551&p0=C22400935>> accessed 10 August 2025.
 - 11 Law of the Republic of Kazakhstan No 141-VIII ZRK 'On the Republican Budget for 2025–2027' (4 December 2024) art 9(1) <<https://adilet.zan.kz/kaz/docs/Z2400000141>> accessed 10 August 2025.
 - 12 Law of the Kyrgyz Republic No 10 'On the Republican Budget of the Kyrgyz Republic for 2025 and the 2026-2027 Planning Period' (15 January 2025) art 15 <<https://cbd.minjust.gov.kg/4-5475/edition/25554/kg>> accessed 10 August 2025.
 - 13 Federal Law No 82-FZ 'On the Minimum Wage' (amended 29 October 2024) art 1 <https://www.consultant.ru/document/cons_doc_LAW_27572/> accessed 10 August 2025.

inflationary pressures and negatively affect real incomes. The persistent divergence between the minimum wage and the subsistence level indicates that the statutory minimum often fails to ensure adequate welfare.

The ratio of the minimum wage to the average wage in EAEU member states generally ranges between 20 and 30% (i.e., the minimum wage corresponds to roughly one-quarter of the average wage), with the notable exception of Kyrgyzstan, where it accounts for only about 10% of the average wage. In many cases, the statutory minimum falls considerably short of the economy-wide average income. Raising the minimum wage to the subsistence level is thus viewed as a necessary measure to protect the lowest-paid categories of workers and combat poverty. However, excessive increases in the minimum wage, if implemented without due regard for inflationary dynamics, risk driving price growth and eroding real incomes—a dilemma widely discussed in economic scholarship. In practice, however, each state addresses multiple objectives simultaneously in regulating minimum wage policy:

- raising its level to the subsistence minimum, thereby protecting the least skilled workers and alleviating poverty;
- ensuring a decent standard of living that enables workers and their families to meet basic needs;
- assigning the minimum wage the role of a regulator benchmark for the entire wage system.

According to ILO Recommendation No. 135 *On the Protection of Wages* (Geneva, 1970), the primary objective of establishing a minimum wage is to provide employees with the necessary social protection in relation to permissible minimum levels of remuneration.¹⁴

Researchers note that earnings below a certain threshold (for example, \$3 per hour) are insufficient to cover the basic needs of a worker and their family—a fact recognised by the international community, including the United Nations and the ILO.¹⁵

The regulation of the minimum wage in the EAEU is driven by objectives of social protection, economic stability, and the harmonisation of competitive conditions within the integrated labour market. The established minimum wage by itself does not guarantee the satisfaction of all basic needs; rather, it establishes a floor below which remuneration should not fall. In practice, even when employers comply with minimum wage requirements, the income levels of many migrants may remain low. Empirical studies have demonstrated that

14 ILO Recommendation No 135 'Minimum Wage Fixing Recommendation, 1970' (22 June 1970) art 2 <https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312473:NO> accessed 10 August 2025.

15 Richard Anker and Martha Anker, *Living Wages Around the World: Manual for Measurement* (Edward Elgar 2017). doi:10.4337/9781786431462.

raising the minimum wage does not have a destructive impact on employment and, in some cases, contributes to reducing income inequality.¹⁶

One of the key issues affecting the real wages of workers in the EAEU countries is the absence of wage indexation mechanisms in the labour legislation of several member states. Without automatic adjustment to inflation, the purchasing power of migrant earnings decreases over time. In this regard, experts suggest drawing on international experience to improve the system of guarantees. In particular, the introduction of a median-based approach to determining the minimum wage is under consideration—for example, setting the benchmark at no less than 50–60% of the median wage level, as recommended in the EU—following ILO Convention No. 131 *On Minimum Wage Fixing, with Special Reference to Developing Countries* (Geneva, 1970).¹⁷

In addition, it has been proposed to develop and adopt an EAEU Model Law “On the Minimum Wage,” which would establish basic benchmarks for all member states, protecting workers from poverty and guaranteeing a decent standard of living. The implementation of such initiatives could harmonise approaches across the EAEU, enhancing the transparency and predictability of wage conditions for labour migrants throughout the Union. An additional priority area is the expansion of opportunities for vocational training and retraining for low-income workers, which would facilitate their transition from low-paid sectors of the economy into more skilled and better-paid occupations.

4 REMUNERATION OF LABOUR MIGRANTS AND MIGRATION POLICY: INTERNATIONAL PERSPECTIVES FOR THE EAEU

Comparative research across different countries demonstrates that labour migrants consistently earn less than native workers. According to the European Central Bank, migrants in the eurozone receive, on average, about 30% lower wages than local employees, while their average net wealth (comprising cash holdings and assets) is approximately 60% lower. Notably, demographic characteristics such as age, education, and work experience account for only around 30% of this wage gap, whereas the remaining 70% is attributed to “unobserved” factors, including language barriers, discrimination, and other structural constraints.¹⁸

Migrants are characterised by greater financial vulnerability and increased sensitivity to economic fluctuations, which is reflected in their frequent reliance on subsistence-level

16 Card and Krueger (n 7).

17 ILO Convention No 131 ‘Minimum Wage Fixing Convention, 1970’ (22 June 1970) <https://normlex.ilo.org/dyn/nrmlx_en/?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312276:NO> accessed 10 August 2025.

18 Maarten Dossche and others, *Immigrants and the Distribution of Income and Wealth in the Euro Area: First Facts and Implications for Monetary Policy* (Discussion Paper Series no 2719, European Central Bank 2022). doi:10.2866/4984.

incomes and the more pronounced decline of their earnings during periods of economic downturn. At the same time, the scale of the wage gap differs significantly across countries: in Cyprus, for example, migrants earn on average 42% less than local workers, whereas in Slovakia their earnings are comparable to or even exceed those of locals, a disparity largely explained by differences in economic structure and labour demand.¹⁹

This reflects the operation of two distinct mechanisms: first, the concentration of migrants in low-skilled and low-paid positions, and second, the existence of barriers preventing their upward mobility into middle-income segments.

According to ILO data, in 2015 migrants in Ireland earned on average 20.6% less than native workers, and 23% less when measured by median hourly wages (compared to the EU average of 8.6–14.1%). The gap persisted even during periods of economic growth and widened substantially during the 2008–2009 financial crisis.²⁰

Additional indicators suggest that foreign workers in Ireland are more likely to receive the statutory minimum wage and to maintain this level for longer periods than native workers. Moreover, migrants are concentrated in lower-paid sectors of the economy, such as services and certain segments of industry. The wage gap also varies across income levels: the greatest disadvantage for migrants is observed in the middle deciles of the wage distribution (particularly around the fourth decile), while in the lowest and highest deciles the differences are considerably smaller. This suggests that the main inequality arises among workers with mid-range earnings—likely due to the limited upward mobility of migrants into higher positions—whereas in low-wage segments, the gap is mitigated by uniformly modest pay levels.

In Finland, the wage gap between foreign and native workers is generally moderate (around 15%). In 2022, the median hourly wage of foreigners was €16.75 compared to €19.61 for Finns (a difference of approximately 14.6%). The disparity is predominantly structural: the concentration of foreign workers in low-paid sectors produces a statistical lag, whereas once qualifications are recognised and access to highly skilled positions is granted, the differences largely disappear. This underscores the decisive role of occupational segregation rather than direct discrimination.²¹

19 James Laurence and others, *Wages and Working Conditions of Non-Irish Nationals in Ireland* (Economic and Social Research Institute 2023). doi:10.26504/jr2.

20 *ibid*; 'New ESRI Research Finds a Significant "Migrant Wage Gap", with East Europeans Particularly Affected, Earning 40% Less Per Hour than Irish Counterparts' (*Economic and Social Research Institute*, 19 January 2023) <<https://www.esri.ie/news/new-esri-research-finds-a-significant-migrant-wage-gap-with-east-europeans-particularly>> accessed 10 August 2025.

21 Hanna Jokimäki and Johanna Arvonen, 'Ulkomaalaistaustaisten palkat pienempiä kuin suomalaistaustaisten – paitsi johtajilla ja erityisasiantuntijoilla' (*Tietotrendit*, 4 November 2024) <<https://stat.fi/tietotrendit/artikkelit/2024/Ulkomaalaistaustaisten-palkat-pienempiae-kuin-suomalaistaustaisten-paitsi-johtajilla-ja-erityisasiantuntijoilla>> accessed 10 August 2025.

The situation of migrants in the Finnish labour market is closely tied to economic conditions. During downturns, unemployment among migrants rises more rapidly than among natives, indicating weaker protection for migrants in times of job cuts. However, when foreign workers manage to obtain positions as professionals or highly skilled specialists, their wages are, on average, comparable to or even exceed those of local workers. Thus, reducing the wage gap requires facilitating migrant employment in skilled positions and supporting their career advancement. The Finnish case demonstrates that with proper integration—taking into account migrants' education and skills—the wage differential may be minimal or even absent, and in some cases migrants may successfully compete for higher earnings.

The international overview reveals that various countries employ distinct approaches to regulating labour migration and ensuring minimum standards of remuneration for migrant workers. A comparison of recent reforms in Poland and the United Kingdom illustrates two contrasting models.

For example, Poland has pursued a policy aimed at simplifying and encouraging the employment of foreign workers. On 29 January 2022, significant amendments to the Act on Foreigners entered into effect, designed to ease employment procedures for migrants and make them more flexible. The key change was the abolition of requirements to provide documentation on residence and proof of stable income. At present, the only condition for a foreigner to obtain a residence and work permit is a salary not lower than the statutory minimum of 3,010 zlotys (gross) per month (approximately €665).²²

This rule applies to all foreign workers, regardless of their employment status (full-time or part-time) or the type of employment contract. In other words, migrants must earn no less than the Polish minimum wage, which is deemed sufficient to meet subsistence requirements. In addition, the reform introduced the possibility of obtaining a single combined residence and work permit, enabling foreign workers to be employed by multiple employers simultaneously.

Poland has also given special attention to neighbouring countries by expanding employment opportunities for citizens of six states—Armenia, Belarus, Russia, Georgia, Moldova, and Ukraine. For them, the maximum period of employment under the simplified procedure (based on an employer's declaration of intent to hire a foreigner, without the standard permit) has been extended from 6 to 24 months. This means, for example, that a citizen of one of these countries may legally work in Poland for up to two years without the need to obtain a formal work permit, provided they have an invitation from an employer.

The Polish experience illustrates a course toward the liberalisation of foreign labour recruitment. The removal of excessive bureaucratic barriers, the guarantee of a minimum

22 'Migrant Integration Hub' (*European Commission*, 10 July 2025) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migrant-integration/migrant-integration-hub_en> accessed 10 August 2025.

wage, and flexible rules on changing employers are intended to bring migrants “out of the shadows,” attract them to sectors in demand, and secure their basic labour rights. These measures stimulate the labour market by adapting migration legislation to the economic needs of the country, while at the same time establishing a clear social minimum of remuneration for all employed foreigners.

The United Kingdom, by contrast, pursues a restrictive strategy that includes raising the minimum salary threshold for skilled worker visas (to £38,700), tightening the conditions for family migration, and introducing a list of occupations subject to higher wage requirements.²³

Employers in sectors traditionally reliant on foreign labour—such as healthcare, hospitality, and agriculture—have warned of potential labour shortages and rising costs, as recruiting workers from abroad now requires offering significantly higher wages. The government, however, maintains that these reforms reflect public demand for reduced immigration and improved welfare of native workers. This approach limits the recruitment of low-paid labour and channels migration towards highly skilled specialists, contributing to an overall increase in the average wages of migrants but simultaneously exacerbating labour shortages in certain sectors and stimulating the growth of informal employment.

These recommendations are consistent with the findings of a number of international studies, which confirm that the regulation of minimum wages has a significant impact on the working conditions of migrants and their economic integration. Cross-country analysis by Edo and Rapoport (2017) shows that in states with low minimum wages, immigration exerts a more negative effect on native workers' earnings, whereas under higher thresholds this effect is statistically neutralised.²⁴ The REMINDER report (Arenas-Arroyo et al., 2019) similarly highlights cross-cultural differences: in Germany and Spain, increases in the minimum wage contributed to narrowing the income gap between migrants and native workers, while in the United Kingdom, the effect was less pronounced.²⁵ Survey-based evidence from Bernd Hayo and Duncan H.W. Roth (2024) further demonstrates that public perceptions of migration are directly linked to expectations regarding its impact on wage levels, an important factor for policymakers shaping policies on minimum wage guarantees.²⁶

23 Government UK, 'Skilled Worker Visa: Immigration Salary List: Guidance' (*Government UK: Home Office*, 22 July 2025) <<https://www.gov.uk/government/publications/skilled-worker-visa-immigration-salary-list/skilled-worker-visa-immigration-salary-list>> accessed 10 August 2025.

24 Anthony Edo and Hillel Rapoport, *Minimum Wages and the Labor Market Effects of Immigration* (Working Paper, CEPII 2017).

25 Esther Arenas-Arroyo, Cinzia Rienzo and Carlos Vargas-Silva, *Minimum Wages, Earnings and Mobility in the EU* (REMINDER Working Paper, University of Oxford 2019).

26 Bernd Hayo and Duncan HW Roth, 'The Perceived Impact of Immigration on Native Workers' Labour Market Outcomes' (2024) 85(91) *European Journal of Political Economy* 102610. doi:10.1016/j.ejpoleco.2024.102610.

Longer-term studies also underline the complexity of the relationship between migration and labour market outcomes. Card's study of the "Mariel Boatlift" in Miami demonstrated that mass immigration did not lead to a significant decline in wages or an increase in unemployment among the local population,²⁷ while Freeman and Abowd's seminal monograph stresses that the relationship between migration, trade, and the labour market is complex and cannot be reduced to a simple downward effect on the wages of native workers.²⁸

Thus, comparing international practices enables the identification of optimal benchmarks for the EAEU. The Polish model demonstrates that combining flexible access to the labour market with guaranteed minimum social standards can effectively balance the interests of the state, employers, and workers. By contrast, the British experience highlights the risks of excessive restrictiveness, while the cases of Ireland and Finland underscore the importance of recognising qualifications and overcoming occupational segregation as key factors in reducing wage inequality. In light of these patterns, it appears advisable for the EAEU to develop its own model of labour migration regulation—one based on liberal instruments of access, coupled with effective guarantees of decent remuneration—which would promote sustainable development and social integration within the region.

5 INTERNATIONAL DECENT WORK STANDARDS FOR MIGRANTS AND MECHANISMS OF LEGAL PROTECTION IN THE EAEU

International instruments in the field of migrant workers' protection establish universal benchmarks that provide for equality in remuneration and access to social guarantees. However, the EAEU member states remain only partially integrated into these legal mechanisms. None of the EAEU countries has yet ratified the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.²⁹ This instrument would guarantee migrants equal pay for equal work and access to social rights (pensions, benefits, and medical care). The absence of ratification means that uniform international obligations in this sphere do not bind the Union's member states.

At the regional level, there is likewise no unified legal framework encompassing all aspects of labour migration within the EAEU. Despite the provisions of the EAEU Treaty establishing the principles of free movement of labour and equality of labour rights for

27 Card (n 5).

28 Abowd and Freeman (n 6).

29 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990 UNGA Res 45/158) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers>> accessed 10 August 2025.

citizens of member states,³⁰ no specific supranational act has been adopted to regulate the status and rights of migrant workers directly. In particular, the EAEU countries have not yet adopted or ratified a common “framework” convention on labour migration that would harmonise basic standards and guarantees. Each state continues to rely on its own labour legislation and bilateral agreements. Similarly, the EAEU itself lacks supranational laws on labour migration: issues such as labour benefits and guarantees are addressed through national legislation and bilateral arrangements. Some CIS conventions—for example, the 2008 Chisinau Convention, ratified by Kazakhstan—exist but do not provide a fully harmonised regional framework.³¹

However, the scope and effectiveness of such agreements remain limited, and a unified regulatory framework has not yet been established across the entire EAEU. This results in a fragmented system of protection: the rights and social guarantees of migrants differ depending on the state, while the mechanisms for their implementation and enforcement are predominantly national in character. Consequently, labour migrants in the EAEU still do not fully enjoy equal rights across all member countries, and the level of legal protection is largely determined by the legislation and law enforcement practices of the host state.

Research shows that a significant proportion of labour migrants in the EAEU remain outside official registration, which contributes to the growth of informal employment and limits the realisation of basic social rights. At the same time, access to healthcare, formal employment, and social protection remains fragmented. In this regard, the proposal to introduce a separate section into the EAEU Treaty devoted to the labour and social rights of migrants appears justified, as it would strengthen their legal protection and enhance the effectiveness of integration processes.³²

Ensuring access to justice is a fundamental prerequisite for protecting the rights of labour migrants in the EAEU. Despite the existence of formal guarantees, in practice, migrants often face linguistic, financial, and procedural barriers that limit their ability to defend their rights in court.

However, formal guarantees cannot be realised without effective enforcement mechanisms and access to justice. The experience of the European Court of Human Rights (ECHR) confirms the crucial role of judicial institutions in safeguarding the rights of migrants. In *Krachunova v. Bulgaria* (No. 18269/18, judgment of 28 November 2023), the Court for

30 Law of the Republic of Kazakhstan No 240-V ZRK ‘On the Ratification of the Treaty on the Eurasian Economic Union’ (14 October 2014) <<https://adilet.zan.kz/eng/docs/Z1400000240>> accessed 10 August 2025.

31 Law of the Republic of Kazakhstan No 235-IV ‘On the Ratification of the Convention on the Legal Status of Migrant Workers and Members of Their Families of the Commonwealth of Independent States’ (31 December 2009) <https://adilet.zan.kz/kaz/docs/Z090000235_> accessed 10 August 2025.

32 Mereke Zhurunova, ‘Issues of Providing Guarantees and Social Protection for EAEU Labour Migrants’ (2024) 7(4) *Access to Justice in Eastern Europe* 401. doi:10.33327/AJEE-18-7.4-a000104.

the first time recognised that a victim of human trafficking has the right to claim compensation for lost earnings from her exploiter on the basis of the prohibition of forced labour (Article 4 ECHR). Bulgarian courts had previously refused to award compensation for the claimant's labour income taken by the perpetrator, considering such work "unworthy." The Strasbourg Court, however, stressed that moral judgments are inadmissible—every worker must be restored to their wages, regardless of the circumstances under which they were lost.³³

In another case, *Dhahbi v. Italy* (No. 17120/09, judgment of 8 April 2014), the ECHR examined a situation in which an immigrant (a Tunisian national) was denied a housing allowance solely based on his nationality, despite the existence of the EU–Tunisia Association Agreement. The Court found a violation of the principle of non-discrimination, stating that the refusal to grant social benefits on the grounds of nationality was contrary to the state's international obligations.³⁴

These judicial decisions demonstrate that judicial practice serves as a key instrument in transforming declarative rights into effective guarantees. While states enjoy broad discretion in shaping social policy, any differential treatment must be based on particularly compelling justifications, since purely budgetary considerations cannot legitimise discrimination.

These precedents underscore that labour migrants must enjoy the same level of legal protection as nationals of the host state, both in terms of remuneration and access to social guarantees. For the EAEU, these cases illustrate the need to strengthen supranational judicial mechanisms. Expanding the jurisdiction of the EAEU Court to include individual complaints from migrants, as well as introducing simplified procedures for the mutual recognition and enforcement of judgments in labour disputes, could significantly enhance legal safeguards. Such reforms would ensure equal access to justice for migrant workers across the Union and contribute to creating a more equitable and balanced regional labour market.

Strengthening supranational protection mechanisms remains an urgent task for the EAEU. In particular, expanding the jurisdiction of the EAEU Court in matters of labour rights would allow it not only to issue advisory opinions but also to hear typical disputes and complaints submitted by migrants. There have already been cases before the EAEU Court concerning the application of labour benefits and guarantees—for example, advisory opinions in cases R-3/21 and R-3/22 regarding the status of employees of Union institutions.

33 *Krachunova v Bulgaria* App no 18269/18 (ECtHR, 28 November 2023) <<https://hudoc.echr.coe.int/eng?i=001-229129>> accessed 10 August 2025.

34 *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014) <<https://hudoc.echr.coe.int/eng?i=001-142504>> accessed 10 August 2025.

In the future, such supranational judicial oversight could become an essential guarantor of effective protection of migrant workers' rights throughout the EAEU.³⁵

Recognising the existing challenges, the Eurasian supranational bodies have undertaken steps toward convergence of approaches and harmonisation of standards. A notable example is the recent Decision of the EEC Board No. 60 of 28 May 2024, "*On Directories Used in the Field of Labour Migration and Social Protection*", aimed at unifying informational tools and enhancing transparency in the regulation of this sphere.³⁶

This act introduces unified directories (classifiers) applicable across all EAEU member states in the regulation of labour migration and social issues. In particular, it provides for the harmonisation of lists of qualifications, occupations, and social benefits, which is expected to ensure mutual recognition of migrants' professional qualifications and comparability of social guarantees throughout the Union.

The implementation of Decision No. 60 in practice will simplify the recognition of education and diplomas of foreign workers by removing bureaucratic barriers to employment. In addition, the agreed-upon directories will facilitate the transfer of social rights. For example, employment history or entitlement to benefits will be considered when a migrant moves from one EAEU country to another. In this way, the EEC has laid the groundwork for creating a more unified space in the field of labour migration. However, it should be noted that such measures are largely technical in nature and cannot substitute for the absence of comprehensive legal guarantees. Their success will depend on the extent of their incorporation into national legal acts and on the willingness of member states to adhere to standard approaches. Without a general legal framework (such as a law or convention), the effectiveness of these measures remains limited, as they cannot entirely eliminate existing gaps in the protection of migrant rights. In other words, the need for a multilateral EAEU framework agreement on labour migration remains highly relevant.

6 CONCLUSION

The analysis of legal regulation and remuneration practices for migrants in the EAEU countries demonstrates that existing mechanisms do not yet fully ensure the standards of decent work enshrined in ILO instruments and affirmed by EU practice. In many member states, statutory minimum wages amount to only 20–30% of the average wage, falling short of the criteria for decent remuneration and leaving a significant share of workers below the minimally acceptable level of social protection. This situation is further

35 Case R-3/21 (EAEU Court, 21 March 2022) <https://courteurasian.org/court_cases/aeau/r-3.21/> accessed 10 August 2025; Case R-3/22 (EAEU Court, 18 October 2022) <https://courteurasian.org/court_cases/aeau/P-3.22/> accessed 10 August 2025.

36 Decision of the EEC Board No 60 'On Directories Used in the Field of Labor Migration and Social Protection' (28 May 2024) <<https://adilet.zan.kz/kaz/docs/H24EK000060>> accessed 10 August 2025.

aggravated by the fragmented legal framework: the absence of ratification of the 1990 UN Convention, the failure to adopt a common EAEU framework convention on labour migration, and the limited scope of CIS regional agreements prevent the establishment of a unified supranational standard of decent pay. As a result, the level of legal and social protection available to migrants depends largely on the host country and its national law enforcement practices.

International experience confirms that achieving decent remuneration is possible through a combination of factors: linking the minimum wage to the median or average income, regular indexation in line with inflation, recognition of migrants' qualifications, and the reduction of occupational segregation. The Polish model demonstrates the effectiveness of liberal regulation, which ensures flexible access to the labour market while guaranteeing wages not lower than the national minimum, whereas the British case highlights the risks of excessive restrictiveness that limits access for low-paid workers. The experiences of Ireland and Finland further confirm that the recognition of qualifications and the integration of migrants significantly reduce income disparities, bringing their earnings closer to the standards of decent remuneration.

For the EAEU, this implies the need to develop its own regulatory model based on liberal principles of labour market access, while ensuring compliance with minimum social standards. Key steps include establishing a supranational legal framework, unifying methodologies for calculating and indexing the minimum wage, recognising professional qualifications, and eliminating gender inequality. At the same time, it is essential to strengthen judicial mechanisms, including expanding the jurisdiction of the EAEU Court in matters related to migrants' labour rights, to guarantee their effective legal protection. Ensuring access to justice, removing linguistic and financial barriers, broadening the EAEU Court's competence, and promoting mutual recognition of judicial decisions in labour disputes among member states are crucial prerequisites for establishing an effective regional system for protecting the rights of migrant workers.

Overall, the establishment of a comprehensive system of guarantees ensuring decent remuneration for labour migrants in the EAEU constitutes not only a social but also an integration priority—one that can enhance the competitiveness of the common labour market and bring the Union closer to international standards of decent work.

REFERENCES

1. Abowd JM and Freeman RB (eds), *Immigration, Trade, and the Labor Market* (NBER 1991).
2. Anker R and Anker M, *Living Wages Around the World: Manual for Measurement* (Edward Elgar 2017. doi:10.4337/9781786431462
3. Arenas-Arroyo E, Rienzo C and Vargas-Silva C, *Minimum Wages, Earnings and Mobility in the EU* (REMINDER Working Paper, University of Oxford 2019).

4. Card D and Krueger AB, *Myth and Measurement: The New Economics of the Minimum Wage* (20th anniversary edn, Princeton UP 2015).
5. Card D, 'The Impact of the Mariel Boatlift on the Miami Labor Market' (1990) 43(2) *ILR Review* 245. doi:10.2307/2523702
6. Dossche M and others, *Immigrants and the Distribution of Income and Wealth in the Euro Area: First Facts and Implications for Monetary Policy* (Discussion Paper Series no 2719, European Central Bank 2022). doi:10.2866/4984.
7. Edo A and Rapoport H, *Minimum Wages and the Labor Market Effects of Immigration* (Working Paper, CEPII 2017).
8. Hayo B and Roth DHW, 'The Perceived Impact of Immigration on Native Workers' Labour Market Outcomes' (2024) 85(91) *European Journal of Political Economy* 102610. doi:10.1016/j.ejpoleco.2024.102610
9. Jokimäki H and Arvonen J, 'Ulkomaalaistaustaisten palkat pienempiä kuin suomalaistaustaisten – paitsi johtajilla ja erityisasiantuntijoilla' (*Tietotrendit*, 4 November 2024) <<https://stat.fi/tietotrendit/artikkelit/2024/Ulkomaalaistaustaisten-palkat-pienempiae-kuin-suomalaistaustaisten-paitsi-johtajilla-ja-erityisasiantuntijoilla>> accessed 10 August 2025.
10. Khassenov M, 'Legal Regulation of the Labour Market of Kazakhstan: Problems and Solutions' in Konrad Adenauer Foundation, *Transformation of the Economy of Kazakhstan* (IndigoPrint 2019) 231.
11. Laurence J and others, *Wages and Working Conditions of Non-Irish Nationals in Ireland* (Economic and Social Research Institute 2023). doi:10.26504/jr2
12. Nanavaty R and others, '7 Experts Explain Why It's Important to Pay Fairer Wages and How to Do It' (*World Economic Forum*, 3 June 2025) <https://www.weforum.org/stories/2022/06/seven-experts-explain-how-to-create-fairer-wages/?utm_source=chatgpt.com> accessed 10 August 2025.
13. Taylor FW, *The Principles of Scientific Management* (Harper & Brothers 1911)
14. Zhurunova M, 'Issues of Providing Guarantees and Social Protection for EAEU Labour Migrants' (2024) 7(4) *Access to Justice in Eastern Europe* 401. doi:10.33327/AJEE-18-7.4-a000104

AUTHORS INFORMATION

Madina Yessirkepova

PhD, Associate Professor, School of Politics and Law, Almaty Management University, Kazakhstan

m.yessirkepova@almau.edu.kz

<https://orcid.org/0000-0003-1011-9171>

Co-author, responsible for Funding acquisition, Investigation, Methodology, Project administration.

Nurbek Isabay

PhD, Associate Professor, the Higher School of Law, Astana International University, Kazakhstan

nurbek.isabay@aiu.edu.kz

<https://orcid.org/0000-0002-6852-0649>

Co-author, responsible for Data curation, Formal Analysis, Supervision, Conceptualization.

Mereke Zhurunova*

Master of laws, PhD candidate, the Higher School of Law, Astana International University, Kazakhstan

mereke_zhurunova@aiu.edu.kz

<https://orcid.org/0000-0001-6020-5823>

Corresponding author, responsible for: Visualization, Writing – original draft, Writing – review & editing.

Leila Amandykova

Candidate of Legal Sciences, Associate Professor, the Higher School of Law, Astana International University, Kazakhstan

leila_amandykova@aiu.edu.kz

<https://orcid.org/0000-0001-5341-1776>

Co-author, responsible for Resources, Software, Validation.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Madina Yessirkepova, Nurbek Isabay, Mereke Zhurunova and Leila Amandykova. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Yessirkepova M, Isabay N, Zhurunova M and Amandykova L, 'Decent Pay and Access to Justice for Labor Migrants in the EAEU: Comparative Legal Perspectives' (2025) 8(4) Access to Justice in Eastern Europe 340-58 <<https://doi.org/10.33327/AJEE-18-8.4-r000129>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-r000129>

Summary: 1. Introduction. – 2. Methodology. – 3. Research Findings: Wage Guarantees and Minimum Wage in the EAEU. – 4. Remuneration of Labour Migrants and Migration Policy: International Perspectives for the EAEU. – 5. International Decent Work Standards for Migrants and Mechanisms of Legal Protection in the EAEU. – 6. Conclusions.

Keywords: *Labour Migration, Eurasian Economic Union (EAEU), Decent Work, Wage Regulation, Minimum Wage, Wage Indexation, Social Protection, Access to Justice, Judicial Protection.*

DETAILS FOR PUBLICATION

Date of submission: 18 Aug 2025

Date of acceptance: 10 Sep 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - Yes

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

We confirm that we have not used any AI tools for writing, translating, or editing the manuscript, submitted to the Access to Justice in Eastern Europe journal for publication. We understand that if AI usage is discovered without notifying the editor, the article may be retracted. We affirm that the research and content of the manuscript are solely our own work. The corresponding author is responsible for ensuring that all co-authors adhere to this declaration.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ГІДНА ОПЛАТА ПРАЦІ ТА ДОСТУП ДО ПРАВОСУДДЯ ДЛЯ ТРУДОВИХ МІГРАНТІВ В ЄАЕС: ПОРІВНЯЛЬНО-ПРАВОВИЙ ОГЛЯД ПЕРСПЕКТИВ

Мадіна Єсіркепова, Нурбек Ісабай, Мереке Журунова* та Лейла Амандикова

АНОТАЦІЯ

Вступ. Трудова міграція залишається ключовим фактором соціально-економічного розвитку в Євразійському економічному союзі (ЄАЕС), проте забезпечення гідної оплати праці та доступу до правосуддя для працівників-мігрантів є недостатньо вирішеною проблемою. Ця прогалина в захисті зберігається, незважаючи на те, що вона безпосередньо стосується міжнародних трудових стандартів та Цілі сталого розвитку №8, що ухвалена ООН, стосовно гідної праці.

Методи. У дослідженні використовується порівняльно-правовий аналіз Договору про утворення ЄАЕС та національного трудового законодавства країн ЄАЕС у порівнянні з міжнародними стандартами (МОП, ООН, ЄС). Емпіричні дані охоплюють офіційну статистику заробітної плати, урядові звіти та міжнародні публікації. Аналіз також передбачає огляд тематичних досліджень з Ірландії, Фінляндії, Польщі та Сполученого Королівства в межах програми «гідної праці» МОП, у якому було звернено увагу на судові механізми захисту прав.

Результати та висновки. Результати дослідження показують, що встановлена законодавством мінімальна заробітна плата в країнах ЄАЕС є дуже низькою (лише 20–30% від середньої заробітної плати та близько 10% у Киргизстані) і часто не індексується з урахуванням інфляції. Як наслідок, працівники-мігранти стикаються з високим рівнем бідності серед тих, хто працює, та значними перешкодами на шляху до правосуддя (мовними, фінансовими та процедурними), що обмежує їхні можливості відстоювати свої права. Натомість, європейська практика демонструє критичну роль судового забезпечення: наприклад, прецедентне право Європейського суду з прав людини показує, що доступ до судів може перетворити формальні трудові гарантії на ефективні права.

У дослідженні дійшли висновку, що ЄАЕС повинен поєднати посилення гарантій мінімальної заробітної плати з посиленням судового захисту для відповідності міжнародним стандартам гідної праці. Основні рекомендації полягають в тому, що мінімальна заробітна плата має залежати від медіанного доходу, також потрібно запровадити автоматичну індексацію та розширення юрисдикції Суду ЄАЕС щодо трудових спорів. Такі заходи зміцнять соціально-економічну безпеку мігрантів, забезпечать реальний доступ до правосуддя та узгодять трудову політику ЄАЕС із глобальними зобов'язаннями щодо гідної праці.

Ключові слова: трудова міграція, Євразійський економічний союз (ЄАЕС), гідна праця, регулювання заробітної плати, мінімальна заробітна плата, індексація заробітної плати, соціальний захист, доступ до правосуддя, судовий захист.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-r000133>

Date of submission: 25 Jul 2025

Date of acceptance: 23 Sep 2025

Last Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Ilda Muçmataj
and Anjeza Liçenji

Review Article

COPYRIGHT AND RELATED RIGHTS LEGISLATION IN ALBANIA: FROM TRADITIONAL TO DIGITAL PROTECTION

Ilda Muçmataj* and Anjeza Liçenji

ABSTRACT

Background: Albania's efficiency in the copyright and related rights landscape remains complex and needs improvement despite ongoing reforms to meet international standards and European Union requirements. Complete legislative harmonization is still lacking, enforcement bodies continue to operate under limited resources and technological restrictions, and public awareness of copyright standards, especially in digital areas, is insufficient. Meanwhile, digital technology has impacted the creation, dissemination, and commercialization of works, thereby expanded market opportunities but also increased the risks of unauthorized use and infringement. Within this context, this article analyses the evolution, challenges, and prospects of Albania's copyright regime in the digital era, identifies regulatory and enforcement gaps, and evaluates proposed legislative amendments aimed at strengthening copyright protection. The research intends to clarify the benefits and drawbacks of the current protection system.

Methods: The article uses a mixed-methods approach that integrates doctrinal legal research, documentary and policy analysis, including legislation, national Intellectual Property (hereinafter referred to as IP), cultural strategies, and ministerial programs, as well as enforcement data analysis, including inspections, sanctions, and blocking requests. The aim is to explore the developments and key milestones of the copyright and related rights legal system, the coherence and capacity of the institutional framework, and the effectiveness of recent enforcement practice.

Results and Conclusions: The analysis indicates that Albania has made significant legislative progress and created supportive institutions; however, its enforcement capacity and alignment with the digital age are still lacking. Administrative inspections and sanctions are active, yet online piracy and cross-border licensing frictions persist. These findings align with the priorities included in the National Plan for European Integration 2024–2026, as well as the 2024 Progress Report. This, therefore, reinforces the need for sustained reform to improve compliance and effectiveness, including further transposition of pending EU instruments, and proposes several recommendations to address current and future needs for IP protection, expand lawful access, and support creators and users in the digital marketplace.

1 INTRODUCTION

Copyright and related rights have been historically seen as vital tools for promoting creativity, innovation, and economic growth. Copyright legal protection, a key component of intellectual property governance in Albania, can be traced back to the Civil Code of 1929, enacted during the reign of King Zog.¹ Under this Code, copyright was classified as a proprietary right (ownership and possession), and intellectual products were recognised as owned by their authors pursuant to the rules outlined in special laws.² Nonetheless, only in recent decades has the legal framework experienced substantial improvements to meet international and European Union standards. Significant steps have been taken, particularly in protecting copyright holders and in striking a balance between the public interest.³ The adoption of Law No. 35/2016, on copyright and related rights, subsequently revised in 2022⁴ (hereinafter referred to as ACL), has transposed the majority of the EU directives; yet, effective enforcement remains challenging. Online piracy remains due to the lack of fully transposed digital era instruments (such as the Digital Single Market, SatCab II, and the Collective Rights Management Directives). Furthermore, institutional authorities, such as

1 Mariana Semini, *E Drejta e Autorit në Shqipëri* (Skanderbeg Books 2009) 23.

2 Article 795 of the Civil Code of the Kingdom of Albania of 1929, see: *Kodi Civil i Vitit 1929: i kohës së Zogut* (Alb Juris 2010).

3 Paul Torremas, Mariana Tutulani and Mariana Dedi, *Pronësia Intelektuale* (Magistrate School 2005) 53-6.

4 Law No 35/2016 'On Copyright and other Related Rights' (31 March 2016) [2016] Official Gazette 64; Law No 37/2022 'On Amendments and Additions to Law No 35/2016 on Copyright and other Related Rights' (14 April 2022) [2022] Official Gazette 69.

the Copyright Directorate (hereinafter referred to as CD), the State Market Surveillance Inspectorate (hereinafter referred to as SIMS), the Audiovisual Media Authority (hereinafter referred to as AMA), the Regulatory Authority for Electronic and Postal Communications, the dedicated unit in Customs, and the State Police, are all working hard but often are underfunded and have fragmented inter-agency coordination. Moreover, the public's low awareness and understanding of copyright standards further undermine compliance.

To examine the trajectory of copyright and related rights evolution in Albania, this article initially examines the developments and key milestones of the legal system, then maps the institutional architecture, identifying the roles, responsibilities, and demands of the leading actors, as well as outlining the steps necessary for future improvement. Finally, it presents a concise set of recommendations designed to facilitate Albania's admission into the European Digital Single Market, while supporting a balanced and innovation-friendly copyright ecosystem in which creators' rights, users', and public interest all flourish.

2 RESEARCH METHODOLOGY

This article uses a mixed-methods approach that combines doctrinal legal research, policy and legislative analysis, court decisions, and enforcement data to present a detailed overview of Albania's copyright framework, institutional structures, and enforcement practices.

The qualitative component is based on the systematic review of legal and policy documents, including both primary and secondary legislation, the EU progress report, and national strategies on culture and intellectual property. Moreover, reports from the government and parliament play an important role as they shed light on institutional priorities and policy directions. At the same time, complementary academic studies and a feasibility study add further context and perspectives. The literature review examines the historical evolution of Albanian copyright law from its early origins to the most recent amendments, contextualising these changes within the broader process of EU integration. In doing so, it points out ongoing issues such as online piracy, incomplete harmonisation, and fragmented institutional capacity.

The analysis is reinforced with quantitative evidence derived from official enforcement data, such as inspections, sanctions, and compliance rates reported by SIMS, AMA, the Electronic and Postal Communications Authority, and other authorities. These statistics serve to illustrate enforcement intensity, identify trends, and evaluate practical outcomes. Institutional documentation, including yearly activity reports from competent authorities, complements these data by displaying the practical function of mandates, capacities, and coordination mechanisms. These materials offer a window into the coherence and efficacy of enforcement structures. Together, these insights provide the broader context necessary to support the study's objectives.

The study integrates legislative analysis, statistical data, institutional reporting, academic literature, and court decisions, utilising a clear source-priority protocol to relate evidence to findings, conclusions, and recommendations. This integrated approach allows the study to navigate the historical and institutional trajectory of Albanian copyright law, as well as translating the identified gaps into concrete proposals for strengthening copyright protection in Albania's digital environment and ensuring a more comprehensive alignment with EU standards.

3 DEVELOPMENTS OF THE LEGISLATIVE FRAMEWORK OF COPYRIGHT AND RELATED RIGHTS

Albania's commitment to protecting copyright and related rights is explicitly stated in the constitutional provision⁵ and reinforced by a series of ratified international treaties.⁶ The extensive protection evolved in tandem with the country's European integration process, beginning in 2006 when the Stabilization and Association Agreement (hereinafter referred to as SAA) with the European Union was signed and took effect on April 1, 2009. The obligations outlined in Articles 70 and 73, "Intellectual Property Rights", of the SAA require Albania to ensure the same level of protection for intellectual property as that of the European Union countries.⁷ This led to substantial changes to copyright and related rights law, particularly in 2016. Law No. 9380/2005, "On Copyright and Related Rights"⁸ as

5 Constitution of the Republic of Albania No 8417 of 21 October 1998 (amended 10 February 2022) art 58 <<http://qbz.gov.al/eli/ligj/1998/10/21/8417>> accessed 22 September 2025.

6 Albania is a member of several fundamental international acts related to copyright and related rights, including the Berne Convention for the Protection of Literary and Artistic Works, accessed by: Decree No 487 'On the accession of the Republic of Albania to the Berne Convention' (9 March 1993) [1993] Official Gazette 4; the Universal Copyright Convention accessed by: Law No 9129 'On the Accession of the Republic of Albania to the Universal Copyright Convention and its 2 Additional Protocols' (8 September 2003) [2003] Official Gazette 83; the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) accessed by: Law No 9950 'On the Accession of the Republic of Albania to the Amendments of the TRIPS Agreement' (10 July 2008) [2008] Official Gazette 122; Internet treaties adopted by: Law No 8838 'On the Accession of the Republic of Albania to the WIPO Copyright Treaty' (22 November 2001) [2001] Official Gazette 57, and Law No 8740 'On the Accession of the Republic of Albania to the WIPO Treaty on Performances, Executions, and Phonograms' (15 February 2001) [2001] Official Gazette 7; as well as other treaties governing related rights including Law No 8579 'On the Accession of the Republic of Albania to the International Convention for the Protection of Performers and Executives, Producers of Phonograms, and Broadcasting Organizations' (16 February 2000) [2000] Official Gazette 6, and Law No 8585 'On the Accession of the Republic of Albania to the Convention 'For the Protection of Producers of Phonograms Against Unauthorized Reproduction of their Phonograms' (15 February 2000) [2000] Official Gazette 7.

7 Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part: Protocols, Declarations (12 June 2006) [2009] OJ L 107/166.

8 Law No 9380 'On Copyright and other Related Rights' (28 April 2005) [2005] Official Gazette 42, as amended.

amended, was repealed and replaced by Law No. 35/2016, marking a significant advancement in the protection and strengthening of copyright and related rights in the country. As stated in the explanatory report of the law, the achievement of these objectives, along with the mechanisms established for their implementation, is modelled after the best laws of EU member states, such as Croatia, Romania, Slovenia, Lithuania, and Italy.⁹ Its adoption was also recognised in the National Strategy for Culture as a key achievement in cultural policy.¹⁰ Following the EU candidate status awarded in June 2014,¹¹ the law fully transposed 7 (seven) key of EU directives, covering: the term of protection of copyright and certain related rights, enforcement of intellectual property rights, copyright and related rights in the information society, the resale right for the benefit of the author of an original work of art, the legal protection of databases, the legal protection of computer programs, the rental and lending rights,¹² and partially aligned with the Satellite and Cable I Directive and the Collective Management Directive.¹³

As noted by different authors, the copyright allows authors of literary, artistic, and scientific works to derive social benefits from the result of their creative works.¹⁴ Under copyright and other related rights law, rights are categorised into two main categories: moral and

- 9 Law No 35/2016 (n 4). See also: Ministry of Culture, 'Explanatory Report on Law No 35/2016' (2016) 10 <<https://www.konsultimipublik.gov.al/>> accessed 22 September 2025.
- 10 Decision of the Council of Ministers No 903 'On the Approval of the National Strategy for Culture, 2019-2025' (24 December 2019) [2020] Official Gazette 188/12.
- 11 'Albania: EU-Albania Relations' (*European Commission*, 2024) <https://enlargement.ec.europa.eu/enlargement-policy/albania_en> accessed 22 September 2025.
- 12 Directive 96/9/EC of the European Parliament and of the Council 'On the Legal Protection of Databases' (11 March 1996) [1996] OJ L 77/20; Directive 2001/29/EC of the European Parliament and of the Council 'On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society' (22 May 2001) [2001] OJ L 167/10; Directive 2001/84/EC of the European Parliament and of the Council 'on the resale right for the benefit of the author of an original work of art' (27 September 2001) [2001] OJ L 272/32; Directive 2004/48/EC of the European Parliament and of the Council 'On the Enforcement of Intellectual Property Rights' (29 April 2004) [2004] OJ L 157/45; Directive 2006/115/EC of the European Parliament and of the Council 'on rental right and lending right and on certain rights related to copyright in the field of intellectual property' (12 December 2006) [2006] OJ L 376/28; Directive 2006/116/EC of the European Parliament and of the Council 'On the Term of Protection of Copyright and Certain Related Rights' (12 December 2006) [2006] OJ L 372/12; Directive 2009/24/EC of the European Parliament and of the Council 'On the Legal Protection of Computer Programs' (23 April 2009) [2009] OJ L 111/16.
- 13 Council Directive 93/83/EEC 'On the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission' (27 September 1993) [1993] OJ L 248/15; Directive 2014/26/EU of the European Parliament and of the Council 'On Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market' (26 February 2014) [2014] OJ L 84/72.
- 14 Reto M Hilty, 'Intellectual Property and Private Ordering' in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (OUP 2018) 898; Ivelyna Podgorna and others, 'Modelling and Analysis of Socio-Economic Development of European Union Countries through the DP2 Method' (2020) 17 WSEAS Transactions on Business and Economics 454. doi:10.37394/23207.2020.17.44.

economic, which have apparent differences from one another.¹⁵ Moral rights are non-transferable and remain inalienable, guaranteeing the author's connection to their works. They encompass the author's control over disclosure of the work to the public, recognition as the author and mention of the authorship (attribution), integrity of the work, and the author's honor or reputation, and withdrawal of the permission for the use of the work, going beyond the two moral rights recognized by the Berne Convention¹⁶ by embracing elements of the French legal tradition.¹⁷ Economic rights, on the other hand, are transferable and give authors or rights holders exclusive control over reproduction, distribution, communication to the public, and adaptation covered in Chapter III, Section 2 of the ACL.¹⁸ In addition to the author's exclusive rights, Section 3 of Chapter III of the ACL also sets out additional economic rights related to specific categories of works, such as works of art, photographs, etc., or secondary rights compared to the ones listed above.¹⁹

The law also governs the rights of artists for their performances, phonogram producers for their recordings, producers of initial fixation for their films, broadcasting entities for their broadcasts, publishers for their publications, and database creators for their databases. It also safeguards the rights specified in particular provisions for computer programs and audiovisual works while ensuring "sui generis" protection of database authors' rights and enforcement issues.²⁰

In 2021, after thorough consultation with the services of the European Commission, the Ministry of Culture prepared additional revisions to Law No. 35/2016. This was part of further harmonisation of national copyright legislation with EU law, aiming to support a unified internal market for copyright-based services.²¹ Sixteen new provisions were introduced that address orphan works, which, despite being a known problem, were not explicitly covered in the original law.²² Moreover, provisions aimed at enhancing access to works for the blind, visually impaired, and those with limited access to printed materials,²³ as well as articles to improve the operational clarity and effectiveness of the Collective

15 Ergysa Ikonimi and Jonada Zyberaj, *E Drejta e re e autorit në Shqipëri dhe të drejtat e lidhura* (Shtypshkronja PEGI 2017) 60.

16 WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO Publication No 615(E) 1978) 41-3.

17 Brad Spitz, *Guide to Copyright in France. Business, Internet, and Litigation* (Kluwer Law International 2015) 57-65.

18 Law No 35/2016 (n 4) ch 3, s 2, arts 25-30.

19 *ibid*, arts 31-39.

20 Fatos Dega, *Pronësia Intelektuale* (Morava 2019) 63-4.

21 Eleonora Rosati, 'From the Early Days of Harmonization to the DSM Directive 2019/790: Continuity and Complexity of the EU Copyright Framework' (2021) 3 *Auteurs & Media* 289. doi:10.2139/ssrn.4187759.

22 Ilda Muçmataj and Laura Çami Vorpsi, 'The Legal Situation for Orphan Works Under the Republic of Albania's Copyright Regime' (2024) 13(4) *Academic Journal of Interdisciplinary Studies* 393. doi:10.36941/ajis-2024-0124.

23 Ilda Muçmataj and Anjeza Liçenji, 'Kufizime nga regjimi i të drejtave të autorit për personat me shikim të dëmtuar: Perspektiva Ndërkombëtare' (Zhvillime dhe risi në të drejtën Private: Konferencë shkencore kombëtare, Shtëpia Botuese FLESH, Universiteti i Tiranës, Fakulteti i drejtësisë, Tiranë, 12 Qershor 2024) 278.

Management System (hereinafter referred to as CMOs), were also introduced.²⁴ The amendments took effect on 11 August 2022.²⁵

Complementary statutes, including the Civil Code and the Codes of Civil and Criminal Procedure, the Criminal, Customs, and Labour Codes, alongside other legal acts and nearly 20 sub-legal acts, further operationalise, clarify, and implement the law,²⁶ reflecting Albania's integrated and multidimensional approach to copyright and related rights. In 2023, significant sublegal acts were enacted, addressing fair compensation for the reproduction of copyrighted works for private use,²⁷ the procedure for the fair compensation of orphan works, and the establishment of a centralised copyright database.²⁸ Although the planned digital platform to consolidate voluntary copyright registrations, contracts, public domain works, registered CMOs, authorised users, and orphan works has been delayed,²⁹ its eventual launch is expected to enhance transparency and improve stakeholder accessibility, reduce bureaucratic burdens, reduce manual work, and digitise the physical archive. Additional bylaws have been enacted to further strengthen the collective management system³⁰ and the operation and compensation framework of the National Council for Copyright (NCC).³¹

- 24 Aligning the law partially with the Directive 2012/28/EU of the European Parliament and of the Council 'on Certain Permitted Uses of Orphan Works' (25 October 2012) [2012] OJ L 299/5, and Directive (EU) 2017/1564 of the European Parliament and of the Council 'on Certain Permitted Uses of Certain Works and other Subject Matter Protected by Copyright and Related Rights for the Benefit of Persons who are Blind, Visually Impaired or Otherwise Print-Disabled and amending Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' (13 September 2017) [2017] OJ L 242/6.
- 25 Decree No 13605 'On the promulgation of Law No 37/2022 "On Amendments and Additions to Law No 35/2016 "On Copyright and Other Related Rights"' (6 May 2022) [2022] Official Gazette 69.
- 26 For a detailed analysis of the sublegal acts' role, see: Luan Omari and Aurela Anastasi, *E Drejta Kushtetuese* (Dajti 2000 2017) 310-4.
- 27 Decision of the Council of Ministers No 465 'On the Determination of the List of Devices and Fees for Fair Compensation for the Reproduction of Works for Private and other Personal Use' (26 July 2023) [2023] Official Gazette 112.
- 28 Decision of the Council of Ministers No 651 'On Creation of the State Database "Register of the Data on Copyright and Related Rights" and Determining the Elements of the Open, Documentary and Electronic Data Register Accessible to the Public' (22 November 2023) [2023] Official Gazette 172.
- 29 The Ministry of Economy, Culture, and Innovation (MECI), in collaboration with the National Agency for Information Society, drafted the terms of reference for the procedure of "Establishment of the Digital Platform for Copyright" planned for 2023.
- 30 Order of the Minister of Culture No 125 'On the Annual Report of the Collective Management Agencies and the One-Stop Shop SUADA' (1 March 2023) [2023] Official Gazette 35; Order of the Minister of Culture No 338 'Instruction on the Determination of the Criteria and Procedures for Obtaining a License for the Collective Management of Copyright, its Renewal, as Well as the Determination of the Criteria and Procedures for the Suspension and Revocation of the License under Law No 35/2016, dated 31.3.2016, "On Copyright and other Related Rights" as amended' (2 June 2023) [2023] Official Gazette 87; Order of the Minister of Culture No 777 'On the Organization, Operation, and Activities of the One-Stop Shop for the Collection of Copyright Remunerations' (24 November 2023) [2023] Official Gazette 179.
- 31 Decision of the Council of Ministers No 737 'On the Amendment of Decision No 35, dated 18.01.2017 "On the Functioning, Organization, and Compensation of the National Council for Copyright (NCC)"' (27 November 2024) [2024] Official Gazette 202.

Albania's long-term vision is articulated through strategic roadmaps. The third National Strategy on Intellectual Property (2022–2025), supported by the World Intellectual Property Organization (WIPO), reflects active institutional involvement in implementing IP legislation and increasing awareness. It encourages creativity and innovation while balancing stakeholder interests, promotes economic, cultural, and scientific growth, and aligns with international standards.³² Then, the National Strategy for Development and European Integration (2022–2030),³³ and the Priority Policy Document (2025–2027)³⁴ together underlie legal reforms, a strong IP protection and enforcement, improved institutional coordination, greater public awareness campaigns, and targeted support for cultural and creative industries.

However, despite significant advancements, certain challenges persist. Gaps remain regarding public lending compensation, the renewal of the Intellectual Property Strategy, and the fight against online piracy in a rapidly evolving technological landscape, as well as the growing demand for the use of copyrighted works in the online environment. Addressing these issues will be necessary to realize a fully harmonized, effective, and inclusive IP system in Albania.

4 INSTITUTIONAL FRAMEWORK AND ENFORCEMENT CAPACITY

Although Law 35/2016 “On Copyright and Related Rights” as amended (hereafter referred to as ACL) does not explicitly provide for a closed list of copyright infringements, they are commonly understood. Following Prof. Semini, they are defined as unauthorized copying, falsification, piracy, or other unauthorized use of protected works, breaching rights holders’ rights wholly or partially.³⁵ To address these infringements, ACL provides a comprehensive set of measures, procedures, and legal remedies in Parts VIII and IX, covering civil, administrative, and criminal remedies. These provisions align with the TRIPs Agreement³⁶ and the Enforcement Directive standards.³⁷

Authors or rightsholders seeking civil relief typically may file civil lawsuits in the Court of First Instance of General Jurisdiction Tirana, under Articles 162 - 176 of the ACL (and the Civil Procedure Code). They may seek cessation of infringement, compensation for

32 Decision of the Council of Ministers No 350 ‘On the Approval of the National Strategy for Intellectual Property 2022–2025’ (26 May 2022) [2022] Official Gazette 85.

33 Decision of the Council of Ministers No 88 ‘On the Approval of the National Strategy for Development and European Integration 2022–2030’ (22 February 2023) [2023] Official Gazette 31/138.

34 Decision of the Council of Ministers No 161 ‘On the Approval of Priority Policy Document 2025–2027’ as amended (20 March 2024) [2024] Official Gazette 53.

35 Semini (n 1) 17–28, 278.

36 For the role of TRIPs Agreement, see: Argita Malltezi, Jonida Rystemaj and Lealba Pelniku, *Aspekte të së Drejtës së Biznesit në Shqipëri* (Mediaprint 2013) 154–6.

37 Directive 2004/48/EC (n 12).

damages, compensation and remuneration for unauthorized use, publication of the court decisions, destruction, alteration, or surrender of illegally reproduced copies. Civil actions may also protect moral rights and access to relevant information; interim and provisional measures further deter ongoing violations and preserve evidence. Where the copyright and related rights violation rises to a criminal offense, Articles 148 and 149 of the Criminal Code, found in Section II (Frauds), Chapter III (Offenses against property and the economic sphere) of the Special Part, impose penal liability.³⁸ These criminal sanctions protect both the economic and moral rights of authors by subjecting infringers to fines or imprisonment.³⁹ While administrative inspection and sanctions are outlined in Part IX of the ACL.⁴⁰ Customs measures are also provided to prevent the import or export of infringing goods.⁴¹

Central to the instructional architecture of implementing copyright and related rights legislation is the Copyright Directorate (CD) within the Ministry of Tourism, Culture and Sport (hereinafter referred to as MTCS).⁴² Mandated by Article 157 of the ACL and supplemented by other provisions, the CD proposes, drafts, and develops copyright strategies and policies related to copyright and related rights in Albania, proposes legislation, oversees the collective management system, including proposing the licensing of CMOs, and monitors their activities. When a CMO breaches the law requirements, the CD recommends the minister responsible for copyright to suspend or revoke its license.⁴³ The Directorate is organized into two main sectors: Registration -

38 Criminal Code of the Republic of Albania No 7895 (27 January 1995), as amended [2021] Official Gazette 5.

39 For a more detailed analysis, see: Ismet Elezi, *E Drejta Penale Pjesa e Posaçme* (Botimet Kumi 2021) 237-8; Marjana Semini-Tutulani, *Hetimi dhe Ndjekja e Veprave Penale që lidhen me Pronësinë Intelektuale në Shqipëri: Manual për Trajnimin e prokurorëve, gjyqtarëve dhe autoriteteve të tjera ligj zbatuese* (WIPO 2020) 34-5, 63-81.

40 For a comprehensive analysis, see: Enea Sheqi, *E Drejta e autorit: Teori, raste dhe komente* (Tirane 2021) 301-7.

41 Customs Code of the Republic of Albania No 102/2014 (31 July 2014) [2014] Official Gazette 134, arts 2, 10, 27, 28, 67, 125, 239; Law No 35/2016 (n 4) art 175; Decision of the Council of Ministers No 651 'On the Implementing Provisions of Law No 102/2014, the Customs Code of the Republic of Albania' (10 November 2017) [2017] Official Gazette 199, art 5.

42 Ministry of Economy, Culture, and Innovation (MECI) has recently been restructured to (MTCS). Decision of the Council of Ministers No 512 'On the Determination of the Scope of State Responsibility of the Ministry of Tourism, Culture, and Sport' (25 September 2025) [2025] Official Gazette 172. Decision of the Council of Ministers No 30 'On the Determination of the Scope of State Responsibility of the Ministry of Economy, Culture, and Innovation' (17 January 2024) [2024] Official Gazette 14.

43 Licenses for collective management agencies (CMOs) are issued by the minister responsible for copyright, upon proposal of the Copyright Directorate (CD). These licenses have a three-year validity period and are renewable. The licensing and renewal process for collective management organizations (CMOs) was completed in 2024, resulting in four active CMOs respectively: Order No 1046 'On the Licence Renewal for the Agency for the Collective Administration of Performers' Rights (AKDIE)'; Order No 1047 'On the Licence Renewal for the Agency for the Collective Management of Authors'

Certification and Appeals, and Monitoring and Coordination, and is currently staffed by eight employees.⁴⁴ Another significant improvement, as noted in the Albanian Progress Report, is the integration of CD services into the government's e-Albania portal, which has facilitated access for authors and rights holders.⁴⁵ Together with the General Directorate of Industrial Property (GDIP),⁴⁶ the CD also prepares, promotes, and organizes awareness campaigns, such as seminars, conferences, and training sessions, addressing copyright and related rights and IP issues in general. These measures are essential in practice, in addition to fulfilling a legal obligation. Through systematic training and awareness-raising initiatives, they provide stakeholders with the necessary information to understand, interpret, and effectively apply legal and sublegal acts. This not only ensures compliance but also promotes the consistent and uniform application of regulatory frameworks, strengthening the protection of intellectual property rights. Moreover, CD collaborates closely with enforcement bodies, including the State Market Surveillance Inspectorate (SIMS), the General Directorates of State Police, Customs, and Taxation Offices. As mentioned in the National Plan for European Integration, this inter-institutional cooperation has improved public awareness, balanced stakeholder interests, and helped reduce informal practices.⁴⁷ Nevertheless, the CD continues to lack sufficient human, financial, and technological resources to face the challenges that technology has imposed effectively, and it possesses no direct authority to enforce online infringement.

New institutional support structures have been established, including the National Copyright Council (hereinafter referred to as NCC), a specialized collegial body under

Rights (ALBAUTOR); Order No 1048 'On the Licence Renewal for Faber Collective Phonogram'; Order No 1049 'On the Licensing of the Audiovisual, Artistic and Documentary Film Agency (FAAD)' (2 December 2024) [2024] Official Gazette 205. A key advancement in Albanian copyright law was the establishment of the One-Stop Shop (S.U.A.D.A.) as a non-profit legal entity. Initially created by Minister of Culture Order No 663/2017, later repealed and reorganized under Order of the Minister of Culture No 777 (n 30), which defines its organization, functions, and activities as the single office responsible for collecting copyright remunerations. This centralized management office unites all licensed Collective Management Organizations (CMOs) under one umbrella, facilitating authorization procedures and reducing transaction costs for users. It operates with a unified remuneration tariff covering all categories of rights. Its primary role is to collect and distribute copyright revenues to rights holders. Since its establishment, individual CMOs have no longer been permitted to collect revenues independently.

44 Until the end of 2024, the CD Organizational Structure staffed only three employees, see: 'Struktura e Ministrisë së Ekonomisë, Kulturës dhe Inovacionit' (*Ministrisë së Ekonomisë, Kulturës dhe Inovacionit*, September 2024) <<https://meki.gov.al/organigrama/>> accessed 22 September 2025.

45 European Commission, *Albania 2024 Report* (SWD(2024) 690 final, 30 October 2024) 64 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52024SC0690>> accessed 22 September 2025.

46 General Directorate of Industrial Property (GDIP) and Copyright Directorate (CD) under MECI, serve as Albania's central authorities for IP.

47 Decision of the Council of Ministers No 122 'On the approval of the National Plan for European Integration 2023–2025' (1 March 2023) [2023] Official Gazette 36, ch 7, 302.

MTCS.⁴⁸ Among other functions, NCC sets remuneration tariffs for users of artistic works in the Albanian market when CMOs and users fail to reach an agreement within 30 days, as provided in Article 144 of the ACL. As noted in the Progress Report, the drafting process for the new tariff methodology has been completed and is currently under review through consultations with relevant stakeholders.⁴⁹ Following the request from CMOs and the renewal of NCC membership,⁵⁰ the new methodology determining remuneration tariffs under the collective management system is expected to be approved soon. Additionally, an Arbitration Board composed of civil law experts (each with at least 10 years of experience) also operates within the CD. The Copyright Directorate serves as its technical secretariat alongside its secretariat role for the NCC.⁵¹

Another novelty introduced by the ACL in 2016 was the establishment of the State Inspectorate of Market Supervision (hereinafter referred to as SIMS) as a supervisory inspectorate.⁵² Among other responsibilities, SIMS monitors and enforces market-level compliance with copyright law.⁵³ According to international and national statistics, in 2023, SIMS's copyright division conducted 354 inspections, resulting in 52 administrative sanctions. Meanwhile, 178 inspections were conducted by the Industrial Property Division, resulting in 9 administrative sanctions.⁵⁴ During 2024, SIMS's Intellectual Property Directorate conducted 750 inspections (685 planned and 65 complaint-based), resulting in 52 administrative measures, 3 warnings, and 49 fines. Specifically, in the area of copyright, 343 out of 633 planned inspections were executed (340 planned and 3 complaint-based), with 40 administrative measures imposed (3 warnings and 37 fines). Most inspections

48 Competences and functions of the National Copyright Council (NCC) are outlined mainly in: Law No 35/2016 (n 4) arts 136, 142–147, 151, 156, 160, and 161. Also see: Decision of the Council of Ministers No 35 'On the Functioning, Organization and Remuneration of the National Copyright Council (NCC)' (1 January 2017) [2017] Official Gazette 9. The NCC operates under its internal regulations, as approved by NCC Decision No. 2, dated 20 April 2017, concerning the approval of the Regulation on the Organization and Functioning of the National Copyright Council (NCC).

49 European Commission (n 45) 64.

50 Orders of the Minister of Economy, Culture, and Innovation No. 350, 351, 352, 253, and 354 dated 20.03.2025 "On the Appointment of a Member of the National Copyright Council".

51 Law No 35/2016 (n 4) art 157.

52 Decision of the Council of Ministers No 36 'On the Establishment, Organisation, and Functioning of the State Inspectorate for Market Surveillance' (20 January 2016) [2016] Official Gazette 10. The activity of SIMS is also based on Law No 99 'On Inspection in the Republic of Albania' (12 September 2024) [2024] Official Gazette 192, as well as on specific laws.

53 For more details on the object of control, the inspection procedure for monitoring copyright and related rights, verification, and providing evidence, decision-making, and information, see: Inspektorati Shtetëror i Mbikëqyrjes së Tregut, *Manual i Inspektimit të Pronësisë Intelektuale "Për Inspektoratin Shtetëror të Mbikëqyrjes së Tregut"* (ISHMT 2023) 47-55 <https://ishmt.gov.al/wp-content/uploads/2024/01/MANUAL_ISHMT.pdf> accessed 22 September 2025.

54 European Commission (n 45) 65. See also: State Market Surveillance Inspectorate, *Work Analysis 2023* (ISHMT 2024) 14-5 <https://ishmt.gov.al/wp-content/uploads/2024/08/Analiza-Vjetore_2023.pdf> accessed 22 September 2025.

focused on unauthorized users of computer software, resulting in 39 fines being issued. In publishing houses, bookstores, and photocopy shops, 38 inspections were carried out, leading to one administrative fine.⁵⁵ These figures show the scale, targeting, and location of the risks. During this year, SIMS ran a proactive, largely planned enforcement. Copyright checks achieved about half of their planned coverage yet produced a higher sanction rate, signaling effective risk targeting. Non-compliance is concentrated in unauthorized computer software, driving most fines and pointing to software use as the priority for both enforcement and prevention.

SIMS decisions may be appealed under the relevant inspections and administrative legislation. At the end of administrative appeal proceedings, final appeals must be submitted to the administrative court.⁵⁶ Official statistics, including those of the Court of First Instance of General Jurisdiction Tirana and the Administrative Court of First Instance, are often limited, as they do not provide detailed data concerning cases of copyright and related rights infringements.⁵⁷ Nevertheless, judicial practice indicates cases in which judicial control has been implemented regarding the activities of administrative bodies. In this regard, the case *Radio +2 sh.a. v. SIMS* may be cited. In this case, SIMS fined the broadcasting company for the unauthorized public communication of works. Radio appealed the SIMS decision in court. The Court held that authorization for the public communication of works must be secured by the user before the use of the work, emphasizing the user's obligation to get the appropriate authorizations in line with the terms of ACL.⁵⁸

SIMS also maintains collaboration with customs and tax authorities, the State Police, economic crime units, and other relevant enforcement bodies to protect copyright and related rights. However, according to the internal analysis, several challenges remain, including insufficient logistical resources, the need for institutional restructuring and staff increases, ongoing training requirements, awareness-raising campaigns, and the necessity of legal and procedural improvements in market surveillance and IP enforcement.⁵⁹

The ACL does not contain authorizing provisions concerning the responsibilities of audiovisual media service providers (Albanian acronym OSHMA) in ensuring compliance

55 State Market Surveillance Inspectorate, *Work Analysis 2024* (ISHMT 2025) 16 <<https://ishmt.gov.al/wp-content/uploads/2025/04/Analiza-Vjetore-2024.pdf>> accessed 22 September 2025.

56 As specified by Law No 49/2012 'On the Organization and Functioning of Administrative Courts and Administrative Disputes' (3 May 2012) [2012] Official Gazette 53, as amended.

57 Court of First Instance of General Jurisdiction Tirana, *Annual Report 2024* (4 March 2025) <<https://gjykata.gov.al/rrethi-tiran%C3%AB/gjykata-e-shkall%C3%ABs-s%C3%AB-par%C3%AB-e-juridiksionit-t%C3%AB-pergjitsh%C3%ABm-tiran%C3%AB/publikime/>> accessed 22 September 2025; Administrative Court of First Instance Tirana, *Annual Report 2021* (26 April 2022) <<https://gjykata.gov.al/gjykata-administrative-e-shkall%C3%ABs-s%C3%AB-par%C3%AB-tiran%C3%AB/gjykata-administrative-e-shkall%C3%ABs-s%C3%AB-par%C3%AB-tiran%C3%AB/rregullore-t%C3%AB-gjykat%C3%ABs/>> accessed 22 September 2025.

58 Decision No 2785 (Administrative Court of First Instance Tirana, 16 July 2018).

59 State Market Surveillance Inspectorate (n 55) 28-31.

with copyright legislation. Instead, this responsibility is established under the organic law of the Audiovisual Media Authority (AMA), which highlights a gap in the overarching copyright framework. In this context, the functions of the AMA (the regulatory body overseeing audio and audiovisual broadcasting services, along with related support services),⁶⁰ including its supervisory and regulatory competences, are primarily outlined in Article 19 of Law No. 97/2013 "On Audiovisual Media in the Republic of Albania" as amended.⁶¹ Among others, AMA ensures that Audiovisual Media Service Operators comply with copyright and related rights legislation, particularly transmission rights.⁶² As pointed out in the IP National Strategy, AMA's role in monitoring and supervising audiovisual media has been reinforced, producing positive results through awareness campaigns, preventive measures, and sanctions applied to operators.⁶³ Legal requirements have been better enforced through cooperation with law enforcement agencies. Collaboration with copyright protection bodies has also been strengthened.⁶⁴ In this respect, AMA collaborates closely with the CD and other authorities responsible for copyright and related rights protection⁶⁵, as well as with other institutions such as the Regulatory Authority for Electronic and Postal Communications, the State Police, the Economic Crime Unit, and other law enforcement agencies, aimed at preventing and reducing violations. The Directorate of Inspections and Supervision in AMA conducted a total of 315 inspections in January and December 2024. During this period, 11 decisions imposing fines were issued, and official records were kept for seven companies that received formal warnings. Moreover, a total of 346 links and 35 official requests have been submitted to the Regulatory Authority for Electronic and Postal Communications for the closure of illegal audiovisual activities, including URLs related to films, sports activities, and piracy.⁶⁶ These figures reflect active monitoring on the ground and increased, coordinated action against online infringement, providing proof to support making the fight against piracy a key operational priority for 2025.

Regarding the field of electronic communications and the postal services sector, the Regulatory Authority for Electronic and Postal Communications plays a vital role in monitoring, overseeing, and controlling the activities of electronic communication network operators and electronic communication service providers. The main competences of this body are outlined in Article 12 of the recently approved Law, "On Electronic Communications in the Republic of Albania".⁶⁷ The Regulatory Authority for Electronic and

60 For further analysis on the role and functions of AMA, see: Brikena Kasmi, *E Drejta e Medias: Pjesa e Përgjithshme* (Drita Print 2017) 245-50.

61 Law No 97/2013 'On Audiovisual Media in the Republic of Albania' (4 March 2013) [2013] Official Gazette 37, as amended.

62 *ibid*, arts 32 and 33 (1) (ë).

63 *ibid*, arts 132, 133.

64 Decision of the Council of Ministers No 350 (n 32) 50.

65 Law No 97/2013 (n 61) art 50 (4).

66 'Media Teknologjia dhe Sfidat Rregullimit te Tregut Audioviziv' (2025) 8 Revista Audiovizive 33.

67 Law No 54/2024 'On Electronic Communications in the Republic of Albania' (30 May 2024) [2024] Official Gazette 102.

Postal Communications, upon request from law enforcement authorities, notifies electronic communications providers to take the necessary actions to restrict access and block or close websites hosting illegal content.⁶⁸ But it lacks competence to assess the content of electronic communications, including internet sites and other online platforms.⁶⁹ The Regulatory Authority for Electronic and Postal Communications may require internet service providers and those offering interpersonal communications services based on numbers, to make freely available to the public information of public interest. This information must be shared in a standardized format defined by the relevant public authorities. It should include, among others, raising awareness about the illegal use of the internet and communication services, particularly the sharing of harmful content that infringes the rights and freedoms of others, such as personal data and copyright.⁷⁰ The Regulatory Authority for Electronic and Postal Communications also collaborates with other state institutions and structures.⁷¹ Under the previous legal framework⁷² and a Memorandum of Cooperation between the Regulatory Authority for Electronic and Postal Communications and AMA,⁷³ a joint Task Force was established in 2022 to combat illegality and prevent piracy and anti-competitive practices in electronic communications networks, and develop activities only by licensed or authorized subjects or entrepreneurs under the supervision of licensed or authorized regulatory authorities.⁷⁴ These combined efforts against online piracy have also been acknowledged in the respective memoranda of the Parliament.⁷⁵

68 Electronic and Postal Communications Authority, *Report on the Activity of the Electronic and Postal Communications Authority for 2023* (AKEP 2024) 106 <https://akep.al/wp-content/uploads/2024/07/ENGLISH_AKEP-RAPORTI-VJETOR-23PRILL-2024-FINAL.pdf> accessed 22 September 2025. See also: Law No 54/2024 (n 67) art 30 (2) (ç), and relevant articles in sublegal acts.

69 Law No 54/2024 (n 67) art 3(2).

70 *ibid*, art 142 (8)(9).

71 *ibid*, art 45 (4).

72 Law No 9918 'On Electronic Communications in the Republic of Albania' (19 May 2008) [2008] Official Gazette 84, art 12.

73 On November 3, 2021, both parties signed the Memorandum of Cooperation, which aims to ensure and support operational, technical, and legal assistance in areas of mutual interest, see: Electronic and Postal Communications Authority, *Activity Report of the Electronic and Postal Communications Authority for 2021* (AKEP 2022) 121 <https://akep.al/wp-content/uploads/2022/09/Akep-Raport-vjetor-2022_20-shtator.pdf> accessed 22 September 2025.

74 Electronic and Postal Communications Authority, *Activity Report of the Electronic and Postal Communications Authority for 2022* (AKEP 2023) 122 <<https://akep.al/ep-content/uploads/2023/07/AKEP-RAPORTVJETOR-20223.pdf>> accessed 22 September 2025. In case of non-compliance with the obligation to respect restrictions regarding unlawful or harmful content, the inspection group may impose administrative measures (fines).

75 Resolution of the Parliament 'On the Evaluation of the Activity of the Authority of Electronic and Postal Communications for the year 2023' (27 June 2024) <<https://www.aksesdrejtesi.al/dokumenta/1727772730rezoluta%20e%20AKEP%202024.pdf>> accessed 22 September 2025. See also: Resolution of the Parliament 'On the Evaluation of the Activity of the Audiovisual Media Authority for the year 2023' (26 July 2024) <<https://ama.gov.al/wp-content/uploads/rezolute-2024...pdf>> accessed 22 September 2025.

Customs enforcement of intellectual-property rights falls to the Customs Administration Directorate, which coordinates activities among other directorates of the General Directorate of Customs, third-party institutions, and stakeholders to intercept infringing imports and exports.⁷⁶ Finally, in the criminal context, the 2024 Annual Report on the State of Criminality shows that only three proceedings were registered for violations of Article 148 of the Criminal Code (publication of another's work under one's own name), and six proceedings were initiated for breaches of Article 149 (infringement of copyright). However, none of these proceedings resulted in convictions.⁷⁷

While the State Police, a unique and centralized institution operating at both central and local levels, has its duties defined in Article 17 of the organic law and other relevant acts.⁷⁸ In the field of intellectual property, its primary tasks are carried out through the Sector for Economic and Financial Crime, which is charged with preventing, detecting, documenting, and combating unlawful activities, particularly criminal offenses. The Albanian National Intellectual Property Strategy 2022-2025 aims to enhance the annual criminal prosecution activity for intellectual property-related crimes by 5%. Nevertheless, despite its crucial role in law enforcement for the protection of intellectual property, including copyright, and coordinated operations with other national enforcement authorities and international partners such as INTERPOL, EUROPOL, and SELEC,⁷⁹ no substantial actions have been reported in relation to digital environments violations.

5 FUTURE CHALLENGES OF COPYRIGHT IN THE ONLINE ENVIRONMENT, EXTENDING THE PROTECTION OF COPYRIGHT AND RELATED RIGHTS

The digital revolution has fundamentally transformed the landscape of intellectual property rights, including copyright and related rights. Digitalization and the extensive online dissemination of creative works have revitalized classical issues related to these rights.⁸⁰ While the shift to digital formats and the rapid online circulation of creative works have created unprecedented opportunities for innovative business models and the broader dissemination of creative works, they have also increased the risk of unauthorized use. As Professor Lombardy observes, digitalization brings both transformative opportunities and

76 See: Customs Code of the Republic of Albania No 102/2014 (n 41) arts 2, 10, 27, 28, 67, 125, 239. For the protection of intellectual property at customs, see also: Council of Ministers Decision No 651 (n 41) art 5.

77 General Prosecutor's Office, *Annual Report on the State of Criminality 2024* (2 June 2025) 225, tab 12 <<https://konsultimipublik.al/konsultime/19>> accessed 22 September 2025.

78 Law No 108/2014 'On the State Police' (31 July 2014) [2014] Official Gazette, as amended. See also: Decision of the Council of Ministers No 750, 'on the approval of the Regulation of the State Police' (16 September 2015) [2015] Official Gazette 167, as amended.

79 Decision of the Council of Ministers No 350 (n 32) 44, 61.

80 Olton Spiro, *E Drejta e Internetit: Aspekte të Shkëmbimeve Elektronike* (Guttenberg 2013) 151.

significant challenges.⁸¹ These are also present in Albanian reality. As presented above, considerable progress has been made in aligning its copyright regime with the EU acquis;⁸² however, the country still lacks the comprehensive digital-rights framework that EU Member States already have, which includes the Digital Single Market Directive, the Digital Services Act, the Digital Market Act, and the AI Act. Moreover, according to the National Plan for European Integration 2024–2026,⁸³ as well as the 2024 Progress Report, the country has not fully transposed several key EU directives, leaving gaps in both legal protection and institutional capacity to guarantee fundamental rights online.⁸⁴ In response, many activities were taken. A comprehensive feasibility study, completed in October 2023, evaluated Albania's legislative and administrative readiness, mapped existing alignment with EU standards, highlighted best practices, and identified areas for improvement. Based on these findings, a new draft of the copyright law was prepared by MECI and is currently available for public consultation.⁸⁵ The study's findings were shared with stakeholders in October 2023,⁸⁶ and since then, a series of informational workshops and training sessions have clarified each party's obligations under the proposed revisions.

The draft amends Law No. 35/2016, as amended, by introducing almost 51 articles that modernize and expand the current regime.⁸⁷ Key objectives include expanding the scope of protection, fully transposing previously partially aligned directives, and harmonizing national rules with EU standards to address modern challenges effectively, particularly online piracy. These requirements were also highlighted in the analytical Program Plan of the Ministry of Economy, Culture, and Innovation for the third quarter of 2025.⁸⁸

The primary change includes the incorporation of Title III of the CMR Directive,⁸⁹ which contains rules for improving the functioning of CMOs and implementing multi-territorial

81 Ettore M Lombardi, *Digitization, Copyright and the Law: Copyleft and the Future of Intellectual Property* (Routledge 2025) 59.

82 Decision of the Council of Ministers No 122 (n 47) ch 7, 297.

83 Decision of the Council of Ministers No 16 'On the Approval of the National Plan for European Integration 2024–2026' (11 January 2024) [2024] Official Gazette 11.

84 European Commission (n 45) 65.

85 The Draft law and related documents see: Ministry of Economy, Culture and Innovation, 'On Some Additions and Amendments to Law No 35/2016 "On Copyright and other Related Rights", as amended' (17 March 2025) <<https://konsultimipublik.gov.al/Konsultime/Detaje/828>> accessed 22 September 2025.

86 The CD, in collaboration with international expertise, is leading these reform efforts, supported by the Albanian-Swiss Intellectual Property Project (ALSIP).

87 Council of Ministers of the Republic of Albania, *Report on Negotiations and European Integration (reporting period: January - March 2024)* (April 2024) 42-3 <<https://kryeministria.al/wp-content/uploads/2024/11/Raport-3MI-2024.pdf>> accessed 22 September 2025.

88 Decision of the Council of Ministers No 818 'On the approval of the general analytical program of draft projects that will be submitted for review to the Council of Ministers during the year 2025' (26 December 2024) [2024] Official Gazette 225.

89 Directive 2014/26/EU (n 13).

licensing for online music rights through collective management organizations. This would enhance the cross-border accessibility of music, simplify cross-border licensing procedures, improve revenue distribution for rights holders, and increase transparency and efficiency in online music management, benefiting creators, rights holders, service providers, and consumers alike. By minimizing fragmentation in rights clearance, the new law should support the growth of lawful online music services outside Albania's boundaries and strengthen copyright enforcement. The draft further extends the mandatory collective-management system, currently limited to cable retransmissions, to cover new forms of retransmission, thereby facilitating broader cross-border access to television and radio programs. It also introduces the concept of "direct injection" and extends the "country of origin" principle to ancillary online services, which will simplify rights clearance procedures and reduce legal uncertainties for broadcasters and retransmission operators. These measures align copyright legislation with the standards set forth in the Satellite and Cable II Directive.⁹⁰ They are expected to increase legal access to audiovisual content across borders, improve licensing efficiency, and support the availability of Albanian and foreign programming in a converging digital media environment.

Furthermore, the amendments clarify and broaden copyright exceptions for education, research, and cultural preservation, while also facilitating the digitization and cross-border use of out-of-commerce works by cultural institutions. New provisions also guarantee fair remuneration and greater contractual transparency for authors and performers, strengthen user rights on content-sharing platforms, and impose clearer responsibilities for online service providers, including liability rules and redress mechanisms. To close regulatory gaps for global platforms not based in Albania, the law also integrates key articles from the EU Digital Services Act, empowering national authorities to enforce copyright rules, requiring local legal representatives, and demanding information from digital intermediaries operating within Albanian territory.

Mechanisms for protecting copyright for online publications are also covered. These measures align copyright legislation with the standards outlined in the Digital Single Market Directive.⁹¹ Recognizing the need for robust enforcement of copyright and related rights legislation, the draft proposes transforming the Copyright Directorate into a General Directorate under the MTCS. This upgrade is expected to enhance administrative capacity, strengthen enforcement powers, particularly for digital complaints, and introduce more precise online dispute resolution mechanisms.

90 Directive (EU) 2019/789 of the European Parliament and of the Council 'Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes, and Amending Council Directive 93/83/EEC' (17 April 2019) [2019] OJ L 130/82.

91 Directive (EU) 2019/790 of the European Parliament and of the Council 'On Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC' (17 April 2019) [2019] OJ L 130/92.

Accessibility for visually impaired persons is also readdressed. Under the new provisions, authorized entities and eligible beneficiaries in Albania may obtain and use copies of works or objects of related rights in a suitable format from authorized entities situated in an EU member state or a third country covered by relevant international agreements. These amendments bring copyright law into complete alignment with the Marrakesh Directive.⁹²

Finally, the draft law fully transposes the Orphan Works Directive,⁹³ filling the gap left by the 2022 amendments by including the category of phonograms and phonogram right holders, broadening the scope of the law.

Taken together, all these amendments aim to modernize Albania's copyright and related rights framework, foster cultural and educational access, and strengthen the rights of creators, rights holders, and users throughout the digital era.

6 CONCLUSIONS AND RECOMMENDATIONS

The recent reforms to Albania's copyright and related rights framework demonstrate a strong dedication and a clear commitment to establishing a modern, efficient, and EU-aligned intellectual property ecosystem that properly supports creativity and innovation. By integrating a combined approach of civil, administrative, and criminal measures, along with reinforced institutional roles and interim enforcement mechanisms, the country is laying the groundwork for a more secure environment for creators, artists, rights holders, and users.

These measures seek to address persistent challenges, such as piracy, counterfeiting, and enforcement gaps. However, despite this well-structured and organized institutional framework, Albania must continue to enhance its enforcement capacity, incorporate advanced technologies, and refine its legal instruments to handle online infringements effectively.

Enhanced coordination is also required both among domestic bodies (such as the CD, AMA, SIMS, the Regulatory Authority for Electronic and Postal Communications, and other enforcement authorities) and with international partners, to ensure adequate protection of rights. In particular, institutional coordination and cooperation agreements should be improved to prevent overlapping competencies in monitoring and enforcing rights.

Furthermore, establishing dedicated contact points at both central and local levels for information sharing and joint activities would help further strengthen implementation. Equally important is the cultivation of a culture of respect for intellectual property, which can be achieved by raising awareness initiatives among economic operators, users, and the broader public.

92 Directive (EU) 2017/1564 (n 24).

93 Directive 2012/28/EU (n 24).

A more accurate assessment of the degree of approximation of Albanian legislation with EU law in this field highlights the need for further alignment and reform. The full implementation of the relevant EU directives, which are currently only partially followed, such as the Collective Rights Management Directive, the Orphan Works Directive, and the Marrakesh Directive, together with the approximation to the Satellite and Cable II Directive and the Digital Single Market Directive, would be a significant step in harmonizing Albania's legal framework with European digital standards. Such changes would not only align national legislation with EU best practices but would also strengthen digital enforcement tools, increase legitimate access to creative content, and foster greater innovation within the cultural and creative sectors of the country.

Finally, the success of these legislative amendments will depend on the timely approval of the proposed measures, effective stakeholder engagement during public consultations, and the allocation of adequate resources for capacity development within the new General Copyright Directorate. Continuous monitoring and periodic evaluation will be essential to ensure that Albania's intellectual property regime keeps up with technological advancements and evolving EU standards in the digital marketplace.

REFERENCES

1. Dega F, *Pronësia Intelektuale* (Morava 2019)
2. Elezi I, *E Drejta Penale Pjesa e Posaçme* (Botimet Kumi 2021)
3. Hilty RM, 'Intellectual Property and Private Ordering' in Dreyfuss R and Pila J (eds), *The Oxford Handbook of Intellectual Property Law* (OUP 2018) 898
4. Ikonomi E and Zyberaj J, *E Drejta e re e autorit në Shqipëri dhe të drejtat e lidhura* (PEGI 2017)
5. Kasmi B, *E Drejta e Medias: Pjesa e Përgjithshme* (Drita Print 2017)
6. Lombardi EM, *Digitization, Copyright and the Law: Copyleft and the Future of Intellectual Property* (Routledge 2025)
7. Malltezi A, Rystemaj J and Pelniku L, *Aspekte të së Drejtës së Biznesit në Shqipëri* (Mediaprint 2013)
8. Muçmataj I and Liçenji A, 'Kufizime nga regjimi i të drejtave të autorit për personat me shikim të dëmtuar: Perspektiva Ndërkombëtare' (Zhvillime dhe risi në të drejtën Private: Konferencë shkencore kombëtare, Shtëpia Botuese FLESH, Universiteti i Tiranës, Fakulteti i drejtësisë, Tiranë, 12 Qershor 2024) 278
9. Muçmataj I and Vorpsi LÇ, 'The Legal Situation for Orphan Works Under the Republic of Albania's Copyright Regime' (2024) 13(4) *Academic Journal of Interdisciplinary Studies* 393. doi:10.36941/ajis-2024-0124
10. Omari L and Anastasi A, *E Drejta Kushtetuese* (Dajti 2000 2017)

11. Podgorna I and others, 'Modelling and Analysis of Socio-Economic Development of European Union Countries through the DP2 Method' (2020) 17 WSEAS Transactions on Business and Economics 454. doi:10.37394/23207.2020.17.44
12. Rosati E, 'From the Early Days of Harmonization to the DSM Directive 2019/790: Continuity and Complexity of the EU Copyright Framework' (2021) 3 Auteurs & Media 289. doi:10.2139/ssrn.4187759
13. Semini M, *E Drejta e Autorit në Shqipëri* (Skanderbeg Books 2009)
14. Semini-Tutulani M, *Hetimi dhe Ndjekja e Veprave Penale që lidhen me Pronësinë Intelektuale në Shqipëri: Manual për Trajnimin e prokurorëve, gjyqtarëve dhe autoriteteve të tjera ligj zbatuese* (WIPO 2020)
15. Sheqi E, *E Drejta e autorit: Teori, raste dhe komente* (Tirane 2021)
16. Spiro O, *E Drejta e Internetit: Aspekte të Shkëmbimeve Elektronike* (Guttenberg 2013)
17. Spitz B, *Guide to Copyright in France. Business, Internet, and Litigation* (Kluwer Law International 2015)
18. Torremas P, Tutulani M and Dedi M, *Pronësia Intelektuale* (Magistrate School 2005)

AUTHORS INFORMATION

Ilda Muçmataj*

PhD (Law), Faculty of Law, Civil Department, University of Tirana, Tirana, Albania

ilda.muçmataj@fdut.edu.al

<https://orcid.org/0009-0007-7590-2470>

Corresponding author, responsible for research methodology, data collection, writing – original draft, supervising.

Anjeza Liçenji

PhD (Law), Associate Professor, Faculty of Law, Civil Department, University of Tirana, Tirana, Albania

anjeza.licenji@fdut.edu.al

<https://orcid.org/0009-0005-0992-8926>

Co-author, responsible for research methodology, data collection, writing – original draft.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Ilda Muçmataj and Anjeza Liçenji. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing Editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Muçmataj I and Liçenji A, 'Copyright and Related Rights Legislation in Albania: From Traditional to Digital Protection' (2025) 8(4) Access to Justice in Eastern Europe 359-81 <<https://doi.org/10.33327/AJEE-18-8.4-r000133>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-r000133>

Summary: 1. Introduction. – 2. Methodology. – 3. Developments of the Legislative Framework of Copyright and Related Rights. – 4. Institutional Framework and Enforcement Capacity. – 5. Future Challenges of Copyright in the Online Environment, Extending the Protection of Copyright and Related Rights. – 6. Conclusions and Recommendations.

Keywords: *copyright protection, EU legislation, online piracy, technological progress, rights holders, users.*

DETAILS FOR PUBLICATION

Date of submission: 25 Jul 2025

Date of acceptance: 23 Sep 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with minor revision

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

AI technologies have only been used to enhance language clarity and grammar. No AI tools were used to generate ideas, structure arguments, analyze data, or produce conclusions.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ЗАКОН АЛБАНІЇ «ПРО АВТОРСЬКЕ ПРАВО ТА СУМІЖНІ ПРАВА»: ВІД ТРАДИЦІЙНОГО ДО ЦИФРОВОГО ЗАХИСТУ

Ільда Мучматай та Анжеза Ліченжи*

АНОТАЦІЯ

Вступ. Питання ефективності Албанії в сфері авторського права та суміжних прав залишається складним та потребує покращення, незважаючи на наявні реформи, що забезпечують відповідність міжнародним стандартам та вимогам Європейського Союзу. Повної гармонізації законодавства досі бракує, правоохоронні органи продовжують працювати в умовах технологічних обмежень та відсутності необхідних ресурсів, а обізнаність громадськості щодо стандартів авторського права, особливо в цифровій сфері, є недостатньою. Тим часом цифрові технології вплинули на створення, поширення та комерціалізацію творів, що сприяло розширенню ринкових можливостей, але також збільшило ризики несанкціонованого використання та порушення прав. З огляду на це, у статті було проаналізовано еволюцію, проблеми та перспективи порядку правового регулювання авторського права Албанії в цифрову епоху, визначено прогалини в регулюванні та правозастосуванні, а також здійснено оцінку запропонованих законодавчих змін, спрямованих на посилення захисту авторських прав. Дослідження має на меті з'ясувати переваги та недоліки чинної системи захисту.

Методи. У статті використовується змішаний методологічний підхід, який поєднує доктринальні юридичні дослідження, документальний та політичний аналіз, зокрема аналіз законодавства, національної інтелектуальної власності (далі – ІВ), культурних стратегій та міністерської програми, а також аналіз даних щодо правозастосування, особливо, що стосується інспекцій, санкцій та запитів на блокування. Метою є дослідження розвитку та ключових етапів правової системи авторського права та суміжних прав, узгодженості та спроможності інституційної бази, а також ефективності нещодавньої практики правозастосування.

Результати та висновки. Аналіз показує, що Албанія досягла значного законодавчого прогресу та створила допоміжні інституції; проте її спроможність до

правозастосування та відповідність вимогам цифрової епохи все ще залишаються недостатніми. Адміністративні інспекції та санкції є дієвими, проте проблеми з онлайн-піратством та транскордонним ліцензуванням зберігаються. Ці висновки відповідають пріоритетам, що зазначені в Національному плані європейської інтеграції на 2024–2026 роки, а також у Звіті про прогрес за 2024 рік. Таким чином, це підсилює необхідність постійних реформ для того, щоб поліпити дотримання та ефективність законів, зокрема подальше впровадження інструментів ЄС, що очікують на розгляд. Також у статті було запропоновано кілька рекомендацій щодо вирішення наявних та майбутніх потреб у захисті ІВ, розширення законного доступу до об'єктів ІВ та підтримки творців та користувачів на цифровому ринку.

Ключові слова: захист авторських прав, законодавство ЄС, онлайн-піратство, технологічний прогрес, правовласники, користувачі.

Review Article

FROM FLEXIBILITY TO REGULATION: REMOTE WORK IN THE UAE PUBLIC SECTOR AND COMPARATIVE EU INSIGHTS

Sumaya Aljahoori

ABSTRACT

Background: Remote work has transformed public sector management and accountability, aligning with the UAE's digital and administrative modernisation strategies to boost efficiency and innovation. As remote work becomes institutionalised across federal entities, there is an increasing need to assess the adequacy and coherence of the legal frameworks. This study analyses how remote work is regulated in the UAE in comparison with the EU, where telework is governed by more established legal standards.

Methods: The research adopts a descriptive, analytical, and comparative legal approach to examine three UAE legal instruments: Cabinet Resolution No. (27) of 2020 on remote work, Federal Decree-Law No. (49) of 2022 on HR, and Cabinet Resolution No. (48) of 2023 on the Executive Regulation. These are compared with major EU instruments, including Directive 2003/88/EC on Working Time, Directive 89/391/EEC on Safety and Health, and Regulation (EU) 2016/679 (GDPR), along with relevant French and German laws and CJEU case law. Through doctrinal analysis and comparison, the study evaluates regulatory maturity, employee protections, and performance accountability.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-r000139>

Date of submission: 07 Oct 2025

Date of acceptance: 28 Oct 2025

Last Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Sumaya Aljahoori

Results and Conclusions: *The findings indicate that the UAE's approach prioritises flexibility, technological readiness, and performance orientation, aligning with its administrative innovation agenda. However, notable regulatory gaps persist, including the absence of a formal right to disconnect, inconsistent performance assessment standards, and limited procedural safeguards for approving or maintaining remote work. By contrast, the EU legal framework provides more structured employee protections, clearer accountability measures, and stronger privacy guarantees. The study concludes that while the UAE's flexible framework is well-positioned for further development, particularly through the adoption of unified performance metrics, explicit employee rest and disconnection rights, and closer alignment with international best practices. These reforms would enhance legal certainty, promote fairness, and strengthen the sustainable governance of remote work in the public sector.*

1 INTRODUCTION

"Remote work is here to stay; let us embrace it together." With this statement, Omar Sultan Al Olama, the UAE's Minister of State for Artificial Intelligence, Digital Economy, and Remote Work Applications, highlighted the country's commitment to establishing remote work laws as a core employment model.¹ The COVID-19 pandemic accelerated the adoption of remote work and enhanced flexibility in employment arrangements,² transforming how governments manage employees and accountability. In the UAE, this transformation aligns closely with the nation's vision of digital governance.

Beginning with Cabinet Resolution No. (27) of 2020 on Remote Work in the Federal Government, and followed by Executive Regulation No. (48) of 2023, implementing Federal Decree-Law No. (49) of 2022 on Human Resources, the UAE has formalised flexible work in the federal sector, reflecting a modern approach to public administration.

By contrast, the EU lacks a specific remote work regulation, relying instead on directives like the Working Time Directive, OSH Framework Directive, and GDPR, along with national laws in countries like France, Spain, and Germany. These frameworks collectively prioritise worker protection, safety, and data privacy.

Despite progress, comparative legal research on remote work is limited, especially regarding employee performance assessment, disciplinary measures, and work-life balance in public service. This study aims to fill that gap through a comparative analysis between the UAE and the EU.

1 'UAE Calls for Tighter Remote Work Policies to Cut Commuting, Make Daily Jobs Easier' *Khaleej Times* (Dubai, 8 January 2025) <<https://www.khaleejtimes.com/jobs/uae-calls-for-more-remote-work-options-to-reduce-commuting-make-daily-jobs-easier>> accessed 28 October 2025.

2 Stavroula Demetriades, Jorge Cabrita and Franz Ferdinand Eiffe, *The Future of Telework and Hybrid Work: Anticipating and Managing the Impact of Change* (ILO Eurofound 2023) 8. doi:10.2806/234429

At the international level, the International Labour Organisation (ILO) established early normative guidance through ILO Convention No. (177) on Home Work (1996) and Recommendation No. (184). The Convention recognises home and tele-based work as legitimate forms of employment. It requires member states to promote equal treatment of on-site workers in terms of occupational safety, remuneration, and social protection.³ Although neither the UAE nor the EU has directly incorporated this Convention into domestic law, its principles inform EU telework frameworks and serve as an international benchmark for evaluating national regulatory approaches.

While the terms “remote work” and “telework” are often used interchangeably, international legal tools draw subtle distinctions. The ILO defines “telework” as work conducted away from the employer’s premises through information and communication technologies.⁴ Conversely, “remote work” is a broader term covering any off-site work setup, including temporary, hybrid, or technology-assisted arrangements. In European Union practice, “telework” is referenced in the 2002 European Framework Agreement on Telework, which highlights voluntary participation and equal treatment. Meanwhile, UAE regulations use ‘remote work’ to encompass a broader range of flexible work arrangements, including hybrid and cross-border arrangements.

The following key questions guide the research:

1. What is the legal framework governing remote work in the UAE, and how has it evolved within the federal human resources system?
2. How does the UAE’s approach compare with the EU framework and selected member states in terms of employee protection, performance management, and data privacy?
3. In what ways does the existing UAE regulation fall short of international best practices, and what legal reforms could enhance its effectiveness?
4. How should employee performance be assessed, and what disciplinary mechanisms ensure accountability in remote work settings?
5. How is work–life balance safeguarded within the UAE framework, and what lessons can be drawn from the EU’s recognition of the “right to disconnect”?

3 ILO *Convention No 177 concerning Home Work* (20 June 1996) <https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312322> accessed 28 October 2025; ILO *Recommendation No 184 concerning Home Work* (20 June 1996) <https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:12100:::12100:P12100_INSTRUMENT_ID:312522> accessed 28 October 2025.

4 Jon Messenger and others, *Working Anytime, Anywhere: The Effects on the World of Work* (ILO Eurofound 2017) 9. doi:10.2806/372726

2 METHODOLOGY

This study adopts a comparative doctrinal and analytical legal method, examining the UAE's remote work regulations alongside primary EU instruments and national laws. The approach follows the functional comparative method, focusing on how different legal systems pursue similar policy objectives under distinct institutional settings. The selection of the UAE and the EU reflects contrasting stages of regulatory maturity: the UAE represents an emerging digital governance model, while the EU provides a mature, rights-based framework.

The comparative method relies on doctrinal analysis of statutory instruments, executive regulations, and judicial decisions in both jurisdictions. It also incorporates secondary analysis of peer-reviewed legal scholarship to evaluate how remote work frameworks operationalise principles of fairness, accountability, and data protection. By aligning doctrinal comparison with contextual administrative analysis, the paper ensures that legal differences are interpreted through their institutional purposes rather than formal categories.

The paper is structured in three parts. Part I explores the UAE's legal framework on remote work; Part II analyses EU regulations and selected national laws; and Part III presents comparative findings and concludes with policy recommendations.

3 FINDINGS AND DISCUSSION

The comparative analysis shows that while the UAE prioritises flexibility and digital readiness, the EU focuses on employee safeguards and consistent enforcement. The findings highlight that both systems address similar challenges in performance accountability, data protection, and work-life balance, but through differing legal logics.

3.1. The UAE Legal Framework for Remote Working

The UAE proactively prepared for shifts in operational methodologies by adopting robust digital systems to maintain a competitive edge globally. Remote work policies were first introduced within the federal sector in 2017, allowing authorities to evaluate their impact on productivity.⁵ In April 2020, the UAE Government issued Cabinet Resolution No. (27)

5 'UAE's Remote Work System: A Pillar of Safety and Efficiency Amid Changing Work Dynamics' (*Emirates News Agency-WAM*, 18 April 2024) <<https://www.wam.ae/en/article/b2pw0gz-uaes-remote-work-system-pillar-safety-and>> accessed 28 October 2025.

for 2020 regarding “Remote Work System in the Federal Government”.⁶ COVID-19 had a direct impact on the need to shift toward remote working.⁷

In 2021, the UAE introduced the region's first virtual work residency visa, enabling foreigners to engage in remote employment within the country for up to one year, subject to specific eligibility criteria.⁸ According to data from YouGov, approximately 46% of the working population currently works remotely in some capacity.⁹

It was decided to implement a remote work system, either full-time or part-time, even during ordinary circumstances.¹⁰ The remote work system operates concurrently with the traditional work framework, in which employees perform their duties at the entities' premises. Nonetheless, the availability of the option is contingent upon a defined set of criteria that employees must fulfil. Primarily, they must be Emirati employees, thereby excluding non-Emirati personnel. Furthermore, the task must be inherently divisible and automated, and managed via an electronic system, thereby excluding roles dependent on manual or non-digital processes. The Federal Authority for Human Resources (FAHR) is the governmental entity responsible for establishing procedures for remote work across federal entities.¹¹

3.1.1. Institutional and Legal Foundation of Remote Work in the UAE

The institutional basis for remote work in the UAE federal sector is set out in Cabinet Resolution No. (48) of 2023 Concerning the Executive Regulation of Federal Decree-Law No. (49) of 2022 Concerning Human Resources in the Federal Government.¹² Article 9 specifies the employment patterns and types of work available—full-time, part-time, temporary, and flexible work—and recognises various work modalities: in-house work,

6 UAE Cabinet Resolution No (27) of 2020 ‘On the Remote Work System in the Federal Government’ [2020] Official Gazette 676 <<https://uaelegislation.gov.ae/en/legislations/1414>> accessed 28 October 2025; ‘Implementing a Remote Work System in the Federal Government in Normal Situations’ (UAE United Arab Emirates Government Portal, 11 August 2025) <<https://u.ae/en/information-and-services/jobs/working-in-uae-government-sector/implementing-a-remote-work-system-in-the-federal-government-in-normal-situations>> accessed 28 October 2025.

7 Dania M Kurdy, Husam-Aldin Nizar Al-Malkawi and Shahid Rizwan, ‘The Impact of Remote Working on Employee Productivity During Covid-19 in the UAE: The Moderating Role of Job Level’ (2023) 3(4) Journal of Business and Socio-Economic Development 340. doi:10.1108/JBSED-09-2022-0104.

8 UAE’s Remote Work System (n 5).

9 Tara Sangani and Rauf Mammadov, *Remote Working in the UAE: Best Practice Review and Future Policy Paper* (PWC Middle East 2025) 3 <<https://www.pwc.com/m1/en/industries/government-public-services/remote-working-in-uae.html>> accessed 28 October 2025.

10 UAE Cabinet Resolution No (27) of 2020 (n 6).

11 Federal Authority of Human Resources (FAHR) <<https://www.fahr.gov.ae/en/home/>> accessed 28 October 2025.

12 UAE Cabinet Resolution No (48) of 2023 ‘Concerning the Executive Regulation of Federal Decree by Law No. (49) of 2022 of Concerning Human Resources in Federal Government’ [2023] Official Gazette 751 <<https://uaelegislation.gov.ae/en/legislations/2115>> accessed 28 October 2025.

remote work within the UAE, and remote work outside the UAE,¹³ intensive working hours, and hybrid work. The latter allows employees to divide their responsibilities between the entity's headquarters and remote locations, facilitating a blend of work arrangements.

Earlier, the UAE Cabinet Council¹⁴ issued Cabinet Resolution No. (27) for 2020 concerning the remote work system in the federal government. Importantly, decisions regarding transfers, promotions, and terminations remain unchanged regardless of whether employees work remotely. Article 11 of the UAE Remote-working resolution states that “employees working remotely shall be entitled to salaries and benefits according to the Grade & Salary scale for federal government employees approved by the cabinet”.¹⁵ Similarly, Article 12 (4) of the UAE Cabinet Resolution No. (48) of 2023 provides that “the employee who works remotely shall receive the financial allocations determined by the remote work system issued by the Cabinet upon FAHR's proposal.”¹⁶ These provisions ensure that remote employment does not lead to inequality or the loss of employment rights. Instead, they integrate remote work into the broader federal human resources framework to promote fairness, transparency, and equal treatment for all public sector employees.

The UAE federal human resources framework emphasises performance monitoring, disciplinary accountability, and termination to maintain efficiency and integrity in the public sector. Under Cabinet Resolution No. (27) of 2020 on Remote Work, federal entities must electronically monitor employees' productivity, output quality, and adherence to policies and deadlines.¹⁷ Violations by employees can result in disciplinary action, including termination for serious offences, under the Federal Human Resources Law. Article 12 of the 2020 Resolution provides a flexible framework for performance appraisal in the federal remote work system, referencing the Federal Government's Performance Management System.¹⁸ Evaluation is based on five criteria—productivity, quality, timeliness, supervisor and client satisfaction, and other relevant factors. Rather than imposing rigid benchmarks (like specific deliverables, deadlines, or quality standards), the framework allows federal entities to customise evaluations based on their functions, promoting a results-based approach that safeguards employees' privacy.

13 'UAE: Approves Remote Work for Government Entities Outside the Emirates' (*LexisNexis Middle East*, 13 March 2025) <<https://www.lexis.ae/2025/03/13/uae-approves-remote-work-for-government-entities-outside-the-emirates/>> accessed 28 October 2025.

14 UAE Cabinet Council is one of the main authorities in the UAE and the executive power of the federation, see: 'The UAE Cabinet' (*UAE United Arab Emirates Government Portal*, 2025) <<https://uaecabinet.ae/en/about-the-cabinet>> accessed 28 October 2025.

15 UAE Cabinet Resolution No (27) of 2020 (n 6) art (11).

16 UAE Cabinet Resolution No (48) of 2023 (n 12) art (12), pt 4.

17 UAE Cabinet Resolution No (27) of 2020 (n 6) art (12).

18 'Performance Management System for the employees of Federal Government' (*Federal Authority for Government Human Resources*, 2025) <<https://www.fahr.gov.ae/en/legislations-guides/systems/performance-management-system-for-the-employees-of-federal-government/>> accessed 28 October 2025.

In 2023, the UAE hosted a forum titled “Remote”, which explored experiences and organisational responses during the COVID-19 pandemic and strategies for advancing remote work within the UAE economy.¹⁹ H.E. Omar Sultan Al Olama emphasised the UAE’s goal of becoming a global leader in remote work as both a competitive advantage and quality-of-life boost. He highlighted the potential of remote work to cut commutes and enhance focus, making it a primary work mode in the UAE.²⁰

Following directives by H.H. Sheikh Hamdan bin Mohammed bin Rashid Al Maktoum, the Dubai Government Human Resources Department (DGHR) approved a flexible hour and remote work policy for Dubai government employees during Ramadan 1446 Hijri (2025).²¹ This policy, aligned with 2025 as the “Year of Community,” reflects Dubai’s commitment to a positive work environment and community values.²² It allows employees up to three flexible hours—5.5 hours from Monday to Thursday and three on Friday—plus remote work for up to two days a week based on job requirements.²³ Similarly, the “Flexible Summer” initiative involves a four-day workweek to reduce summer hours for public sector employees.²⁴ These initiatives align with the UAE’s broader strategy for well-being and happiness and contribute to easing traffic congestion through flexible scheduling.²⁵

It is important to note that current UAE regulations do not explicitly address cross-border remote work, despite it being referenced in federal human resource law as a newly recognised recruitment pattern of employment.²⁶ However, from March 2025, the UAE began permitting remote work for government entities outside the Emirates.²⁷ This move is expected to enable the UAE to access specialised skills and knowledge from around the world, thereby enhancing the execution of projects and studies for federal entities.

19 Sangani and Mammadov (n 9) 18.

20 *ibid.*

21 ‘DGHR Approves Flexible, Remote Work Policy for Dubai Government Employees During Ramadan’ (*Protocol Department - Dubai*, 26 February 2025) <<https://www.protocol.dubai.ae/en/media-listing/news-events/dghr-approves-flexible-remote-work-policy-for-dubai-government-employees-during-ramadan/>> accessed 28 October 2025.

22 ‘UAE Year of Community “Who’s the → in your life?”’ (*UAE Year of Community*, 2025) <<https://uaeyearof.ae/en/2025>> accessed 28 October 2025.

23 DGHR Approves (n 21).

24 ‘Dubai Launches Four-Day Work Week and Reduced Summer Hours for Government Employees’ (*Atlas*, 27 June 2025) <<https://www.atlashxm.com/resources/dubai-four-day-work-week-summer-hours>> accessed 28 October 2025.

25 ‘Dubai Recommends Expanding Remote Work Policies to Ease Traffic’ (*DubaiEye*, 11 November 2024) <<https://www.dubaieye1038.com/news/local/dubai-recommends-expanding-remote-flexible-work-policies-to-ease-traffic/>> accessed 28 October 2025.

26 UAE Federal Law-Decree No (49) of 2022 ‘On Human Resources in the Federal Government’ [2022] Official Gazette 737, art (6) <<https://uaelegislation.gov.ae/en/legislations/1594>> accessed 28 October 2025.

27 UAE: Approves Remote Work (n 13).

3.1.2. Judicial and Administrative Practice in the UAE

Recent UAE decisions illustrate how remote work laws are evolving, with courts addressing disputes over absences, refusals to renew remote work arrangements, and terminations following denied requests.

One notable case involved termination for absence and denied remote work renewal (Dubai Court of Cassation, Administrative Case No. 2/2024, judgment of 5 March 2024).²⁸ The employee was absent for 17 consecutive days within one year without permission or a valid reason, leading to termination. The employee argued that he had a medical certificate and had been performing his duties both remotely and in person, without neglecting or refusing his duties. The agency previously authorised him to work remotely due to his health condition, and his consulting work enabled him to do so. The Court upheld the termination, emphasising that remote work is a privilege, not a right, and that the administration retains discretion to determine whether tasks can be performed remotely in the public interest.²⁹ Failure to meet attendance rules was misconduct under Federal HR Law and grounds for termination. This case underscores that remote work is a privilege requiring approval; repeated absences after denied requests are a disciplinary violation.³⁰

Another illustrative case concerned the legal recognition of remote work as a valid mode during COVID-19 (Abu Dhabi Court of Cassation, in Administrative Appeal No. (71) of 2021 (judgment of 29 September 2021). Examining the legal treatment of remote work in the UAE public sector, the court addressed whether terminating a public employee for alleged absence during the pandemic was lawful.³¹ The Court ruled that the employee's situation was not "unauthorised absence," as he was exempt from physical attendance under

28 Case No 2/2024 (Dubai Court of Cassation, 5 March 2024).

29 Executive Council of the Emirate of Dubai Resolution No (36) of 2020 'Concerning Telework System for the Employees of the Government of Dubai (25 November 2020) <[https://dlp.dubai.gov.ae/Legislation%20Reference/2020/Executive%20Council%20Resolution%20No.%20\(36\)%20of%202020.html](https://dlp.dubai.gov.ae/Legislation%20Reference/2020/Executive%20Council%20Resolution%20No.%20(36)%20of%202020.html)> accessed 28 October 2025. The text in Article (10) of Executive Council Resolution No. (36) of 2020 regarding the remote work system for Dubai Government employees, regarding the "Direct Supervisor's Duties," states that "For the purposes of implementing the provisions of this resolution, the direct supervisor shall undertake the following: 1. Identify employees assigned to work remotely within the organizational unit they supervise, taking into account the public interest, impartiality, and fairness in selecting employees assigned to work remotely in accordance with the regulations and bylaws..."

30 The initial judgment, upheld by the appeal, concluded the case was dismissed because the employee was absent for 17 consecutive workdays from 11/29/2022 to 12/23/2022 without evidence of approved remote work or medical reasons. Also, Cassation Labor Appeal No. 18 of 2023 (Abu Dhabi Court of Cassation, Judgment of 29 March 2023, although these case apply on private sector, but It is essential that the administration formalize remote work arrangements through a clear written contract or authorization, as terminating an employee on the grounds of absence is impermissible without prior documented approval or evidence of nonperformance.

31 Appeal No 71 of 2021 (Abu Dhabi Court of Cassation, 29 September 2021).

Circular No. (8) issued by the Department of Government Support.³² This circular extended remote work for vulnerable groups, such as employees with chronic illnesses or those living with high-risk family members. The judgment highlighted that if the administration neither explicitly denies a remote work request nor requires in-person attendance, continuing remote work does not constitute abandonment. The Court upheld the Committee of Objections' decision to annul the dismissal, noting that COVID-19 remote-work directives are part of the legal framework for public employment.³³ It also emphasised that failing to attend the workplace under these exceptional circumstances cannot be interpreted as implied resignation. This case affirms that remote work, when authorised by law or circulars, is a valid way to fulfil public service duties, and disciplinary or termination decisions should consider the context of remote work during health emergencies.

3.2. The European Union Legal Framework

To date, the EU does not have a dedicated regulation for remote work or telework. Instead, remote work is addressed indirectly through various EU-Level instruments, including: the Working Time Directive (Directive 2003/88/EC)³⁴; the Occupational Safety and Health (OSH) Framework Directive (Directive 89/391/EEC)³⁵; the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679;³⁶ the Work-Life Balance Directive (Directive (EU) 2019/1158)³⁷; and the right to disconnect.³⁸

At the national level, each EU member state applies its own labour laws, often with detailed remote work regulations. For example, Spain enacted Royal Decree-Law 28/2020 to

32 'Guidelines Issued for Working from Government Offices in Abu Dhabi' (*Abu Dhabi Media Office*, 30 May 2020) <<https://www.mediaoffice.abudhabi/en/government-affairs/guidelines-issued-for-working-from-government/>> accessed 28 October 2025. This guide shows that the exempted categories (who may continue working from home) are employees living with diagnosed cases of Covid-19 or those who have symptoms, employees who have chronic diseases, people of determination, pregnant and breastfeeding employees, and employees over the age of 60.

33 Appeal No 71 of 2021 (Abu Dhabi Court of Cassation, 29 September 2021).

34 Directive 2003/88/EC of the European Parliament and of the Council 'Concerning Certain Aspects of the Organisation of Working Time' (4 November 2003) [2023] OJ L 299/9.

35 Council Directive 89/391/EEC 'On the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work' (12 June 1989) [1989] OJ L 183/1.

36 Regulation (EU) 2016/679 of the European Parliament and of the Council '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)' (27 April 2016) [2016] OJ L 119/1.

37 Directive (EU) 2019/1158 of the European Parliament and of the Council 'On Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' (20 June 2019) [2019] OJ L 188/79.

38 Nicolas Boring, 'Telework and the French "right to Disconnect"' (*Library of Congress Blogs*, 21 August 2020) <<https://blogs.loc.gov/law/2020/08/telework-and-the-french-right-to-disconnect/>> accessed 28 October 2025.

formalise remote work during the COVID-19 pandemic.³⁹ Additionally, the Netherlands established the Flexible Working Act, which permits employees to request modifications to their work location, although employers may deny such requests for legitimate business reasons.⁴⁰ In Germany, comprehensive labour laws apply to remote workers, with a focus on occupational health and safety standards for home offices.⁴¹ The subsequent examples will address regulations related to remote work within EU member states.

France's perspective on remote working is shaped by European labour directives and French social demands, both of which have significantly changed workplaces. Home telework, often informal in nature, offers several benefits such as reduced commuting time, less traffic, and improved work-life balance.⁴² The 2005 National Interprofessional Agreement (ANI) and subsequent amendments to the French Labour Code in 2017 formalised telework for employees.⁴³

The French Court of Cassation ruled that being unreachable on one's personal mobile outside work hours does not constitute gross misconduct, dismissal, negligence, or grounds for dismissal.⁴⁴ The court held that an employee's failure to answer work calls outside of regular hours of employment was not a valid reason for termination. The right to disconnect is now codified into Article L2242-17 of the French Labour Code.⁴⁵

39 Real Decreto-Ley No 28/2020 'de trabajo a distancia' (22 septiembre 2020) [2020] BOE-A 253/79929 <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-11043> accessed 28 October 2025.

40 Lidy Milders, 'Netherlands: Be Careful in Handling Requests Covered by the Flexible Work Act' (*LegalGlobal*, 24 June 2024) <<https://leglobal.law/2024/06/24/netherlands-be-careful-in-handling-requests-covered-by-the-flexible-work-act/>> accessed 28 October 2025.

41 "For employees who work remotely, the employer is responsible for ensuring proper working conditions from a health and safety perspective," see: 'Remote Working Legislation, Laws & Regulations in Germany' (*CMS Expert Guide*, 7 May 2024) <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-remote-working/germany>> accessed 28 October 2025.

42 Anne Aguilera and others, 'Home-Based Telework in France: Characteristics, Barriers and Perspectives' (2016) 92 *Transportation Research, Pt A: Policy and Practice* 1. doi:10.1016/j.tra.2016.06.021.

43 'Rules and Obligations Regarding Remote Work (in France)' (*Beemyflex*, 2024) <<https://www.beemyflex.com/en/articles/les-regles-et-obligations-en-matiere-de-teletravail>> accessed 28 October 2025.

44 Caroline Froger-Michon, 'Right to Disconnect Enshrined in French Labor Law' (*CMC Law Now*, 15 December 2016) <<https://cms-lawnow.com/en/ealerts/2016/12/right-to-disconnect-enshrined-in-french-labour-law>> accessed 28 October 2025.

45 UNI Global Union Professionals and Managers, *Ligistlation a Right to Disconnect* (UNI P&M 2020) <<https://uniglobalunion.org/report/legislating-the-right-to-disconnect/>> accessed 28 October 2025. Article L2242-17 of the French Labor Code states that "The annual negotiations on equal opportunities between women and men and the quality of working life cover... The terms enabling employees to fully exercise their right to disconnect and the introduction by the company of schemes regulating the use of digital tools, with a view to ensuring compliance with regulations governing rest and leave periods, privacy and family life," see: Code du travail (version 28 octobre 2025) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072050/> accessed 28 October 2025.

Employers are also mandated to uphold occupational health and safety standards, furnish necessary equipment or financial remuneration for remote work, and safeguard employees from psychosocial hazards.⁴⁶ Although there is presently no EU-wide legislation guaranteeing the right to disconnect, the European Parliament has advocated for laws allowing employees to disengage from work-related communications outside of standard working hours without facing repercussions.⁴⁷

Germany regulates remote work—often referred to as “homeoffice” or “mobile Arbeit”—through a combination of labour law, occupational safety regulations, and collective bargaining agreements. There is no universal legal entitlement to remote work in Germany; employees do not possess a statutory right to perform their duties remotely.⁴⁸ Instead, such agreements depend on individual employer or sectoral arrangements. The Working Hours Act (*Arbeitszeitgesetz* – *ArbZG*) applies fully to remote work, requiring maximum daily/weekly hours, mandatory rest breaks, and restrictions on Sunday and holiday work.⁴⁹

As of January 2021, the German government has been developing the Mobile Work Act (*Mobile-Arbeit-Gesetz*), which, if enacted, would grant employees a legal right to work from home whenever feasible.⁵⁰ There are currently no specific regulations concerning information security or the use of private company technology for individuals working remotely. Nevertheless, employers are responsible for ensuring compliance with the GDPR's provisions and for establishing secure methods for exchanging employees' and customers' personal data.⁵¹

The EU's legal framework for remote work is often praised for comprehensively protecting employees' rights, but it still contains notable gaps. The regulation of telework across EU jurisdictions relies heavily on collective agreements and individual contracts, offering flexibility to adapt to diverse circumstances. While this approach has advantages, it also

46 'Remote Working Legislation, Laws & Regulations in France' (*CMS Expert Guide*, 7 May 2024) <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-remote-working/france>> accessed 28 October 2025.

47 'Parliament Wants to Ensure the Right to Disconnect from Work' (*European Parliament*, 30 April 2024) <<https://www.europarl.europa.eu/topics/en/article/20210121STO96103/parliament-wants-to-ensure-the-right-to-disconnect-from-work>> accessed 28 October 2025.

48 'Working from Home and Employment Law in Germany: What you Need to Know Now' (*Rotwang Law*, 13 May 2025) <<https://rotwang-law.de/en/homeoffice-und-arbeitsrecht-in-deutschland-was-sie-jetzt-wissen-muessen/>> accessed 28 October 2025.

49 *Arbeitszeitgesetz* (*ArbZG*) (6 June 1994) <<https://www.gesetze-im-internet.de/arbzg/BJNR117100994.html>> accessed 28 October 2025.

50 'Remote Work in Germany' (*Boundless*, 2021) <https://boundlesshq.com/guides/germany/remote-work/?utm_source=chatgpt.com> accessed 28 October 2025. The Mobile Work Act (*Mobile-Arbeit-Gesetz*) law has been drafted and is currently under review by individual federal ministries. The next step is approval by the cabinet and a decision from the Bundestag and Bundesrat on whether it becomes law.

51 'Data Protection and Working Remotely' (*General Data Protection Regulation*, 2020) <<https://gdprinfo.eu/data-protection-and-working-remotely>> accessed 28 October 2025.

requires effective coordination between legal sources and strong collective actors to ensure that teleworkers' protections are not overshadowed by employer interests.⁵² EU laws provide robust rights in theory, but in practice, their application to remote work remains fragmented, exposing gaps in privacy protection, digital monitoring, and cross-border employment regulation.

3.3. Comparative Findings and Discussion

Recent research shows remote work regulations are evolving to balance flexibility, accountability, and employee well-being. Trujillo Pons and Megino Fernández highlight how today's culture of digital presenteeism and the underlying expectation to be constantly available are not beneficial for either the employer or the employee. Such practices negatively impact workers' health and mental integrity, resulting in personal and social costs for individuals and economic losses for organisations.⁵³ In contrast, the UAE's digital governance reforms, driven by initiatives like Vision 2021 and the Government Excellence Model (GEM), emphasise performance-based evaluation, administrative flexibility, and institutional accountability to enhance service delivery and foster innovation in public-sector operations.⁵⁴

3.3.1. Working Time and Monitoring

One of the most recent cases before the Court of Justice of the European Union (CJEU) provides important clarification on employers' obligations. On 19 December 2024, the CJEU issued its ruling in Case C-531/23 (Loredas), clarifying and reaffirming employers' obligations under the Working Time Directive (Directive 2003/88/EC).⁵⁵

The case concerned a domestic worker in Spain who challenged her dismissal, unpaid overtime, and compensation for unused vacation days. She argued that Spanish law, which exempted domestic employers from recording actual working hours, was incompatible with EU law. The Spanish courts referred questions to the CJEU regarding the compatibility of this exemption with EU law. The CJEU held that this exemption

52 Luca Ratti and Antonio García-Muñoz, 'The Regulation of Remote Work. Seeking Balance Through the Articulation of Labour Law Sources: A Comparative Appraisal' (2024) 40(3) *International Journal of Comparative Labour Law and Industrial Relations* 303. doi:10.54648/ijcl2024012.

53 John Hopkins, 'Managing the Right to Disconnect: A Scoping Review' (2024) 16(12) *Sustainability* 4970. doi:10.3390/su16124970.

54 Abeer Abuzanjal and Hamdi Bashir, 'Service Innovation Challenges in UAE Government Entities: Identification and Examination of the Impact of Organisational Size and Excellence Model Implementation' (2024) 10(3) *Journal of Open Innovation: Technology, Market, and Complexity* 100364. doi:10.1016/j.joitmc.2024.100364.

55 'European Union: CJEU Reaffirms Obligation to Register Working Time' (*L&E Global Alliance of Employers' Counsel Worldwide*, 25 February 2025) <<https://leglobal.law/2025/02/25/european-union-cjeu-reaffirms-obligation-to-register-working-time/>> accessed 28 October 2025.

could not be upheld, ruling that even domestic workers must have their working hours documented through an objective and reliable system. Such a system is vital to ensuring that rights to maximum working hours and rest periods, as guaranteed by the Directive and the Charter of Fundamental Rights of the European Union, are effectively enforceable. The judgment stressed that while Member States can modify the methods of recording, these modifications cannot undermine the core obligation. Exemptions that hinder effective oversight or make it too hard for workers to enforce their rights are incompatible with EU standards law.

This case has significant implications. It closes loopholes that previously allowed certain employers—particularly households and domestic workers—to evade their responsibilities. It also emphasises that performance monitoring and disciplinary measures, especially in cases involving overtime or rest violations, are intrinsically linked to the protection of legal rights. Without proper time registration systems, those rights cannot be effectively protected or upheld

3.3.2. Cross-Border Remote Work and Data Protection

A comparable case, involving an additional concern related to the General Data Protection Regulation (GDPR), is the recent judgment of the Paris Labour Court (1 August 2024, No. 21/06451).⁵⁶ In this case, an employee who worked remotely from outside the EU without prior authorisation from their employer was dismissed for gross misconduct. The court upheld the dismissal, noting that remote work conducted outside the European Union may raise data protection concerns under the GDPR. Any transfer of personal data beyond EU borders must comply with rigorous regulations, such as the Standard Contractual Clauses (SCCs). The employer, lacking awareness of the employee's geographic location, was unable to implement essential compliance measures to ensure the protection of personal data and, consequently, could be held liable for potential GDPR violations.

This case highlights the need for regulators to select countries carefully, time zones, and specific durations for remote work. They must also determine whether such arrangements constitute a contract renewal and clarify the grounds for doing so.

56 David Hartmann, 'Remote Working from Abroad Without Authorization: Grounds for Dismissal for Gross Misconduct' (*Alaris Avocats*, 14 October 2024) <<https://www.alaris-law.com/remote-working-abroad-without-authorization/>> accessed 28 October 2025. In May 2019, a permanent employee hired as a flow and compliance analyst received temporary remote work authorization from Canada in 2020 after her flight was canceled. She wanted to settle permanently in Canada and requested a contract termination, which was denied. She then notified her employer of her resignation, effective December 31, 2020, but continued working remotely from Canada and asked for an extension until mid-February 2021 due to financial difficulties, which was refused. During the pandemic, the company allowed remote work from abroad only if employees were within two hours of Paris time, not applicable to her. By March 2021, she disclosed she was still in Canada and asked for adjusted hours, but her employer refused and demanded she return to France. When she did not comply, she was dismissed for gross misconduct.

Furthermore, regulations concerning data protection must be explicitly communicated to both employers and employees.

Another notable case illustrating the impact of remote work is the Irish tribunal ruling involving a university professor dismissed by University College Cork (UCC).⁵⁷ In 2021, during the COVID-19 pandemic, a Dutch professor employed by UCC worked remotely. After Ireland's lockdown ended, the professor sought to relocate to Cork, but the university failed to provide assistance, forcing him to commute frequently and spend only one week per month in Cork. UCC's HR Director dismissed Professor Naudé, citing "absolute assurances" regarding relocation, alleged contract frustrations, and declared the contract as "null and void," while offering three months' pay. The WRC (Workplace Relations Commission) officer described the case as "extraordinary", criticised UCC's unconvincing defence, and upheld the professor's unfair dismissal claim, ordering UCC to pay EUR 300,000 within 42 days. This case highlights the importance of clear and concise remote and hybrid working policies, particularly when employees work outside the employer's jurisdiction.

In the UAE, Article 27 of the Personal Data Protection Law (PDPL) governs the transfer of personal data across borders.⁵⁸ Any transfer outside the UAE is only permitted if specific legal conditions are met, such as using standard contractual clauses, explicit consent, or ensuring adequate data protection in the destination jurisdiction. This provision effectively limits remote work involving overseas locations, requiring employers and agencies to establish compliant data transfer mechanisms and mitigate risks under international data laws.

Moreover, Article 16 of Cabinet Resolution No. (27) for 2020 states that remote employees must sign a Code of Ethics, a Confidentiality of Information agreement, and an agreement against subcontracting.⁵⁹ This indicates that the UAE's remote work framework fosters institutional trust between the agency and its employees. This integrated approach combines technological oversight with contractual and ethical commitments to enhance institutional trust and accountability. Any breach of confidentiality may result in disciplinary or even civil and criminal liability. These provisions emphasise that the UAE's remote-work framework is not a matter of arbitrary privilege but a carefully structured legal system aimed at balancing efficiency, responsibility, and employee welfare.

57 Rob Harkavy, 'Irish Tribunal Slams University in Unfair Dismissal Claim' (*Global Legal Insights*, 2 May 2024) <<https://www.globallegalinsights.com/news/irish-tribunal-slams-university-in-unfair-dismissal-claim/>> accessed 28 October 2025.

58 UAE Federal Decree-Law No (45) of 2021 'Concerning the Protection of Personal Data' [2021] Official Gazette 712 <<https://uaelegislation.gov.ae/en/legislations/1972>> accessed 28 October 2025.

59 UAE Cabinet Resolution No (27) of 2020 (n 6).

3.3.3. Work–Life Balance and Employee Rights

Several cases from European Union member states have addressed issues related to remote work. For example, the Central Board of Appeal of the Dutch Court issued its ruling in a case involving a German employee who worked remotely from the Netherlands for her German employer.⁶⁰ The Dutch Court determined that, because the cross-border remote work activities were not agreed upon between the employer and employee and were not part of the employment contract, the multi-state rules did not apply. Consequently, the employee's primary jurisdiction was Germany (based on the main rule of EU Regulation 883/2004), as Germany was considered the primary work location. While this Dutch ruling is local, it illustrates how EU multi-state rules are applied in practice and underscores the need for clear, upfront agreements with employees on cross-border remote work.

The Work Life Balance and Miscellaneous Provisions Act 2023 grants employees the right to request remote work and outlines the procedures employers must follow.⁶¹ It emphasises considering both the employee and employer's needs, as well as the WRC Code of Practice for Employers and Employees' Right to Request Remote Working.⁶² The Act also specifies the response time and requires explanations for any refusals. Importantly, it distinguishes between the right to request remote work and have that request processed and the unconditional right to work remotely. The ruling in *Karabko v TikTok Technology Ltd* highlighted this difference, reassuring employers that their authority to decide on remote work, based on business reasons, remains intact.⁶³

The right to disconnect—which allows employees to disengage from work communications outside of working hours—is crucial for work-life balance, protecting privacy, and preventing burnout. Many European countries have implemented laws that regulate working hours, rest periods, and privacy, all of which are vital for effective telework so that employees can enjoy personal time free from work-related obligations.⁶⁴

60 'Netherlands: Importance of Cross-Border Remote Work Agreements between Employer and Employee for Multi-State Rules' (*Vialto Partners*, 29 February 2024) <<https://vialtopartners.com/regional-alerts/netherlands-social-security-importance-of-cross-border-remote-work-agreements-between-employer-and-employee-for-multi-state-rules>> accessed 28 October 2025.

61 *Work Life Balance and Miscellaneous Provisions Act 2023* (Office of the Attorney General, 2023) <<https://www.irishstatutebook.ie/eli/2023/act/8/enacted/en/html>> accessed 28 October 2025.

62 'Ireland Update: Requests to Work Remotely-Lessons from *Karabko v TikTok Technology Ltd*' (*Labor Law Plus*, 14 October 2024) <<https://www.laborlawplus.com/content/ireland-update-requests-to-work-remotely-lessons-from-karabko-v-tiktok-technology-ltd/>> accessed 28 October 2025.

63 Suzanne Keenan, 'Requests to Work Remotely-Lessons from *Karabko v TikTok Technology*' (*Byrne Wallace Shields*, 8 October 2024) <<https://www.byrnwallaceshields.com/news-and-recent-work/publications/requests-to-work-remotely-lessons-from-karabko-v-tiktok-technology-ltd.html>> accessed 28 October 2025.

64 Naj Ghosheh, 'Telework and The Right to Disconnect: International Experiences' (Reflections on Decent Work in the Digital Era: Conference, Center for Judicial Studies, Lisbon, January 27-28, 2022).

A recent study examined the impact of the shift to remote and hybrid work arrangements on managers' and employees' experiences. The research revealed that while virtual communication proves effective, face-to-face interaction remains valuable. Clear performance expectations are crucial in hybrid and remote environments. Despite technological tools that track productivity, managers should focus on building trust and avoiding micromanagement.⁶⁵

In contrast, European frameworks, such as Directive 2003/88/EC on working time, extend beyond productivity considerations to address issues like social isolation, workload inequality, and declining work-life balance.⁶⁶

According to the UAE guidelines for remote working within the federal government, working time is recorded electronically through the Bayanati System.⁶⁷ Employees eligible for remote work must log into the system, which tracks attendance and departure electronically to ensure they perform their assigned tasks. The Dubai Government's Smart Employee Application further facilitates the electronic registration of working hours.⁶⁸

A recent study on surveillance effectiveness found that remote work impacts the visibility of monitoring activities, which can, in some cases, improve organisational performance.⁶⁹ However, the study also indicated that remote work often leads to greater reliance on electronic surveillance tools, such as keystroke monitoring and location tracking, which may undermine employee trust, productivity, and well-being.⁷⁰ Another recent study cautions organisations to carefully evaluate electronic monitoring, as it may harm employees while providing limited performance benefits.⁷¹ Overuse of such tools can lower job satisfaction, heighten stress, and negatively affect well-being, demonstrating no clear link to productivity. To mitigate these effects, performance targets should be designed to reduce stress and provide resources to meet goals.

65 Calvin Mabaso and Natalie Manuel, 'Performance Management Practices in Remote and Hybrid Work Environments: An Exploratory Study' (2024) 50(1) SA Journal of Industrial Psychology 1. doi:10.4102/sajip.v50i0.2202

66 Directive 2003/88/EC (n 34).

67 Federal Authority for Government Human Resources, *The Guide of Remote Working System in the Federal Government* (FAHR 2020) 3.

68 'Smart Employee Application Supports Remote Work' (*Government of Dubai*, 25 March 2020) <<https://www.digitaldubai.ae/newsroom/news/smart-employee-application-supports-remote-work>> accessed 28 October 2025.

69 Nathan Jensen and others, 'Conspicuous Monitoring and Remote Work' (2020) 176 Journal of Economic Behavior & Organization 489. doi:10.1016/j.jebo.2020.05.010.

70 Oliver G Kayas, 'Workplace Surveillance: A Systematic Review, Integrative Framework, and Research Agenda' (2023) 168 *Journal of Business Research* 114212. doi:10.1016/j.jbusres.2023.114212.

71 Rudolf Siegel, Cornelius J König and Veronika Lazar, 'The Impact of Electronic Monitoring on employees' Job Satisfaction, Stress, Performance, and Counterproductive Work Behavior: A Meta-Analysis' (2022) 8 *Computers in Human Behavior Reports* 100227. doi:10.1016/j.chbr.2022.100227.

The main substantive difference between the UAE Federal HR Framework and EU directives concerns discretion and accountability. The UAE's system—especially under Federal Decree-Law No. (49) of 2022 and Cabinet Resolution No. (48) of 2023—grants considerable administrative discretion to public entities for deciding eligibility, conducting performance evaluations, and approving remote work. This flexibility aligns with the UAE's performance-focused administrative culture and allows for adaptable workforce management.

Conversely, EU directives, particularly Directive 2003/88/EC on working time and Directive 89/391/EEC on occupational safety, impose binding procedural obligations on employers, limiting discretion to ensure employee protections and transparent accountability. EU institutions focus on enforceable rights, judicial oversight, and collective bargaining, whereas the UAE relies mainly on hierarchical supervision and performance metrics within its public sector.

This comparison highlights that administrative accountability in the UAE is managerial and results-oriented, while in the EU it is procedural and rights-based. Comparative findings reveal that the UAE's performance framework emphasises measurable outputs and efficiency, supported by electronic monitoring. Conversely, EU law prioritises procedural fairness and restricts surveillance through data protection and work safeguards. These contrasting approaches reflect two regulatory logics: efficiency-based governance versus rights-based accountability.

Both jurisdictions face ongoing data protection challenges in the context of remote work. While the GDPR offers strong safeguards, it struggles with enforcement and cross-border transfer. UAE's PDPL is similar but narrower. Both need to address digital monitoring and security risks.

Regarding employee rights and work-life balance, the EU's framework explicitly acknowledges the right to disconnect and sets maximum working-hour regulations to support employee well-being. In contrast, the UAE's system, while more flexible, does not have a formal right to disconnect or standardised rest periods. Nevertheless, seasonal measures such as flexible summer hours and Ramadan adjustments indicate a gradual shift toward institutionalising work-life balance.

To summarise the comparative discussion, the following table outlines the main legal and institutional differences between the UAE and EU frameworks regarding remote work regulation.

Dimension	UAE Framework	EU Framework
Legal Basis	Federal Decree-Law No. (49) of 2022; Cabinet Resolutions No. (27) of 2020 and No. (48) of 2023	Directive 2003/88/EC (Working Time); Directive 89/391/EEC (OSH); Regulation (EU) 2016/679 (GDPR); national telework laws (France, Spain, Germany)
Employee Rights	Salary equality; eligibility criteria defined by job type; no codified right to disconnect	Statutory working-time limits, rest periods, occupational safety, privacy, and right to disconnect (in some member states)
Employer Obligations	Provide digital tools, ensure performance monitoring, maintain confidentiality and ethical compliance	Ensure safe working conditions, record working hours, comply with GDPR data protection rules
Accountability Mechanisms	Administrative supervision and performance-based evaluation (FAHR system)	Judicial enforcement and oversight by data protection and labor authorities
Cross-Border Regulation	Remote work abroad recognized (2025), subject to PDPL Art 27 on data transfer	Data-transfer rules under GDPR;

4 CONCLUSION AND RECOMMENDATIONS

Building on the findings summarised above, the conclusion outlines specific legal reforms and policy recommendations to enhance fairness, accountability, and regulatory coherence in remote work governance. This study does not advocate for a direct transplantation of EU standards into the UAE framework. Instead, it supports contextual adaptation, whereby the UAE adopts functional elements—such as performance accountability and employee protection—from EU experience while maintaining consistency with its administrative structure and cultural-legal context. Such an approach balances innovation with institutional coherence, ensuring regulatory reforms enhance effectiveness without disrupting established governance models.

This study has examined the legal frameworks for remote work in the UAE and the EU, noting both similarities and differences. The UAE has developed a proactive, performance-based regime for public sector telework, granting federal entities discretion in setting standards, encouraging innovation, but risking inconsistency. Conversely, the EU relies on directives, legislation, and judicial rulings, emphasising safeguards such as recording

working hours, workplace safety, and the right to disconnect—protections that European courts have affirmed as universal.

While the UAE has advanced digital tools like the “Smart Employee” app and flexible policies, it lacks codified rights on time tracking and work–life balance. Cross-border remote work poses challenges around data security and jurisdiction, with EU case law highlighting risks and the UAE recently recognising remote work outside the state. Clear rules on data security, GDPR-like protections, and employer obligations are needed.

According to research findings, the following recommendations could be provided:

1. Standardise performance indicators for remote working employees: Develop a standardised set of key performance indicators (KPIs) for federal entities to reduce subjectivity in remote work assessments. These should include both quantitative metrics (e.g., timeliness and output) and qualitative measures (e.g., collaboration and client satisfaction).
2. Establish requirements for recording working time: Implement a requirement for objective and reliable time-recording systems that align with international best practices and EU jurisprudence (e.g., C-55/18, C-531/23). Ensure these systems are compatible with flexible and hybrid working arrangements while protecting employee privacy.
3. Introduce a “right to disconnect” policy: Translate seasonal initiatives (Ramadan flexible hours, summer compressed workweeks) into a broader legal right to disconnect from work-related communications outside official hours. Frame this as part of the UAE’s well-being and happiness strategy, as it is an effective way to promote productivity and improve work-life balance. This supports one of the objectives of the UAE strategy: prioritising wellbeing.
4. Strengthen cross-border remote work regulation: Draft comprehensive regulations concerning remote work conducted from abroad, encompassing eligibility criteria for countries, maximum permissible durations, implications for taxation and social security, and obligatory data protection measures. Additionally, require remote work agreements to clearly specify the work location, duration, monitoring mechanisms, and the employer's accountability.
5. Enhance data protection in remote work: Align confidentiality and cybersecurity measures with global standards by implementing safeguards similar to the EU GDPR, such as data transfer agreements. Additionally, develop federal guidelines for remote work conducted abroad to reduce cross-border risks.
6. Promote training and awareness: Provide ongoing training for managers and employees on performance management in remote settings, ethical monitoring, and digital confidentiality obligations. Promote a results-oriented management culture that emphasises trust and accountability rather than invasive surveillance.

In conclusion, the UAE has established a solid foundation for regulating remote work within the public sector. However, further refinement is required to ensure fairness, consistency, and alignment with global standards. By introducing clear performance metrics, codifying the right to disconnect, and addressing cross-border challenges, the UAE can establish itself as a leading model of future-oriented, employee-centred governance in the digital era.

REFERENCE

1. Abuzanjali A and Bashir H, 'Service Innovation Challenges in UAE Government Entities: Identification and Examination of the Impact of Organisational Size and Excellence Model Implementation' (2024) 10(3) *Journal of Open Innovation: Technology, Market, and Complexity* 100364. doi:10.1016/j.joitmc.2024.100364
2. Aguilera A and others, 'Home-Based Telework in France: Characteristics, Barriers and Perspectives' (2016) 92 *Transportation Research, Pt A: Policy and Practice* 1. doi:10.1016/j.tr.2016.06.021
3. Boring N, 'Telework and the French "right to Disconnect"' (*Library of Congress Blogs*, 21 August 2020) <<https://blogs.loc.gov/law/2020/08/telework-and-the-french-right-to-disconnect/>> accessed 28 October 2025
4. Demetriades S, Cabrita J and Eiffe FF, *The Future of Telework and Hybrid Work: Anticipating and Managing the Impact of Change* (ILO Eurofound 2023). doi:10.2806/234429
5. Froger-Michon C, 'Right to Disconnect Enshrined in French Labor Law' (*CMC Law Now*, 15 December 2016) <<https://cms-lawnow.com/en/ealerts/2016/12/right-to-disconnect-enshrined-in-french-labour-law>> accessed 28 October 2025
6. Ghosheh N, 'Telework and The Right to Disconnect: International Experiences' (Reflections on Decent Work in the Digital Era: Conference, Center for Judicial Studies, Lisbon, January 27-28, 2022)
7. Hartmann D, 'Remote Working from Abroad Without Authorization: Grounds for Dismissal for Gross Misconduct' (*Alaris Avocats*, 14 October 2024) <<https://www.alaris-law.com/remote-working-abroad-without-authorization/>> accessed 28 October 2025.
8. Hopkins J, 'Managing the Right to Disconnect: A Scoping Review' (2024) 16(12) *Sustainability* 4970. doi:10.3390/su16124970
9. Jensen N and others, 'Conspicuous Monitoring and Remote Work' (2020) 176 *Journal of Economic Behavior & Organization* 489. doi:10.1016/j.jebo.2020.05.010
10. Kayas OG, 'Workplace Surveillance: A Systematic Review, Integrative Framework, and Research Agenda' (2023) 168 *Journal of Business Research* 114212. doi:10.1016/j.jbusres.2023.114212

11. Keenan S, 'Requests to Work Remotely-Lessons from Karabko v Tiktok Technology' (Byrne Wallace Shields, 8 October 2024) <<https://www.byrnwallaceshields.com/news-and-recent-work/publications/requests-to-work-remotely-lessons-from-karabko-v-tiktok-technology-ltd.html>> accessed 28 October 2025
12. Kurdy M, Al-Malkawi HAN and Rizwan S, 'The Impact of Remote Working on Employee Productivity During Covid-19 in the UAE: The Moderating Role of Job Level' (2023) 3(4) Journal of Business and Socio-Economic Development 339. doi:10.1108/JBSED-09-2022-0104
13. Mabaso C and Manuel N, 'Performance Management Practices in Remote and Hybrid Work Environments: An Exploratory Study' (2024) 50(1) SA Journal of Industrial Psychology 1. doi:10.4102/sajip.v50i0.2202
14. Messenger J and others, *Working Anytime, Anywhere: The Effects on the World of Work* (ILO Eurofound 2017). doi:10.2806/372726
15. Milders L, 'Netherlands: Be Careful in Handling Requests Covered by the Flexible Work Act' (*LegalGlobal*, 24 June 2024) <<https://leglobal.law/2024/06/24/netherlands-be-careful-in-handling-requests-covered-by-the-flexible-work-act/>> accessed 28 October 2025
16. Ratti L and García-Muñoz A, 'The Regulation of Remote Work. Seeking Balance Through the Articulation of Labour Law Sources: A Comparative Appraisal' (2024) 40(3) International Journal of Comparative Labour Law and Industrial Relations 303. doi:10.54648/ijcl2024012
17. Sangani T and Mammadov R, *Remote Working in the UAE: Best Practice Review and Future Policy Paper* (PWC Middle East 2025) <<https://www.pwc.com/m1/en/industries/government-public-services/remote-working-in-uae.html>> accessed 28 October 2025
18. Siegel R, König CJ and Lazar V, 'The Impact of Electronic Monitoring on employees' Job Satisfaction, Stress, Performance, and Counterproductive Work Behavior: A Meta-Analysis' (2022) 8 *Computers in Human Behavior Reports* 100227. doi:10.1016/j.chbr.2022.100227

AUTHORS INFORMATION

Sumaya Aljahoori

PhD, Assistant Professor, Public Law, United Arab Emirates University, Al Ain, United Arab Emirates

s.aljahoori@uaeu.ac.ae

<https://orcid.org/0000-0001-8746-9490>

Corresponding author, solely responsible for the manuscript preparing.

Competing interests: No competing interests were disclosed.

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Sumaya Aljahoori. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing Editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Aljahoori S, 'From Flexibility to Regulation: Remote Work in The UAE Public Sector and Comparative EU Insights' (2025) 8(4) Access to Justice in Eastern Europe 382-406 <<https://doi.org/10.33327/AJEE-18-8.4-r000139>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-r000139>

Summary: 1. Introduction. – 2. Methodology. – 3. Findings and Discussion. – 3.1. *The UAE Legal Framework for Remote Working.* – 3.1.1. *Institutional and Legal Foundation of Remote Work in the UAE.* – 3.1.2. *Judicial and Administrative Practice in the UAE.* – 3.2. *The European Union Legal Framework.* – 3.3. *Comparative Findings and Discussion.* – 3.3.1. *Working Time and Monitoring.* – 3.3.2. *Cross-Border Remote Work and Data Protection.* – 3.3.3. *Work-Life Balance and Employee Rights.* – 4. Conclusions and Recommendations.

Keywords: remote work, telework, public administration, UAE law, comparative administrative law, public service, public sector, European Union.

DETAILS FOR PUBLICATION

Date of submission: 07 Oct 2025

Date of acceptance: 28 Oct 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - Yes

Number of reviewer report submitted in first round: 3 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

I confirm that no artificial intelligence tools or services were used at any stage of writing, translating, editing, or analyzing content for this manuscript.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

**ВІД ГНУЧКОСТІ ДО РЕГУЛЮВАННЯ:
ПОРІВНЯЛЬНИЙ АНАЛІЗ ДИСТАНЦІЙНОЇ РОБОТИ
В ДЕРЖАВНОМУ СЕКТОРІ ОАЕ ТА ДОСВІДУ ЄС**

Сумая Альджагурі

АНОТАЦІЯ

Вступ. Дистанційна робота трансформувала управління та підзвітність державного сектору, завдяки поєднанню стратегій цифрової та адміністративної модернізації ОАЕ для того, щоб підвищити ефективність та впровадження інновацій. Оскільки дистанційна робота інституціоналізується у федеральних органах, зростає потреба в оцінці адекватності та узгодженості правових баз. Це дослідження аналізує, як дистанційна робота регулюється в ОАЕ порівняно з ЄС, де керуються більш усталеними правовими нормами.

Методи. У дослідженні використовується описовий, аналітичний та порівняльно-правовий підхід для вивчення трьох правових документів ОАЕ: Постанови Кабінету Міністрів № (27) від 2020 року про дистанційну роботу, Федерального декрету-закону № (49) від 2022 року про управління персоналом та Постанови Кабінету Міністрів № (48)

від 2023 року про виконавче регулювання. Вони порівнюються з основними інструментами ЄС, зокрема з Директивою 2003/88/ЄС про робочий час, Директивою 89/391/ЄС про безпеку та здоров'я, Регламентом (ЄС) 2016/679 (GDPR), а також з відповідними законами Франції, Німеччини та судовою практикою Суду справедливості ЄС. За допомогою доктринального аналізу та порівняння у дослідженні оцінюється рівень розвитку процесу регулювання, захист працівників та відповідальність за результати роботи.

Результати та висновки. Результати дослідження показують, що підхід ОАЕ надає пріоритет гнучкості, технологічній готовності та орієнтації на результативність, що відповідає його програмі адміністративних інновацій. Однак, залишаються помітні прогалини в регуляторному забезпеченні, включно з відсутністю офіційного права на відключення від роботи, невідповідні стандарти оцінки ефективності та обмежені процесуальні гарантії для схвалення або підтримки віддаленої роботи. Натомість, правова база ЄС забезпечує більш структурований захист працівників, чіткіші заходи щодо підвітності та сильніші гарантії конфіденційності. У дослідженні було зроблено висновок, що гнучка база ОАЕ має хороші можливості для подальшого розвитку, зокрема завдяки прийняттю єдиних показників ефективності, чітких прав працівників на відпочинок та відключення від роботи, а також більш тісній узгодженості з найкращими міжнародними практиками. Ці реформи підвищать правову визначеність, сприятимуть справедливості та зміцнять стале управління дистанційною роботою в державному секторі.

Ключові слова: віддалена робота, дистанційна робота, державне управління, законодавство ОАЕ, порівняльне адміністративне право, державна служба, державний сектор, Європейський Союз.

ABSTRACT IN ARABIC

مقالة مراجعة

من المرونة إلى التنظيم: العمل عن بُعد في القطاع الحكومي بدولة الإمارات – قراءة مقارنة مع التجربة الأوروبية

سمية الجهوري

الملخص

الخلفية: شهد العمل عن بُعد تحولاً جذرياً في أساليب الإدارة والمساءلة داخل القطاع الحكومي الإماراتي، تماشيًا مع توجه الدولة نحو التحول الرقمي والتحديث الإداري الهادف إلى رفع كفاءة الأداء وتعزيز الابتكار. ومع اتساع نطاق تطبيق هذا النمط الوظيفي في الجهات الاتحادية، برزت الحاجة إلى تقييم الإطار القانوني المنظم له من حيث الاتساق والفعالية. تتناول الدراسة كيفية تنظيم العمل عن بُعد في دولة الإمارات ومقارنته بالتجارب الأوروبية، حيث تحكمه هناك معايير قانونية أكثر رسوخًا واستقرارًا.

المنهجية: تعتمد الباحثة منهجاً وصفيًا وتحليليًا مقارنًا، مستندة إلى ثلاثة تشريعات إماراتية رئيسية: قرار مجلس الوزراء رقم (27) لسنة 2020 بشأن نظام العمل عن بُعد، والمرسوم بقانون اتحادي رقم (49) لسنة 2022 بشأن الموارد البشرية، وقرار مجلس الوزراء رقم (48) لسنة 2023 المتعلق بلانحته التنفيذية. وتُقارَن هذه التشريعات الإماراتية مع أبرز الأطر القانونية في الاتحاد الأوروبي، بما في ذلك التوجيه رقم 2003/88/EC المتعلق بتنظيم وقت العمل، والتوجيه رقم 89/391/EEC بشأن السلامة والصحة المهنية، واللائحة الأوروبية رقم 679/2016 الخاصة بحماية البيانات (GDPR)، إضافةً إلى القوانين الوطنية ذات الصلة في كلٍّ من فرنسا وألمانيا، وأحكام محكمة العدل التابعة للاتحاد الأوروبي (CJEU). ومن خلال التحليل المعياري والمقارنة القانونية، تُقِيم الدراسة مدى نضج الإطار التنظيمي، ومستوى الحماية الممنوحة للموظفين، وآليات المساءلة المرتبطة بالأداء.

النتائج والاستنتاجات: تُظهر نتائج الدراسة أن النهج الذي تتبناه دولة الإمارات يُولي أولوية للمرونة والاستعداد التقني وتركيز الأداء، بما يتماشى مع أجندتها الرامية إلى تعزيز الابتكار الإداري وتحديث منظومة العمل الحكومي. ومع ذلك، لا تزال هناك ثغرات تنظيمية بارزة، من أهمها غياب نص قانوني صريح يقرّ بحق الموظف في الانفصال عن العمل، وتفاوت معايير تقييم الأداء، وضعف الضوابط والإجراءات المنظمة لاعتماد أو استمرار نظام العمل عن بُعد. وعلى النقيض من ذلك، يميّز الإطار القانوني في الاتحاد الأوروبي بكونه أكثر تنظيمًا من حيث حماية حقوق الموظفين، ويُقدّم آليات مساءلة أوضح، و ضمانات أقوى لحماية الخصوصية. وتخلص الدراسة إلى أن الإطار المرن الذي تعتمده دولة الإمارات يشكل قاعدة متقدمة قابلة للتطوير، لا سيما من خلال اعتماد مؤشرات أداء موحدة، وإقرار حقوق واضحة للراحة والانفصال عن العمل، وتعزيز مواعمة التشريعات مع أفضل الممارسات الدولية. ومن شأن هذه الإصلاحات أن تعزز اليقين القانوني، وتعزز الإنصاف، وتعزز الحوكمة المستدامة للعمل عن بعد في القطاع العام.

Opinion Article

PRIMACY OF CARE AND HUMAN DIGNITY: DECOLONIAL TURN VERSUS ANTI-SOCIAL NEOLIBERAL CAPITALISM AND POSITIVIST AND POSTMODERN EPISTEMOLOGIES

Galym Zhussipbek

ABSTRACT

Background: *This article discusses the primacy of care, empathy, and dignity in human life and social relations. There is a connection among care, connection, and human dignity that forms the value-based foundation of human rights. Conversely, there is a nexus between the rise of neoliberalism and the relativisation of fundamental human rights values, including respect for equal moral human dignity, which can be recognised through empathy. Non-positivist approaches such as critical realism and decolonial perspectives critique neoliberal capitalism, as well as positivist and postmodern epistemologies, for dismissing the importance of values and separating reason and emotions. The violation of human dignity due to the denial of social rights is a global problem inherent in contemporary neoliberal capitalism, which tends to reject a universalistic understanding of human dignity. Legal minimalism in legal systems illustrates how the adverse effects of neoliberalism can undermine the development of*

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-o000141>

Date of submission: 02 Jul 2025

Date of acceptance: 23 Oct 2025

Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Galym Zhussipbek

health rights. The neoliberal mindset has led not only to the instrumentalisation of human rights but also to the relativisation of gross violations of international law, for example, by “normalising” full-scale aggression against Ukraine, reducing everything to a “capitalistic deal” and disregarding war crimes.

Methods: This research is interdisciplinary and conceptual-normative. Epistemologically, it is based on the assumptions of meta-theoretical critical realism, the ethics of care, and the decolonial approach, as conceptualised in recent years by authors from post-socialist countries. The prioritisation of empathy, which is key to perceiving equal moral human dignity, is central to this understanding of the decolonial turn. Therefore, this article adopts conceptual, normative, and hermeneutical methods, including critical analysis of neoliberal capitalism, positivist, and postmodern epistemologies. As an example from judicial practice, the influence of the neoliberal mindset on the implementation of health rights is addressed conceptually.

Results and conclusions: This paper proposes a solution to the multiple problems generated by neoliberalism and positivist and postmodern epistemologies: a cultural change and mental revival that can be achieved through a decolonial approach, which precedes the transformation of hierarchical neoliberal economic, judicial, and political systems. Overall, it is important to frame discussions about the nature of the state, law, democracy, and security by focusing on the concepts of human dignity, care, and empathy, which go beyond conventional positivist and postmodern approaches in the social sciences and legal studies, as well as the “conventional normal” in academia.

1 INTRODUCTION

“The only objective truth is determined by the market; all other values have the status of mere opinions; everything else is relativist hot air.”¹ This statement vividly summarises the logic of the ideologues of what is today known as neoliberal capitalism, or neoliberalism. Neoliberalism is a slippery concept; nonetheless, conventional definitions tend to emphasise the free market as a panacea for all major economic, social, and political problems.²

The violation of human dignity resulting from the denial of social rights is a global problem inherent in neoliberal capitalism, which tends to reject a universalistic understanding of human dignity. Since the 1980s, neoliberalism has become a defining feature of our

1 Stephen Metcalf, ‘Neoliberalism: The Idea that Swallowed the World’ *The Guardian* (London, 18 August 2017) <<https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>> accessed 5 November 2025.

2 Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso Books 2019).

collective existence; its theories have turned into dogma, its vernacular has become a kind of *lingua franca*, and its assumptions have been subsumed under "common sense".³

What is unprecedented in recent years is that neoliberal capitalism has become a major factor behind the interconnected crises of ethics, the economy, social development, health, and ecology—crises that have brought the world to a historic crossroads, necessitating a significant change of direction.⁴

The Main Concepts and Assumptions

Neoliberalism creates structural injustice and violence, as well as the hierarchies of worth in society. Neoliberal reforms laid the ground not only for oligarchic but also for authoritarian consolidation in post-socialist Eurasian countries, which was legitimised by the trauma and social injustice resulting from privatisation conducted in a legal vacuum. The capitalist triumphalism of the early 1990s has given way to the dystopian realities of an authoritarian, restrictive, and reactionary form of rentier neoliberalism in post-socialist countries.⁵

Like any complex and multifaceted social phenomenon, neoliberal capitalism is susceptible to adaptation and evolution. The emergence of new state capitalism models does not inherently oppose neoliberalism; rather, the two coexist and intertwine.⁶

Additionally, the effects of legal minimalism on health rights, explored in this article, are among the most significant examples of neoliberalism's adaptation to social, political, and cultural contexts. Although there is extensive research that addresses the adverse effects of neoliberal capitalism, there is still a lack of interdisciplinary and normative research that explores the relativisation of the fundamental values of human rights, such as the universality of human dignity (a value-based foundation of human rights rarely used in positivist and postmodern social sciences concept) and justice—as a consequence of neoliberalism's influence.

This paper adopts the universalistic understanding of dignity, meaning a value that is held universally and applies to all human beings' inherent and intrinsic worth.⁷ It does not aim to contrast the social justice-based welfare state with democracy. Instead, this paper recognises that the notion of human dignity protected by social rights is not only

- 3 Luke Savage, 'Neoliberalism? Never Heard of it' [2019, 11 March] Jacobin <<https://www.jacobinmag.com/2019/11/neoliberalism-term-meaning-democratic-party-jonathan-chait>> accessed 5 November 2025.
- 4 Stephen R Gill and Solomon R Benatar, 'Reflections on the Political Economy of Planetary Health' (2020) 27(1) Review of International Political Economy 167. doi:10.1080/09692290.2019.1607769.
- 5 Balihar Sanghera and Elmira Satybaldieva, *Rentier Capitalism and Its Discontents: Power, Morality and Resistance in Central Asia* (Palgrave Macmillan 2021).
- 6 Ilias Alami and others, 'Quo Vadis Neoliberalism in an Age of Resurgent State Capitalism?' (2024) 1(1) Finance and Space 340. doi:10.1080/2833115X.2024.2392736.
- 7 Barbara A Misztal, 'The Idea of Dignity: Its Modern Significance' (2013) 16 (1) European Journal of Social Theory 101. doi:10.1177/13684310124492.

fundamental to the welfare state but is increasingly accepted as a core aspect of democratic society.⁸ The notion of universal human dignity is a fundamental difference between “genuine” democracy and “populist” pseudo-democracy.

Furthermore, this paper accepts that the universality of human rights is a structural, rather than a cultural or civilizational, idea. According to the interpretation of the decolonial turn it adopts, each indigenous culture is capable of producing interpretations consistent with the main principles of universality of human rights—such as respect for the equal moral dignity of all people, gender equality, freedom of choice, freedom of religion, and the creation of a political nation.⁹

The universality of human rights requires the conceptual and ideational legitimisation from doctrines which are conventionally regarded as “non-Western” and “non-positivist” for several reasons. First, human rights have been instrumentalised by neoliberalism and other hierarchical ideologies. Second, recent phenomena—such as the dramatic shifts in U.S. policies following the November 2024 election, the growing threat posed by global tech oligarchs to democratic and human rights values, and the full-scale invasion of Ukraine by Russia, along with the tacit acquiescence of some who promote an anticolonial and decolonial agenda while residing in Western countries—underscore the need for broader legitimizing foundations.

It is becoming increasingly evident that indigenous groups should spearhead the development of human rights. It should not be forgotten that the affirmation of human equality by the Universal Declaration of Human Rights (UDHR) was largely due to the role of small and middle (such as Lebanon) and non-Western countries (such as the Republic of China, whose Confucianism-inspired representative Peng Chun Chang was a key architect of this Declaration). This also indicated that chastened European powers had renounced racial and civilizational hierarchies in favour of universal humanism.¹⁰

The main assumptions of this paper, consistent with the insights of critical realism, the ethics of care, and the decolonial approach are as follows: (1) social scientists cannot avoid making evaluations in terms of well-being, justice, and morality; (2) care, concern, empathy and sense of human dignity are essential in human life, and dignity is connected to social rights and social justice; and (3) the protection of equal moral human dignity can be possible if we accept and internalise the primacy of care and concern, their connection with dignity.

8 ibid.

9 Galym Zhussipbek, ‘Why do we Need to Talk about Decolonization and Decoloniality: Empathy, Human Rights, the Kazakh Culture and Social Justice’ (Public discussion “Egin” Cultural Centre, 23 August 2025) doi:10.5281/zenodo.15108864.

10 Whyte (n 2).

Aims, Objectives and Nature of the Research

The aims of this study are twofold: first, to discuss the nexus between care, social rights, and human dignity and the challenges posed by neoliberal capitalism; and second, to apply the decolonial epistemology conceptualised by post-socialist authors to critique neoliberal capitalism, as well as positivist and postmodern epistemologies.

Accordingly, this article seeks to achieve two objectives. First, it engages in conceptual and normative discussions by applying a non-positivist epistemology and concepts such as care, empathy, and dignity, which are often overlooked in positivist and postmodern research. Second, it aims to offer solutions by referring to a decolonial approach.

This research is interdisciplinary and conceptual-normative. Epistemologically, it is premised on the assumptions of meta-theoretical critical realism (primarily based on the work of Andrew Sayer), the ethics of care (drawing on the concepts of Eva Kittay), and the decolonial approach (as conceptualised in recent years by post-socialist authors). Critical realism offers a comprehensive criticism of positivist social sciences and neoliberal capitalism, while the ethics of care and decolonial epistemology reinforce a universalistic understanding of dignity.

Through the decolonial lens, this paper argues that the structural injustice and hierarchies of worth created by neoliberal capitalism violate human dignity. The decolonial approach emphasises reclaiming dignity in the face of systemic injustice and social hierarchies. Overall, this article adopts a conceptual, normative, and hermeneutical approach, combined with a critical analysis of neoliberal capitalism.

By referring to judicial practice, this paper examines how the neoliberal mindset influences the implementation of the right to health and health care, which are vital to uphold the values of care, concern and empathy.

The first sections discuss the primacy of concern and care, the place of empathy and dignity, and a universalistic understanding of dignity, drawing on the concepts of the ethics of care and critical realism. The following sections explore the nexus between a universalistic understanding of dignity and social rights, as well as the decolonial approach, which is based on the revival of empathy and universality of human dignity.

Subsequent sections discuss the colonialities of neoliberal capitalism and the limitations of positivist and postmodern epistemologies. The paper examines the neoliberal mindset's impact on the principle of minimalism in legal systems, and the need to address the adverse effects of neoliberal capitalism and the emergence of a decolonial turn in the aftermath of the war in Ukraine.

Finally, the paper presents the perspectives of cultural change and moral revival based on the decolonial approach.

2 PRIMACY OF CONCERN AND CARE, AND THE IMPORTANCE OF EMPATHY

Our relationship to the world is one of concern. We flourish or suffer not only because of our immediate physical needs but also because of our perceptions of concern and care. The human view of the world is essentially evaluative. We are particularly vulnerable to how others treat us. Overall, human beings are, by nature, both capable and needy, active and dependent, and inherently vulnerable beings.¹¹ Care and concern are grounded in empathy and connection.

Empathy has been studied across a range of disciplines, from philosophy to neuroscience, social psychology, and legal studies. One approach attributes epistemic value by acknowledging its cognitive role, which finds its fullest expression in the phenomenological school. Another concept of empathy emphasises its biological basis primarily to explain moral behaviour in a naturalistic manner.¹²

Cognitive Empathy and Legal Studies

The so-called cognitive empathy differs from affective empathy. It denotes the ability to ascribe mental states to others—such as beliefs, intentions, or emotions. Characterised by perspective taking, cognitive empathy is important in social sciences and legal studies.¹³ As such, it involves a high degree of other-oriented reasoning and goes beyond mere emotional association with others' feelings.¹⁴

In the legal field, cognitive empathy can play a significant role, for example, in interpreting constitutional rights. It can be seen as a tool that, on the one hand, allows justices to examine the roots of rights and, on the other, requires that each opinion remain open to future questioning.¹⁵

Legal studies, like much of social theory and philosophy, still lack the awareness of context, empathy and concern for others.¹⁶ As Corso notes in her analysis of empathy's place in the interpretation of constitutional rights, empathetic judging represents a deeper form of judicial reasoning:

11 Margaret S Archer, *Being Human: The Problem of Agency* (CUP 2000) doi:10.1017/CBO9780511488733; Andrew Sayer, *Why Things Matter to People: Social Science, Values and Ethical Life* (CUP 2011) doi:10.1515/9783839427255-012.

12 Lucia Corso, 'Should Empathy Play any Role in the Interpretation of Constitutional Rights?' (2014) 27(1) *Ratio Juris* 94. doi:10.1111/raju.12037.

13 Heidi L Maibom, 'Introduction to Philosophy of Empathy' in Heidi Maibom (ed), *The Routledge Handbook of Philosophy of Empathy* (Routledge 2017) 1. doi:10.4324/9781315282015.

14 Corso (n 12) 99.

15 *ibid* 112.

16 Andrew Sayer, 'Values within Reason' (2017) 54(4) *Canadian Review of Sociology* 468. doi:10.1111/cars.12172.

“The claim that empathy should play a role in the adjudication of constitutional rights implies at least two normative assumptions. The first is that empathy may redress the wrongs of law, especially when they result from dominance and power, even when they masquerade behind a veil of neutrality. The second is that empathy leads to a way of reasoning with rules that runs counter to what is often labelled judicial minimalism. In my view, empathetic judging is an in-depth type of judging.”¹⁷

Empathy And Sense Of Dignity

According to the ethics of care, which challenges the "conventional" in the positivist Western scientific paradigm's hierarchical and masculinist understandings, dignity is a feature that must be perceived to be.¹⁸ Human dignity's universalistic nature can be perceived by empathy. Empathy is fundamental to understanding the universal and equal dignity of all human beings because it allows us to recognise that others feel and think as we do, and that our inner feelings are alike in some fundamental fashion.

Empathy, when approached from a position of a bounded self, honours the moral equality of the other persons with whom one maintains empathic feelings.¹⁹ However, due to the epistemological problems inherent in today's positivist and postmodern epistemologies (as discussed below), the concept of empathy has been largely overlooked in human rights studies in legitimising universal human dignity.²⁰ Ultimately, empathy is about care, concern, and connection, and about perceiving the equal moral dignity of human beings.

Non-positivist critical realism holds that moral sentiments such as concern, care, and respect for others are primary in human life.²¹ Among these, dignity is a fundamental concern for human beings. Although notoriously difficult to define, dignity is closely tied to how others interpret and treat us—especially in terms of relations of equality and difference.

Dignity requires acknowledgement of human vulnerability and the recognition that our connection to the world is one of concern and care. It is inherently tied to being treated with moral concern and care.²² The insights of the ethics of care and critical realism together illuminate the intimate relationship between concern, care, and dignity. In this understanding, concern, care, and connection are about the sense of human dignity.

17 Corso (n 12) 110.

18 Eva Feder Kittay, 'Equality, Dignity and Disability' in Mary Ann Lyons and Fionnuala Waldron (eds), *Perspectives on Equality: The Second Seamus Heaney Lectures* (Liffey 2005) 93.

19 Franke Wilmer, 'Empathy as Political Action: Can Empathic Engagement Disrupt Narratives of Conflict in Israeli-Palestinian Relations' (2018) 13 *Journal of Social Science Research* 2860. doi:10.24297/jssr.v13i0.7934.

20 Lynn Hunt, *Inventing Human Rights: A History* (W Norton 2007).

21 Archer (n 11); Sayer (n 11).

22 Sayer (n 11).

3 UNIVERSALISTIC UNDERSTANDING OF DIGNITY AND SOCIAL RIGHTS

Dignity is a call upon others to recognise our immaterial intrinsic worth.²³ Moreover, the universalistic understanding of dignity holds that dignity is a value inherent to all human beings. According to the universalistic understanding—which is the value-based foundation of the universality of human rights—dignity is "not gradable";²⁴ it is impossible for one human being to possess more dignity than another. All human beings possess equal dignity and, consequently, equal fundamental human rights. Thus, fundamental normative equality exists between each bearer of dignity.²⁵

As the ethics of care emphasises, dignity is unconditional—it is not determined by any factor. The ultimate source of our dignity lies not in the human capacity for autonomy or rationality (that is, the possession of intellect), but rather in the distinctly moral capacity to care. In other words, dignity is bound to the human capacity to care for another and be cared for.²⁶

As a universalistic value, dignity can be found in all major international human rights documents, as well as across many cultures and in theological sources of Judaism, Christianity, and Islam.²⁷ The universalistic conception of dignity opposes the views that ground dignity on possessing specific qualities. Dignity, being a normative concept, implies an absolute value. Hence, a person of dignity may not be sacrificed for anyone else.²⁸ Ultimately, dignity is a core social concept, and without a universalistic understanding, it can be easily neglected or appropriated.

The concept of human dignity is not merely a claim, but rather a "moral source" from which all fundamental rights derive—implying that some absolute rights exist. Dignity is also inherently connected to the rights that ensure social well-being. Hence, the acceptance and protection of human dignity require the development of economic and social human rights.²⁹

On the other hand, many philosophers argue that recognition (as a person) is an essential human need that also derives from dignity. In this framework, this need is also the fundamental principle of justice, which encompasses economic and social justice. As such, social justice is a manifestation of respecting human dignity.

23 Kittay (n 18) 113.

24 Rowan Cruft, S Matthew Liao and Massimo Renzo, 'The Philosophical Foundations of Human Rights: An Overview' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 1.

25 Klaus Steigleder, 'Human Dignity and Social Welfare' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 471.

26 Eva Feder Kittay, 'The Ethics of Care, Dependence, and Disability' (2011) 24 (1) *Ratio Juris* 49. doi:10.1111/j.1467-9337.2010.00473.x.

27 Misztal (n 7).

28 Steigleder (n 25).

29 Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41(4) *Metaphilosophy* 464. doi:10.1111/j.1467-9973.2010.01648.x.

However, there is today a noticeable "marginalisation" of social justice in contemporary academia and social movements, where issues of race, gender, and sexuality have often been elevated to the level previously reserved for economic and social justice.³⁰ The development of social justice is hindered by a phenomenon this paper calls "neoliberal human rights" (see below).

The following section discusses the structural injustice created by neoliberal capitalism.

4 DECOLONIAL TURN, EMPATHY AND UNIVERSALITY OF HUMAN DIGNITY

Definition of Decoloniality

The dominance of neoliberal ideology and positivist epistemology creates distinct colonialities, foremost at the levels of ideas, knowledge, and perceptions. Moreover, neoliberalism's apathetic logic and positivist "cold rationality" erode human faculties like justice, empathy and care about others and the planet. The violation of human dignity resulting from structural injustice is inherent in neoliberal capitalism, and positivist epistemology is complicit in sustaining it.

Hence, in the face of colonisation by the market-centric "morality" of neoliberalism (which is prone to the relativisation of human rights values and principles and to the creation of social and economic hierarchies) and by positivist epistemology (which contributes to the normalisation of structural injustice), the decolonial turn gains importance. As Bhatia and Priya note,³¹ the decolonial turn does not reflect a single theory but rather a family of scattered positions that share the view that coloniality poses one of the central challenges for the vast majority of people living in the age of unequal neoliberal globalisation.

Following the perspectives of Mignolo and Walsh, and Tlostanova,³² this paper understands decoloniality as the recognition of, and struggle against, hegemony and hierarchies that became internalised and normalised after the end of colonialism. These hierarchies persist across economic relations, education, culture, knowledge production, and urbanisation, which are collectively referred to as colonialities. Specifically, drawing on Tlostanova this, this paper adopts a decolonial approach as a struggle against all types of systemic oppression

30 Gary Dorrien, 'Nancy Fraser, Iris Marion Young, and the Intersections of Justice: Equality, Recognition, Participation, and Third Wave Feminism' (2021) 42(3) *American Journal of Theology & Philosophy* 5. doi:10.5406/21564795.42.3.01.

31 Sunil Bhatia and Kumar Ravi Priya, 'Decolonizing Culture: Euro-American Psychology and the Shaping of Neoliberal Selves in India' (2018) 28(5) *Theory & Psychology* 645. doi:10.1177/0959354318791315.

32 Walter D Mignolo and Catherine E Walsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke UP 2018) doi:10.1215/9780822371779; Madina Tlostanova, *Decoloniality of Being, Knowledge and Feeling* (Tselinny 2020).

and subjugation, including hierarchies of worth and the structural injustices created by neoliberal capitalism and positivist epistemology.³³

In some cases, decolonial critique of the exclusionary and assimilatory nature of modernity and capitalism may provide the grounds to justify and legitimise moral or cultural relativism. In recent years, the decolonial agenda has been exploited by far-right and reactionary thinkers and groups in Russia, India, and Turkey. However, this paper advances a decolonial approach critical of moral relativism. Decoloniality should not be misused to legitimise exclusivist, authoritarian and oppressive understandings, norms and models. In this sense, decoloniality affirms universal human dignity as its own ethical foundation.

Acceptance of Emotions, Decolonial Turn and Dignity

Colonisation and coloniality can be understood on an emotional level: since colonisation entails humiliation, while coloniality brings disconnection and alienation from one's identity, culture, history, language, and ancestors.³⁴ Coloniality undermines self-empathy, producing low self-esteem, self-respect, and even self-hatred. Post-colonial societies are characterised by the internalisation and reproduction of violence and colonial practices, such as social hierarchies inherited from the colonial period. Harm like degradation of empathy is the defining emotional feature of colonisation and coloniality.

Thus, decoloniality represents an emotional path toward healing, in which empathy and self-empathy are crucial.³⁵ That is why decolonial thinkers³⁶ emphasise the importance of the stage of mourning—before one can begin to dream anew. Empathy enables the internalisation of ontological equality, the understanding that all human beings possess equal worth, meaning the absence of hierarchies of worth. Therefore, the acceptance and revival of empathy is essential for decolonisation and the decolonial turn.

In this sense, decoloniality leads to the interpretation and social construction of authentic cultures (local “cosmologies”) to legitimise the universalistic understanding of dignity. It also involves resisting the appropriation of dignity by conservative morality. The decolonial turn thus becomes a process of realising individual and collective human rights to self-determination in ways that do not violate others' rights, while affirming universal human dignity within indigenous, religious and social frameworks. Hence, what is said about the value-based foundation of human rights—the universal human dignity—is also about the decolonial turn in understanding culture, identity and religion.³⁷

33 Tlostanova (n 32).

34 Zhussipbek (n 9).

35 *ibid.*

36 e.g. Poka Laenui, 'Processes of Decolonization' in Marie Battiste (ed), *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press 2000) 150.

37 Zhussipbek (n 9).

The decolonial approach accepts pluralism and cultural diversity like no other thought. As such, decoloniality calls for the upholding of multiculturalism at the level of epistemologies. Though pluralism and multiculturalism are related concepts, they differ in focus and application. Pluralism is a broader concept, referring to the coexistence of diverse groups (in various forms) with mutual respect. However, it does not necessarily imply active policies to support or accommodate diversity; it is more about the *de facto* society in which diverse groups coexist and interact peacefully. Multiculturalism goes beyond pluralism by actively recognising, respecting, and accommodating cultural, ethnic, and religious diversity within society. Hence, it requires institutional and policy reforms to address inequalities and ensure the inclusion of minority groups, allowing them to maintain their distinct identities while participating fully in public and political life.³⁸

5 NEOLIBERAL CAPITALISM: VIOLATION OF DIGNITY AND ITS COLONIALITY

Neoliberalism's Relativisation and Instrumentalisation of Human Rights

The main ideas and principles of neoliberal capitalism fundamentally challenge the evaluative nature of our relationship with the world and undermine the primacy of care, concern and dignity in human life. The market-oriented logic of neoliberalism celebrates wealth, profits, and money-making as ends in themselves. A competitive market is seen not only as a more efficient means of distributing resources, but as the “basic institution of a moral and society”.³⁹ A life of human dignity is obscured and removed from people's consciousness by the fetishisation of the market economy, which recognises as “objective truth” only that which is determined by market forces, while everything else, including all values, is rendered relative.⁴⁰

From its inception, neoliberal thought rejected the very idea of establishing an international, cross-cultural consensus on a list of human rights. For neoliberals, the horrors of World War II were not a product of Western civilisation, but the results of the collectivist challenge to the liberalism that had previously defined it.⁴¹ Thus, neoliberalism's belief in the “universality” of the market economy implies a relativist approach to the universality of human rights. Neoliberal moral truisms such as “human dignity and human inequality are not in contradiction” and “freedom is only possible in a market society”⁴² reveal this relativistic approach toward human dignity and rights.

38 Tariq Modood, *Multiculturalism* (John Wiley & Sons 2013).

39 Whyte (n 2).

40 Metcalf (n 1).

41 Whyte (n 2).

42 Jeanne Morefield, ‘When Neoliberalism Hijacked Human Rights’ [2020, 1 May] Jacobin <<https://www.jacobinmag.com/2020/01/morals-markets-human-rights-rise-neoliberalism-jessica-whyte>> accessed 5 November 2025.

Even social struggles for dignity (e.g., against racism, sexism) have been co-opted by neoliberalism, leading to an emphasis on symbolic recognition (e.g., diversity in companies) without addressing structural inequalities.

At the same time, neoliberalism has instrumentalised human rights to legitimise its ideology and neoliberal restructuring of the state.⁴³ In general, a contingent penetration of neoliberalism into human rights has helped legitimise transformative interventions that subject states to the dictates of international markets.⁴⁴ As Marks⁴⁵ argues, the consolidation of the neoliberal agenda was made, in part, by the advancement of the human rights movement. Similarly, Moyn observes that although human rights did not create neoliberalism, they proved too weak to remedy the gaps in wealth and counter income inequality produced by neoliberal globalisation.⁴⁶ In other words, human rights neither countered nor effectively acknowledged neoliberalism's obliteration of the ceiling on material inequality.

This paper contends that the above-mentioned analyses of Marks and Moyn can be best understood through the lens of what this paper calls "neoliberal human rights".

"Neoliberal human rights" are dismissive of the universalistic understanding of dignity and agnostic to social rights. They exemplify the co-optation of the once revolutionary concepts of universal human rights by neoliberals who "refashioned the idea of freedom by tying it fundamentally to the free market and turning it into a weapon to be used against anticolonial projects all over the world".⁴⁷ Ultimately, neoliberal human rights have been constructed in such a way that they are completely unthreatening to existing power structures, even legitimising the intensification of material inequality.⁴⁸

These "neoliberal human rights" bear little resemblance to Nkrumah's program of economic self-determination and were even hostile to post-colonial leaders' claims. They sharply diverge from the notion of human rights they advocated.⁴⁹

Moreover, the long-standing reluctance of philosophers to accept the doctrine of human rights—grounded in the universalistic idea of human dignity—as an important part of

43 David Harvey, *A Brief History of Neoliberalism* (OUP 2005) doi:10.1093/oso/9780199283262.001.0001; Whyte (n 2).

44 Neve Gordon, 'How Human Rights Were Defanged from Any Truly Emancipatory Potential' [2020, 24 January] *The Los Angeles Review of Books* <<https://lareviewofbooks.org/article/how-human-rights-were-defanged-from-any-truly-emancipatory-potential>> accessed 5 November 2025.

45 Susan Marks, 'Human Rights in Disastrous Times' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 309.

46 Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard UP 2019).

47 Morefield (n 42).

48 Kate Nash, 'The Cultural Politics of Human Rights and Neoliberalism' (2019) 18 (5) *Journal of Human Rights* 490. doi:10.1080/14754835.2019.1653174.

49 Whyte (n 2).

political philosophy⁵⁰ demonstrates the difficulties ensuing from the dominance of positivist and postmodern epistemologies. Neoliberal capitalism has thus been able to instrumentalise human rights precisely because of the weak foundations of human rights philosophy in today's positivist and postmodern academia, where relativism inherent in postmodern epistemology fosters, at least implicitly, scepticism towards issues of justice and rights.

In sum, "neoliberal human rights" represents another dimension of neoliberalism's coloniality since it legitimises the hierarchies of worth and non-acceptance of equal moral dignity of human beings. The analysis made for Chile and other Latin American and post-colonial African states shows that "neoliberal human rights" helped to preserve the inequalities of capitalism.⁵¹

Structural Injustice

This paper emphasises that structural injustice—and the social injustice resulting from it—forms the basis for the violation of human dignity and is one of the central sources of today's coloniality. It is important to distinguish between *coloniality* and *colonialism*: while colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation ("empire"), coloniality refers to the long-standing patterns of power that emerged as a result of colonialism, specifically in culture, economic relations, labour, intersubjective relations, knowledge production.⁵² In the broadest sense, coloniality means the hierarchies of worth. In the case of neoliberalism, they are created by structural injustice.

Structural injustice is characterised by systemic and institutional conditions—whether directly or through structural consequences—that prevent significant parts of society from fully accessing fundamental human needs such as housing, education, health care, and clean water.⁵³ It is thus a primary cause of systemic poverty and marginalisation. It can be argued that structural injustice means that some people are unseen and unheard, and even their lives are considered "expendable" and "disposable". In essence, neoliberal capitalism views humans as mere economic entities rather than beings with emotional and moral needs. This paper argues that reducing people to economic units—valuing human beings only for their productivity, and prioritising the pursuit of profit-seeking over human and social well-being—violates human dignity.

Structural injustice is not only a combination of inequality, social exclusion and humiliation;⁵⁴ it is also another name for the hierarchical society in which hierarchies of

50 Jonathan Wolff, 'The Demands of the Human Right to Health'(2012) 86(1) Aristotelian Society Supplementary Volume 217. doi:10.1111/j.1467-8439.2012.00215x.

51 Gordon (n 44).

52 Nelson Maldonado-Torres, 'On the Coloniality of Being: Contributions to the Development of a Concept' (2007) 21(2-3) Cultural Studies 240. doi:10.1080/09502380601162548.

53 Peter Uvin, *Human Rights and Development* (Kumarian Press 2004).

54 *ibid.*

worth are created. Hierarchies of worth can also be seen in the fact that neoliberalism creates political capital for the rich, thus leading to plutocracy, which prevents the emergence of democracy.⁵⁵

The prohibition of discrimination and the protection of vulnerable and marginalised groups are transversal minimum obligations to the concept of human rights.⁵⁶ Yet, within a neoliberal capitalist context, their fulfilment—particularly concerning social rights, is hardly possible. Neoliberalism is fundamentally hostile to the protection of social and economic human rights, which are essential for upholding human dignity. It treats social programmes as a violation of the rule of law,⁵⁷ branding them as a "totalitarian threat"⁵⁸. The idea of the state to which neoliberal capitalism is committed is anathema to the concept of the state, which underpins the human rights paradigm. Overall, the conditions for violating human rights are structurally embedded in neoliberalism.⁵⁹

By pathologising mass politics as a threat to "individual freedoms", neoliberalism has sought to construct a lexicon of "neoliberal human rights" that legitimises the neoliberal state.⁶⁰ Furthermore, more consolidated authoritarian regimes could promote more rigorous neoliberal policies. Notably, the forms of governance, like in Chile under Pinochet, were justified by neoliberals on the grounds that "progressive" market-oriented reforms can be implemented only by a "strong hand".⁶¹ Also, the so-called "shock therapy" in the transition from socialism to capitalism or IMF/World Bank-sponsored comprehensive reforms called "structural adjustment", which eschewed the alternative of "gradualism", was the extreme of contemporary utopian social engineering.⁶²

To conclude, neoliberalism's colonialities can be identified through the following manifestations: structural injustice leading to the relativisation of human dignity; the creation of hierarchies of worth; the treatment of human beings as disposable and expendable; and the instrumentalisation of human rights and the emergence of "neoliberal human rights".

55 Sanghera and Satybaldieva (n 5).

56 Maria Dalli, 'The Human Right to Health: A Retrospective Analysis after 70 Years of International Recognition' (2018) 11 *The Age of Human Rights Journal* 24. doi:10.17561/tahrj.n11.2.

57 Raymond Plant, *The Neo-liberal State* (OUP 2010).

58 Whyte (n 2).

59 Paul O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) *Human Rights Law Review* 483. doi:10.1093/hrlr/ngm015.

60 Gordon (n 44).

61 Kuat Akizhanov, 'The Impact of Financialisation on Income Inequality in the Context of Neoliberalism: Country Cases Study-USA, South Korea, Argentina, Sweden' (PhD thesis, University of Bath 2019).

62 William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Penguin Books 2006).

6 NEOLIBERAL CAPITALISM AND THE RISE OF ILLIBERAL DEMOCRACIES AND AUTHORITARIANISM: WHY DO WE NEED TO TALK ABOUT NEOLIBERAL CAPITALISM'S ADVERSE EFFECTS IN THE WAKE OF WAR IN UKRAINE?

This paper argues that the recent rise of populism and illiberal democracies is, in part, a consequence of neoliberal capitalism's assault on social and economic human rights, leading to the gradual thinning and eventual erosion of social justice. These factors have produced a sense of violated dignity among ordinary citizens, as dignity is directly associated with social well-being. The surge of reactionary politics and further rise of right-wing parties in the Eastern and Central European countries⁶³—as well as the consolidation of Putin's regime in Russia after the 2000s—would not have been possible without the adverse effects of neoliberal capitalism. Chief among these were the traumatic experience of marketisation reforms, accompanied by a sense of humiliation and social-economic “disaster”. Under the conditions of neoliberal division of labour, income, and social/economic status, specifically, in the countries that are not in the “core” of the capitalist world, the human dignity of millions, primarily due to the underdevelopment of social rights, cannot be sufficiently protected.

The full-scale invasion of Ukraine, on the one hand, reveals the myopia or “inattentiveness” of decolonial scholars—both from the so-called “global North” and “global South”—toward the colonial experiences of post-Soviet peoples and the ongoing neocolonial policies and attitudes. For this reason, this paper is based on the decolonial perspectives of the post-socialist scholars. Furthermore, the influence of positivist and postmodern epistemologies can explain the continuing racist and orientalist positions of the so-called Russian liberals and democrats.

On the other hand, a thorough analysis of the reasons and consequences of the aggression against Ukraine and the reactions to this aggression supports Amadae's⁶⁴ interpretation that neoliberalism, through the prism of political theory, can be codified in non-cooperative game theory. Within this framework, the so-called “rational choice” (a solipsistic or lop-sided “rationalism”) justifies ends irrespective of means. This understanding leads to Machiavellianism, against which positivist or postmodern social sciences remain toothless. Neoliberal capitalism thus reveals an inherent deficit in its capacity to accept justice, standing firmly against the gross violations of international law, and to show empathy for the victims of aggression by a nuclear power with a military-industrial complex.

63 See, e.g. Gareth Dale and Adam Fabry, 'Neoliberalism in Eastern Europe and the Former Soviet Union' in Damien Cahill and others (eds), *The SAGE Handbook of Neoliberalism* (SAGE 2018) 234.

64 Sonja M Amadae, *Prisoners of Reason: Game Theory and Neoliberal Political Economy* (CUP 2015) doi:10.1017/CBO9781107565258.

Moreover, the mindset of neoliberalism has helped to whitewash the militaristic leaders by commodifying everything—from gross violations of international law and war crimes to the suffering of ordinary citizens and ecological devastation—reducing all to a mere “business deal”. Ignoring the most heinous crimes committed against the people of “peripheral” (or “semi-peripheral”) countries is what characterises a significant number of the owners and chiefs of large corporations, especially techno-oligarchs in democratic countries. This “sacrificing” of entire nations and peoples for the sake of business interests and political populism is a logical outcome of the combination of the apathetic reason of capitalism (which has emerged from the lopsided reason of positivism) and relativist postmodernism.

The creation of private companies hiring mercenaries reflects a dark extension of a Machiavellian-capitalistic mindset—one that “rationalises” income generation by whatever means, including killing. This phenomenon is not merely a result of the relativisation of human values caused by neoliberalism but also of the brutalisation of personality, to which neoliberalism has a direct connection (inter alia, the structural injustice, chronic low incomes, and insufficient social programs in the neoliberal Eurasian states can push people to join the sides of militaristic leaders). The belief in a self-regulating market inculcated by neoliberal/neoclassical economics is nothing but a socially learned “cultural prejudice” that impairs empathy and hardens personality.

From a decolonial perspective,⁶⁵ contemporary international public and private law can be characterised as colonial or neocolonial. The strongest evidence lies, first, in the conduct of permanent members of the United Nations—those primarily responsible for protection of peace—who have tended to breach the underlying principles of international law, such as inviolability of territorial integrity and sovereignty of independent states, and even committed war crimes and genocides (which are, in fact, the evidences that international law is inherently political). Second, international law has failed to create effective mechanisms to sanction or restrict, let alone punish, the states and leaders who instigate war and commit war crimes.

Finally, the neocolonial character of international law can be seen in what might be called the “faulty” definition of genocide (of the 1948 UN Convention), to which the Soviet-Stalinist state directly participated. This “narrow” and “politicised” definition does not technically cover the destruction of cultural, social, and political groups. Consequently, it took decades for the Ukrainian Holodomor—a Soviet-made famine—to be recognised as genocide, while other peoples, such as the Kazakhs, who lost nearly half their population in the same period, continue to struggle for similar recognition. Ironically, one of the most significant barriers to acknowledging the Kazakh famine as genocide lies

65 See: Lena Salaymeh and Ralf Michaels, ‘Decolonial Comparative Law: A Conceptual Beginning’ (2022) 86(1) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 166. doi:10.1628/rabelsz-2022-0007.

in positivist and postmodern academia itself, imprisoned by the “technicalities” of the existing definition of genocide (as the author has personally witnessed through the years of engagement in such debates).

7 COLONIALITY OF POSITIVIST AND POSTMODERN SOCIAL SCIENCES

There is a direct nexus between the dominance of positivist epistemology in social sciences and the rise of neoliberal capitalism. Here, the term positivism is used in a broader sense: it does not merely refer to modelling the social sciences on the natural sciences, but also believing in some “ahistorical and objective” realities, or viewing the world through an inherently a-historical lens.⁶⁶

Beyond the limitations of market-centric economic theory, positivist academia has largely remained silent in the face of social theories that justify the commodification of land, labour, and money, showing indifference to systemic injustice. Furthermore, as Barreto⁶⁷ argues, at a more fundamental level, the so-called positivist “apathy” and coldness can help explain the detailed planning, precise organisation, and consistent execution of mass murders, such as the Holocaust, by humans who were otherwise emotionally capable. Rationalising and disciplining structures of order, work and economisation contributed to the separation between reality and consciousness in modern societies; in interaction with the complex causes, these structures made the horror of the Holocaust possible. Crucially, the conditions that enabled such genocide could, in principle, allow it to recur.⁶⁸

Both positivist and postmodern epistemologies are dismissive of concepts such as care, empathy, and dignity; as such, they are reluctant to acknowledge that care, concern, and empathy are primary connectors in human life. Positivist epistemology, in particular, hardly accepts the universalistic perception of human dignity, which can be perceived through empathy.

As critical realist scholar Sayer⁶⁹ emphasises, positivism maintains a strict separation between value judgements and objectivity and often “anchors” dignity in capacities for autonomy or rationality. The culture and mindset shaped by modernity and positivism, self-described as “masculine” (or “rational and powerful”), have attributed weakness,

66 Salman Sayyid, ‘Critical Muslim Studies: Post-Positivism’ (*New Books Network*, 5 June 2024). <<https://newbooksnetwork.com/critical-muslim-studies-post-positivism>> accessed 5 November 2025.

67 José Manuel Barreto, ‘Ethics of Emotions as Ethics of Human Rights: A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty’ (2006) 17 *Law and Critique* 73. doi:10.1007/s10978-006-0003-y.

68 Hans Karl Peterlini, ‘Dialogue with Adorno. *How to Deal with Right-Wing Populism, Racism and Institutional Cruelization*’ in Hans Karl Peterlini, *Learning Diversity* (Springer 2023) 139. doi:10.1007/978-3-658-40548-9_7.

69 Sayer (n 11).

emotionality and vulnerability to non-modern or colonised “others”.⁷⁰ Therefore, in general, empathy is a notion that is alien to positivist epistemology.

That is why contemporary philosophers, critical realists, and decolonial scholars⁷¹ argue that the tendency to downplay the role of values and emotions, foremost positive ones such as empathy, and to separate reason and emotions, reason and values, is an epistemological problem of a positivist approach. However, treating values like dignity and justice as merely a-rational or subjective is misguided. This derationalized understanding of normativity, constructed through the is-ought framework, is not limited to positivists but also found in postmodern approaches such as post-structuralism.⁷²

Postmodernism emerged as a reaction to positivism, which sought certainty, linear progress and a hierarchically ordered world. Yet by avoiding “big questions” of justice and morality, postmodernism has embraced relativism. Its tendency to relativise values has not addressed the problems created by positivism and modernity, e.g. postmodern approaches appeared to be ill-equipped to protect and uphold justice, fairness and social well-being. This paper aligns with the decolonial critique, which sees postmodernism as another iteration of modernity that fails to resolve the problems that modernity has wrought on humanity.

8 PERSISTENCE OF POVERTY, NEOLIBERAL MINDSET AND MINIMALISM PRINCIPLE IN LEGAL SYSTEMS

The roots of chronic and structural inequality—manifested, inter alia, in the widening income inequality—in any society influenced by neoliberal capitalism lie in “legally” protected “unhealthy” employer-employee relations and systemic marginalisation of labour unions, which can sometimes be pushed beyond the legal framework. Although neoliberal capitalism opposes the state with an institutionalised commitment to social protection and justice, it creates the neoliberal state, which protects the rentier classes, transnational companies, and property owners against citizens claiming their rights.⁷³ By encouraging monodisciplinarity, neoliberal capitalism masks the real causes and solutions to poverty;⁷⁴ in other words, a proper understanding of poverty necessitates accepting it as a political and socially determined phenomenon.

70 Andrew Sayer, ‘Wie weit reichen soziale Konstruktionen? Critique and Naturalism’ in Urs Lindner and Isabell Mader (eds), *Critical Realism Meets Kritische-Theorie: Ontologie, Erklärung und Kritik in den Sozialwissenschaften* (Transcript Verlag 2017) 315. doi:10.1515/9783839427255-012.

71 Barreto (n 67); Sayer (n 16), Tlostanova (n 32).

72 Sayer (n 16).

73 Harvey (n 43).

74 Wendy Olsen, ‘Poverty’ In Mervyn Hartwig (ed), *Dictionary of Critical Realism* (Routledge 2007) doi:10.4324/9781315688299.

The so-called minimalistic conceptualisation of social rights dominates international human rights law and national judicial systems. For example, the right to health, according to the minimalism principle, is often interpreted as a minimum core of health care services aimed at subsistence or survival.⁷⁵ However, a human rights-based approach to health requires that health policies and programs prioritise not only the absence of discrimination, but specifically the needs of economically disaffected—those who are at the end of the road to greater justice.⁷⁶

The minimalistic approach, which is co-opted by neoliberal capitalism, lays the grounds for the slow development of social rights. This approach in some countries (e.g., in the USA, the UK, and Canada) has undermined prior gains in health and educational rights. Under the minimalism principle, legal protections of health rights can be interpreted in ways that hinder citizens' access to health care. For example, in recent decades, in the US and Canada, legal protection of health rights has led to judicial decisions that often yield negative interpretations of those rights, in line with the commercialisation of health care. In Canada, the litigation of health rights undermined equality and reinforced privatisation within established systems of universal health care.⁷⁷ In other words, due to the influence of the neoliberal mindset, health rights can be interpreted by lawyers as rights of non-interference, which cannot lead to the development of full-fledged social human rights.⁷⁸

The indivisibility of human rights necessitates that civil rights be conducted in a manner that respects, defers to, and is amicable with the scope of social rights. When social rights are not considered as an independent branch of human rights but as a part of civil rights, one can speak of the colonisation of social rights. Neoliberals use this understanding of social rights to downgrade and eventually block their development.⁷⁹ The minimalism principle paves the way for this negative phenomenon. According to one position, the system of the European Convention on Human Rights, with the Court's decisions, reflects the subordination of social rights to civil rights. Catalán observes that the development of human rights reflects the fact that courts and legal scholars have primarily focused on examining the consequences of civil rights on social rights. However, the indivisibility of human rights necessitates recognising that their interpretation is broader in scope than that of civil rights.⁸⁰

75 Eduardo Arenas Catalán, 'The Right of Access to Healthcare: Tracing Solidarity in the United Nations, Inter-American and European Human Rights Systems' (2021) ESIL Research Forum 'Solidarity – The Quest for Founding Utopias of International Law', Catania, 15-16 April 2021) <<https://hdl.handle.net/1814/74446>> accessed 5 November 2025.

76 Oleg Yaroshenko and others, 'Right to Health Care: The Practice of the ECtHR and the Case of Ukraine' (2022) 18 The Age of Human Rights Journal 239. doi:10.17561/tahrj.v18.6496.

77 Colleen M Flood and Aeyal Gross, 'Litigating the Right to Health: What Can we Learn from a Comparative Law and Health Care Systems Approach' (2014) 16(2) Health and Human Rights 62.

78 *ibid.*

79 Catalán (n 75).

80 *ibid.*

Another position argues that, although the Court distinguished between civil and social rights in the case of the right to health care, it attempts to apply an “integrated approach” when interpreting the Convention rights. This approach accepts the indivisibility of all human rights; thus, the enjoyment of civil and political rights does not impede the independent development of social rights, which are not secondary to civil and political rights. Nonetheless, the integrated approach to protecting the right to health is most evident in the jurisprudence of the Indian Supreme Court, but is largely absent in Western democracies.⁸¹

Overall, the minimalistic conceptualisation of social rights, which predominates in international human rights law,⁸² is insufficient for creating robust social human rights under the conditions of the global spread of a neoliberal mindset, which itself is prone to “mutations”. In such a context, for example, the commodification of health rights may occur, endangering the universality and equality of social rights, even in democratic states. The same is true for the human right to education, which, under a neoliberal context, is easily commodified.⁸³

9 CULTURAL CHANGE THROUGH REVIVING EMPATHY AND DIGNITY: PROMISES OF DECOLONIAL TURN

The primacy of dignity, grounded in care and concern, cannot be properly understood and protected by positivist and postmodern epistemologies. However, contrary to positivist and postmodern epistemologies, non-positivist epistemologies, such as critical realism and decolonial approach, emphasise that emotions, values and reason are not contradictory; moreover, emotions and values are not beyond reason or intellect.⁸⁴ Emotions reflect real and universal structures of the human psyche that serve to evaluate the moral rightness of social interactions.⁸⁵

The decolonial approach, as conceptualised by authors from post-socialist countries and adopted in this paper, is based on the revival of empathy. When allied with the views of critical realism and the ethics of care, it may help achieve what can be called a cultural transformation—internalising the primacy of care, concern, and dignity (understood in a

81 Maša Marochini, ‘Civil and Political, and Economic and Social Rights-Indivisible or Separable?’ (2014) 64(2) *Zbornik Pravnog fakulteta u Zagrebu* 307.

82 Catalán (n 75).

83 Galym Zhussipbek, ‘Human Right to Health, Social Rights and Human Dignity versus Relativist Challenge of Neoliberal Capitalism’ (2025) 25 *The Age of Human Rights Journal* e9272. doi:10.17561/tahrj.v25.9272.

84 For example, Sayer (n 11); Zhussipbek (n 9).

85 Ben Luongo, ‘Critical Realism, Human Rights, and Emotion: How an Emotive Ontology Can Resolve the Tensions Between Universalism and Relativism’ (2021) 22(2) *Human Rights Review* 217. doi:10.1007/s12142-021-00618-0.

universalistic sense) in personal and social life. As Putnam emphasises, mental or cultural change and moral revival should precede economic change.⁸⁶ In other words, what is important is cultural transformation, which comes before the transformation of economic, political, and legal systems; a decolonial turn in academia, the legal sector, and other areas of social life can be helpful. The international system and international law will change last.

This kind of cultural change is also about moral revival. Morality—a concept avoided by postmodernism and hijacked by positivism—is not necessarily defined in terms of social or religious conservatism. Morality involves giving people what they are entitled to: their rights and respect for the equal moral dignity of human beings. Decolonial approaches in the philosophy of law emphasise that the absolute separation between law and morality is an illusion. Law-making does not require a political sovereign, the singular obsession of the Western positivist legal approach. Hence, law existed before colonialism and law is more than the law of the modern state.⁸⁷

Overall, economic and legal systems—complex social phenomena that shape the personal and social lives of most citizens, including in areas such as education—cannot exist beyond ethical or moral considerations.⁸⁸ While legal mechanisms are crucial for developing and protecting human rights and democracy, the most important aspect is epistemology: the mindset of those who implement and interpret the law. Any “decent and good” law can be re-interpreted and misused if a specific intention exists. Recent examples include the situation in the U.S. following the November 2024 elections, when the Supreme Court’s rules contributed to the erosion of the checks on executive power, and the litigation of health rights in Canada, which undermined the principle of equality and helped erode the universal nature of universal health care.

10 CONCLUSIONS

There is a direct nexus among care, social rights, and dignity, all of which are fundamental to human life. Neoliberal capitalism—inherently hierarchical and prone to creating structural injustice—poses serious challenges to understanding these connections. Consequently, the hardening of human personality and the relativisation of justice and human dignity are natural outcomes of the neoliberal capitalist mindset.

As a key assertion, this paper proposes a cultural change or transformation to prioritise empathy, particularly cognitive empathy. Achieving this requires humanistic, nurturing

86 Judy Woodruff, ‘Robert Putnam Reflects on How America Became So Polarized and What Can Unify the Nation’ (PBS News, 19 February 2025) <<https://www.pbs.org/newshour/show/robert-putnam-reflects-on-how-america-became-so-polarized-and-what-can-unify-the-nation>> accessed 5 November 2025.

87 Salaymeh and Michaels (n 65).

88 Andrew Sayer, ‘Welfare and Moral Economy’ (2018) 12(1) Ethics and Social Welfare 20. doi:10.1080/17496535.2017.1377273.

models of upbringing and education, since empathy is formed primarily during childhood. Second, there is a need to realise the indivisibility of human rights, specifically the development of social rights as independent category of human rights, which are indispensable for protecting human dignity. The principle of indivisibility is often overlooked in neoliberal and authoritarian contexts, which are closely connected.⁸⁹ The so-called “conventional human rights approaches”, which can be hijacked by neoliberalism—leading to what this paper depicts as “neoliberal human rights”—must be reassessed.

Genuinely universal and inclusive human rights must be grounded in the uncompromising recognition of the non-gradable nature of human dignity, which is intimately linked to social rights. Accordingly, the conceptualisation and development of truly inclusive human rights, guided by a decolonial approach, can help overcome the entanglements among human rights, law, and neoliberal capitalism. At the same time, understanding injustices created by the hierarchical international system and international law also requires cultivating a mindset with a distinctive language of human dignity.

Third, addressing structural injustice generated by neoliberalism demands transformations in political economy, social relations, and the philosophy of the state and law—all of which revolve around the rebirth of the social contract. In essence, the idea of a social contract-based state should mean the protection of dignity because it is created by the agency of free and equal citizens; agency and dignity are two halves of one whole. All in all, the core purpose of the state philosophy and law, as well as political economy, ought to be ensuring that all citizens live with dignity, which is tentatively called a “dignity-based” approach, which also means not to allow the emergence of structural injustice.

Non-positivist approaches, such as critical realism and the decolonial approach, criticise neoliberal capitalism, as well as positivist and postmodern epistemologies, for dismissing the importance of values like care, empathy, and dignity, and at least for separating—if not explicitly dichotomising—reason from emotions and values. The instrumentalization of human rights in general, the misuse of legal minimalism in relation to health rights, specifically, and the relativisation of gross violations of international law—such as “normalising” or even whitewashing the full-scale aggression against Ukraine (while ignoring war crimes) by applying the logic that everything can be seen as a “capitalistic deal”, could also be possible due to the effects of the neoliberal mindset.

In this context, this paper proposes a solution to the multiple problems generated by neoliberalism and by positivist and postmodern epistemologies: a cultural change and mental revival achieved through a decolonial approach. This transformation comes before the reforms of hierarchical neoliberal economic, judicial, and political systems.

Overall, it is important to frame discussions about the state, law, democracy, and security around the concepts of human dignity, care, and empathy—concepts beyond conventional

89 Zhussipbek (n 83).

positivist and postmodern approaches in social sciences, legal studies, and “conventional normal” in academia, in general. It is not unregulated markets, as neoliberals argue, but people with moral vision—prioritising care, empathy, and dignity, and shaping their legal consciousness and social relations—who create democratic societies and foster peaceful coexistence in the international system.

REFERENCES

1. Akizhanov K, 'The Impact of Financialisation on Income Inequality in the Context of Neoliberalism: Country Cases Study-USA, South Korea, Argentina, Sweden' (PhD thesis, University of Bath 2019)
2. Alami I and others, 'Quo Vadis Neoliberalism in an Age of Resurgent State Capitalism?' (2024) 1(1) Finance and Space 340. doi:10.1080/2833115X.2024.2392736
3. Amadae SM, *Prisoners of Reason: Game Theory and Neoliberal Political Economy* (CUP 2015). doi:10.1017/CBO9781107565258
4. Archer MS, *Being Human: The Problem of Agency* (CUP 2000). doi:10.1017/CBO9780511488733
5. Arenas Catalán E, 'The Right of Access to Healthcare: Tracing Solidarity in the United Nations, Inter-American and European Human Rights Systems' (2021 ESIL Research Forum 'Solidarity – The Quest for Founding Utopias of International Law', Catania, 15-16 April 2021) <<https://hdl.handle.net/1814/74446>> accessed 5 November 2025
6. Barreto JM, 'Ethics of Emotions as Ethics of Human Rights: A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty' (2006) 17 Law and Critique 73. doi:10.1007/s10978-006-0003-y
7. Bhatia S and Priya KR, 'Decolonizing Culture: Euro-American Psychology and the Shaping of Neoliberal Selves in India' (2018) 28(5) Theory & Psychology 645. doi:10.1177/0959354318791315
8. Corso L, 'Should Empathy Play any Role in the Interpretation of Constitutional Rights?' (2014) 27(1) Ratio Juris 94. doi:10.1111/raju.12037
9. Cruft R, Liao SM and Renzo M, 'The Philosophical Foundations of Human Rights: An Overview' in Cruft R, Liao SM and Renzo M (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 1
10. Dale G and Fabry A, 'Neoliberalism in Eastern Europe and the Former Soviet Union' in Cahill D and others (eds), *The SAGE Handbook of Neoliberalism* (SAGE 2018) 234
11. Dalli M, 'The Human Right to Health: A Retrospective Analysis after 70 Years of International Recognition' (2018) 11 The Age of Human Rights Journal 24. doi:10.17561/tahrj.n11.2

12. Dorrien G, 'Nancy Fraser, Iris Marion Young, and the Intersections of Justice: Equality, Recognition, Participation, and Third Wave Feminism' (2021) 42(3) *American Journal of Theology & Philosophy* 5. doi:10.5406/21564795.42.3.01
13. Easterly W, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Penguin Books 2006)
14. Flood CM and Gross A, 'Litigating the Right to Health: What Can we Learn from a Comparative Law and Health Care Systems Approach' (2014) 16(2) *Health and Human Rights* 62
15. Gill SR and Benatar SR, 'Reflections on the Political Economy of Planetary Health' (2020) 27(1) *Review of International Political Economy* 167. doi:10.1080/09692290.2019.1607769
16. Gordon N, 'How Human Rights Were Defanged from Any Truly Emancipatory Potential' [2020, 24 January] *The Los Angeles Review of Books* <<https://lareviewofbooks.org/article/how-human-rights-were-defanged-from-any-truly-emancipatory-potential>> accessed 5 November 2025
17. Habermas J, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41(4) *Metaphilosophy* 464. doi:10.1111/j.1467-9973.2010.01648.x
18. Harvey D, *A Brief History of Neoliberalism* (OUP 2005) doi:10.1093/oso/9780199283262.001.0001
19. Hunt L, *Inventing Human Rights: A History* (W Norton 2007)
20. Kittay EF, 'Equality, Dignity and Disability' in Lyons MA and Waldron F (eds), *Perspectives on Equality: The Second Seamus Heaney Lectures* (Liffey 2005) 93
21. Kittay EF, 'The Ethics of Care, Dependence, and Disability' (2011) 24 (1) *Ratio Juris* 49. doi:10.1111/j.1467-9337.2010.00473.x
22. Laenui P, 'Processes of Decolonization' in Battiste M (ed), *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press 2000) 150
23. Luongo B, 'Critical Realism, Human Rights, and Emotion: How an Emotive Ontology Can Resolve the Tensions Between Universalism and Relativism' (2021) 22(2) *Human Rights Review* 217. doi:10.1007/s12142-021-00618-0
24. Maibom HL, 'Introduction to Philosophy of Empathy' in Maibom H (ed), *The Routledge Handbook of Philosophy of Empathy* (Routledge 2017) 1. doi:10.4324/9781315282015
25. Maldonado-Torres N, 'On the Coloniality of Being: Contributions to the Development of a Concept' (2007) 21(2-3) *Cultural Studies* 240. doi:10.1080/09502380601162548
26. Marks S, 'Human Rights in Disastrous Times' in Crawford J and Koskeniemi M (eds), *The Cambridge Companion to International Law* (CUP 2012) 309.

27. Marochini M, 'Civil and Political, and Economic and Social Rights-Indivisible or Separable?' (2014) 64(2) Zbornik Pravnog fakulteta u Zagrebu 307
28. Metcalf S, 'Neoliberalism: The Idea that Swallowed the World' *The Guardian* (London, 18 August 2017) <<https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>> accessed 5 November 2025
29. Mignolo WD and Walsh CE, *On Decoloniality: Concepts, Analytics, Praxis* (Duke UP 2018) doi:10.1215/9780822371779
30. Misztal BA, 'The Idea of Dignity: Its Modern Significance' (2013) 16 (1) European Journal of Social Theory 101. doi:10.1177/13684310124492
31. Modood T, *Multiculturalism* (John Wiley & Sons 2013)
32. Morefield J, 'When Neoliberalism Hijacked Human Rights' [2020, 1 May] Jacobin <<https://www.jacobinmag.com/2020/01/morals-markets-human-rights-rise-neoliberalism-jessica-whyte>> accessed 5 November 2025
33. Moyn S, *Not Enough: Human Rights in an Unequal World* (Harvard UP 2019)
34. Nash K, 'The Cultural Politics of Human Rights and Neoliberalism' (2019) 18 (5) Journal of Human Rights 490. doi:10.1080/14754835.2019.1653174
35. O'Connell P, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) Human Rights Law Review 483. doi:10.1093/hrlr/ngm015
36. Olsen W, 'Poverty' In Hartwig M (ed), *Dictionary of Critical Realism* (Routledge 2007) doi:10.4324/9781315688299
37. Peterlini HK, 'Dialogue with Adorno. *How to Deal with Right-Wing Populism, Racism and Institutional Cruelization*' in Peterlini HK, *Learning Diversity* (Springer 2023) 139. doi:10.1007/978-3-658-40548-9_7
38. Plant R, *The Neo-liberal State* (OUP 2010)
39. Salaymeh L and Michaels R, 'Decolonial Comparative Law: A Conceptual Beginning' (2022) 86(1) Rabels Zeitschrift für ausländisches und internationales Privatrecht 166. doi:10.1628/rabelsz-2022-0007
40. Sanghera B and Satybaldieva E, *Rentier Capitalism and Its Discontents: Power, Morality and Resistance in Central Asia* (Palgrave Macmillan 2021)
41. Savage L, 'Neoliberalism? Never Heard of it' [2019, 11 March] Jacobin <<https://www.jacobinmag.com/2019/11/neoliberalism-term-meaning-democratic-party-jonathan-chait>> accessed 5 November 2025
42. Sayer A, 'Values within Reason' (2017) 54(4) Canadian Review of Sociology 468. doi:10.1111/cars.12172
43. Sayer A, 'Welfare and Moral Economy' (2018) 12(1) Ethics and Social Welfare 20. doi:10.1080/17496535.2017.1377273

44. Sayer A, *Why Things Matter to People: Social Science, Values and Ethical Life* (CUP 2011) doi:10.1515/9783839427255-012
45. Sayer A, 'Wie weit reichen soziale Konstruktionen? Critique and Naturalism' in Lindner U and Mader I (eds), *Critical Realism Meets Kritische-Theorie: Ontologie, Erklärung und Kritik in den Sozialwissenschaften* (Transcript Verlag 2017) 315. doi:10.1515/9783839427255-012
46. Sayyid S, 'Critical Muslim Studies: Post-Positivism' (*New Books Network*, 5 June 2024). <<https://newbooksnetwork.com/critical-muslim-studies-post-postivism>> accessed 5 November 2025
47. Steigleder K, 'Human Dignity and Social Welfare' in Düwell M and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 471
48. Tlostanova M, *Decoloniality of Being, Knowledge And Feeling* (Tselinnyy 2020)
49. Uvin P, *Human Rights and Development* (Kumarian Press 2004)
50. Whyte J, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso Books 2019).
51. Wilmer F, 'Empathy as Political Action: Can Empathic Engagement Disrupt Narratives of Conflict in Israeli-Palestinian Relations' (2018) 13 *Journal of Social Science Research* 2860. doi:10.24297/jssr.v13i0.7934
52. Wolff J, 'The Demands of the Human Right to Health'(2012) 86(1) *Aristotelian Society Supplementary Volume* 217. doi:10.1111/j.1467-8439.2012.00215x
53. Woodruff J, 'Robert Putnam Reflects on How America Became So Polarized and What Can Unify the Nation' (*PBS News*, 19 February 2025) <<https://www.pbs.org/newshour/show/robert-putnam-reflects-on-how-america-became-so-polarized-and-what-can-unify-the-nation>> accessed 5 November 2025.
54. Yaroshenko O and others, 'Right to Health Care: The Practice of the ECTHR and the Case of Ukraine' (2022) 18 *The Age of Human Rights Journal* 239. doi:10.17561/tahrj.v18.6496
55. Zhussipbek G, 'Human Right to Health, Social Rights and Human Dignity versus Relativist Challenge of Neoliberal Capitalism' (2025) 25 *The Age of Human Rights Journal* e9272. doi:10.17561/tahrj.v25.9272
56. Zhussipbek G, 'Why do we Need to Talk about Decolonization and Decoloniality: Empathy, Human Rights, the Kazakh Culture and Social Justice' (Public discussion "Egin" Cultural Centre', 23 August 2025) doi:10.5281/zenodo.15108864

AUTHORS INFORMATION

Galym Zhussipbek

PhD., SDU University, Department of Social Sciences, Kaskelen/ Almaty, Kazakhstan

galym.zhussipbek@sdu.edu.kz

<https://orcid.org/0000-0002-6924-6039>

Corresponding author, solely responsible for the manuscript preparing.

Competing interests: No competing interests were disclosed.

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Galym Zhussipbek. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Assistant Editor – Mag. Viktoriia Ivanova. **English Editor** – Julie Bold.

Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Zhussipbek G, 'Primacy of Care and Human Dignity: Decolonial Turn Versus Anti-Social Neoliberal Capitalism and Positivist and Postmodern Epistemologies' (2025) 8(4) Access to Justice in Eastern Europe 407-35 <<https://doi.org/10.33327/AJEE-18-8.4-o000141>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-o000141>

Summary: Introduction. – 2. Primacy of Concern and Care, and the Importance of Empathy. – 3. Universalistic Understanding of Dignity and Social Rights. – 4. Decolonial Turn, Empathy and Universality of Human Dignity. – 5. Neoliberal Capitalism: Violation of Dignity and Its Coloniality. – 6. Neoliberal Capitalism and the Rise of Illiberal Democracies and Authoritarianism: Why Do We Need to Talk about Neoliberal Capitalism's Adverse Effects in the Wake of War in Ukraine? – 7. Coloniality of Positivist and Postmodern Social Sciences. – 8. Persistence of Poverty, Neoliberal Mindset and

Minimalism Principle in Legal Systems. – 9. Cultural Change through Reviving Empathy and Dignity: Promises of Decolonial Turn. – 10. Conclusions.

Keywords: *dignity; empathy; social rights; neoliberal capitalism; structural injustice; decolonial approach.*

DETAILS FOR PUBLICATION

Date of submission: 02 Jul 2025

Date of acceptance: 23 Oct 2025

Publication: 18 Nov 2025

Whether the manuscript was fast tracked? – No

Number of reviewer report submitted in first round: 5 reports

Number of revision rounds: 2 rounds with major revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>

Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Аналітична стаття

ПРІОРИТЕТ ТУРБОТИ ТА ЛЮДСЬКОЇ ГІДНОСТІ:
ДЕКОЛОНІАЛЬНИЙ ПОВОРОТ ПРОТИ АНТИСОЦІАЛЬНОГО
НЕОЛІБЕРАЛЬНОГО КАПІТАЛІЗМУ ТА ПОЗИТИВІСТСЬКИХ
І ПОСТМОДЕРНІСТСЬКИХ ЕПІСТЕМОЛОГІЙ

Галим Жусіпбек

АНОТАЦІЯ

Вступ. У цій статті розглядається пріорит турботи, емпатії та гідності в людському житті та соціальних відносинах. Існує зв'язок між турботою, взаєминими та людською гідністю, який формує ціннісну основу прав людини. І навпаки, існує зв'язок між піднесенням неолібералізму та релятивізацією фундаментальних цінностей прав людини, що стосується і рівності права на повагу до людської гідності, яку можна розпізнати через емпатію. Непозитивістські підходи, такі як критичний реалізм та деколоніальні перспективи, критикують неоліберальний капіталізм, а також

позитивістські та постмодерністські епістемології за ігнорування важливості цінностей, а також за розмежування розуму та емоцій. Порушення людської гідності через заперечення соціальних прав є глобальною проблемою, властивою сучасному неоліберальному капіталізму, який схильний відкидати універсалістське розуміння людської гідності. Правовий мінімалізм у правових системах ілюструє, як негативні наслідки неолібералізму можуть підірвати розвиток права на охорону здоров'я. Неоліберальний спосіб мислення призвів не лише до інструменталізації прав людини, але й до релятивізації грубих порушень міжнародного права, наприклад, через «нормалізації» повномасштабної агресії проти України, зведення всього до «капіталістичної угоди» та ігнорування воєнних злочинів.

Методи. Це дослідження є міждисциплінарним та концептуально-нормативним. Епістемологічно воно базується на припущеннях метатеоретичного критичного реалізму, етики турботи та деколоніального підходу, що останнім часом концептуалізували автори з постсоціалістичних країн. Пріоритет емпатії, яка є ключем до сприйняття рівності права на повагу до людської гідності, є центральним для розуміння деколоніального повороту. Отже, у цій статті використовуються концептуальні, нормативні та герменевтичні методи, зокрема критичний аналіз неоліберального капіталізму, позитивістської та постмодерністської епістемології. Як приклад із судової практики, концептуально розглядається вплив неоліберального мислення на реалізацію прав на охорону здоров'я.

Результати та висновки. У цій статті пропонується вирішення численних проблем, породжених неолібералізмом, позитивістською та постмодерністською епістемологіями: культурні зміни та ментальне відродження, яких можна досягти за допомогою деколоніального підходу, що передувє трансформації ієрархічних неоліберальних економічних, судових та політичних систем. Загалом, важливо формувати дискусії про природу держави, права, демократії та безпеки, зосереджуючись на концепціях людської гідності, турботи та емпатії, які виходять за межі традиційних позитивістських та постмодерністських підходів у соціальних науках та юридичних дослідженнях, а також «традиційної норми» в академічних колах.

Ключові слова. Гідність; емпатія; соціальні права; неоліберальний капіталізм; структурна несправедливість; деколоніальний підхід.

Case study

PERCEPTIONS OF EMPLOYEE MOTIVATION AND ITS ROLE IN WORK EFFICIENCY: A QUALITATIVE CASE STUDY IN THE BASIC COURT OF PRISTINA

Besard Belegu and Lavdim Terziu*

ABSTRACT

Background: Kosovo's judicial system has undergone ongoing legal reforms and improvements in infrastructure. However, despite these efforts, overall performance remains a significant challenge for public institutions, highlighting the need to examine factors influencing institutional efficiency. Among these, employee motivation is particularly significant due to its direct impact on the daily operations of the judicial system.

While international academic literature widely acknowledges the crucial role of employee motivation in institutional performance, this study specifically investigates how employees at the Basic Court of Prishtina perceive motivation as influencing their work efficiency.

Methods: The research draws on findings from semi-structured interviews with court employees and compares these perceptions with published official data on institutional efficiency.

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-c000128>

Date of submission: 04 Jun 2025

Date of acceptance: 27 Aug 2025

Last Publication: 18 Nov 2025

Disclaimer:

The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

Copyright:

© 2025 Besard Belegu
and Lavdim Terziu

Results and Conclusions: *The analysis reveals the absence of sustainable mechanisms for fostering employee motivation within the Basic Court of Prishtina. Continuous reforms have not yielded the expected outcomes, mainly due to the predominance of a bureaucratic culture within the institution. Findings from this study closely align with the international academic literature and Public Service Motivation (PSM) theory, which posits that motivation is not merely a matter of financial compensation but is strongly linked to recognition, inclusion, and opportunities for professional development.*

Findings from this research underscore the need for reforms that consider the human and cultural dimensions of public institutions, offering practical recommendations for establishing an effective, long-term motivation system within the judicial system.

1 INTRODUCTION

Employee motivation has long been a key subject in studies related to public management and administration and has been extensively examined by classical theorists, including Maslow (1943), Adams (1963), Vroom (1964), and Lock & Latham (1990).¹ These theories offer different perspectives on motivation and factors that foster it within organisations, focusing on individual needs, expectations, perceptions of fairness, and goal setting. In public institutions, motivation plays a critical role in ensuring institutional effectiveness because, besides affecting the operational performance of the institution, it also shapes the development of its trust and integrity.²

Various studies have shown that policies designed to enhance employee motivation have a direct impact on work efficiency and play a fundamental role in organisational success.³ Leadership strategies, organisational culture, and communication dynamics are considered the most significant factors in enhancing employee productivity and performance due to their contribution to creating a positive work environment.⁴ Therefore, motivation is

- 1 Abraham H Maslow, 'A Theory of Human Motivation' (1943) 50(4) *Psychological Review* 370. doi:10.1037/h0054346; John Stacy Adams, 'Toward an Understanding of Inequity' (1963) 67 *Journal of Abnormal and Social Psychology* 422. doi:10.1037/h0040968; Victor H Vroom, *Work and Motivation* (Wiley and Sons 1964); Edwin A Locke and Gary P Latham, *A Theory of Goal Setting and Task Performance* (Prentice Hall 1990).
- 2 Christopher Pollitt and Geert Bouckaert, *Public Management Reform: A Comparative Analysis – Into the Age of Austerity* (4th edn, OUP 2017).
- 3 Gayane Tovmasyan and Diana Minasyan, 'The Impact of Motivation on Work Efficiency for Both Employers and Employees also During COVID-19 Pandemic: Case Study from Armenia' (2020) 4(3) *Business Ethics and Leadership* 25. Doi:10.21272/bel.4(3).25-35.2020.
- 4 Sarwar Khawaja and Hengameh Karimi, 'Exploring Factors Influencing Work Productivity: A Qualitative Case Study of Employee Motivation and Leadership Practices' (2024) 8(4) *Edelweiss Applied Science and Technology* 727. doi:10.55214/25768484.v8i4.1451.

regarded as a primary driver of organisational growth and development, as motivated employees demonstrate better performance and greater engagement in their daily tasks.⁵

In Kosovo, salary increases for civil servants have been used as a strategy to combat corruption and promote institutional accountability. However, a 2024 report by the Kosovo Justice Institute argues that the absence of well-established performance evaluation systems, collective agreements, and social dialogue has considerably constrained the impact of these measures. In the absence of these elements, a traditional administrative culture continues to dominate, often creating a demotivating and insecure environment for public sector employees. These concerns have been confirmed by the European Commission's 2023 Report on Kosovo and are further supported by studies analysing the challenges of public administration reforms in the context of European integration.⁶

The theory of Public Service Motivation (PSM) argues that the motivation of public servants is not limited to material incentives but also by the desire to contribute to the common good and serve society with integrity. In contrast, a study by Tovmasyan and Minasyan (2020) shows that employees in the public sector value more material incentives, such as salary, bonuses, and health insurance, compared to non-material incentives, including career advancement, workplace atmosphere, flexible working hours, and training opportunities.⁷

Considering these two opposing theoretical approaches and the specific challenges in the context of Kosovo, this study aims to explore how employees at the Basic Court of Prishtina perceive motivation and its role in enhancing work efficiency. Accordingly, the research question guiding this work is: What are the perceptions of employees regarding the role of motivation in enhancing work efficiency?

This study aims to:

1. Identify the main factors that influence employee motivation within the Basic Court of Prishtina.
2. Analyse employees' perceptions of the relationship between motivation and their work efficiency.
3. Compare employees' perceptions with official data on the court's institutional performance.

5 Doreen Tsotsoo Ashai and others, 'Motivation and its influence on task performance in a workplace: A study of Access Bank Ghana' (2023) 7(1) *European Journal of Human Resource Management Studies* 163. doi:10.46827/ejhrms.v7i1.1577.

6 European Commission, 'Kosovo 2023 Report' SWD(2023) 692 final (8 November 2023) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023SC0692>> accessed 4 June 2025; Artan Fejzullahu and Besard Belegu, 'The Challenges of Public Administration Reforms in Kosovo in the Context of Eurointegration Process' (2022) 8(1) *Journal of Liberty and International Affairs* 292. doi:10.47305/JLIA2281292f.

7 Tovmasyan and Minasyan (n 3).

2 RESEARCH METHODOLOGY

2.1. Research Design

The methodology of this study is primarily based on the qualitative approach. However, in order to ensure a more comprehensive framework, quantitative data from official sources (e.g., performance report of the Kosovo Judicial Council) were utilised. The latter served to complement the qualitative analysis by enabling a comparison between the perceptions of participants and institutionally reported indicators.

2.2. Sampling and Case Selection

The Basic Court of Prishtina was selected as the case study due to its size, the complexity of its operations, and its significant institutional role in general. As the largest court in Kosovo, it deals with a large number of complex cases and faces unique organisational challenges, mainly arising from the fact that Prishtina's population includes residents from all municipalities of Kosovo. This makes it a focal point within the judicial system of Kosovo and a unique opportunity to examine the internal motivation mechanisms and performance dynamics, with implications not only for this court but for the judicial system of Kosovo as a whole.

Due to the sensitive and restricted nature of the judicial system of Kosovo and the practical difficulties in securing access to important institutional actors, only nine semi-structured interviews were conducted, comprising six men and three women. Participants were selected using purposive sampling, based on their institutional role and their relevance to the main objectives of this study.

Specifically, the sample included two members from the Kosovo Judicial Council, two judges from the civil division, and two from the criminal division at the Basic Court of Prishtina, one executive clerk, and two professional associates. This sample was deemed sufficient for this study as the experiences and perceptions of the selected participants provided extensive insights regarding the motivational factors that affect institutional efficiency.

2.3. Interview Code Explanation

To ensure confidentiality, participants were assigned unique codes of identification. These codes correspond to their institutional role and position, thus ensuring that their names and personal identities remain undisclosed. Specifically, interviews with members of the Kosovo Judicial Council were coded as 101 and 102; judges from the Civil Division as 103 and 104; judges from the Criminal Division as 105 and 106; the executive clerk as 107, and two professional associates as 108 and 109. This categorisation is useful in analysing responses according to their institutional roles and improves the clarity of results.

2.4. Data Collection Process

Data were collected using semi-structured interviews based on open-ended questions, allowing respondents to provide detailed answers. The approach was chosen to obtain deeper insights into issues such as motivation, institutional direction, and organisational challenges. Due to limited access and other institutional restrictions, the interviews were conducted via email.

The interview guide was developed with reference to the literature on employee motivation and judicial performance. The questions focused on topics such as working conditions, salaries, leadership and communication, bureaucratic culture, and suggestions for improving motivation within the judicial system.

In addition to the interviews, other official reports and statistics on the performance of the Kosovo Judicial Council were analysed. These secondary sources were used to support qualitative findings and to provide a more comprehensive framework for assessing institutional performance.

2.5. Data Analysis

Data from the interviews were analysed using thematic analysis. The process involved coding responses and identifying persistent patterns that are related to the research topic.⁸

Main themes that emerged from the responses were:

1. The impact of working conditions on motivation
2. The impact of salary on performance and motivation
3. The impact of leadership and management
4. The impact of bureaucratic culture
5. Suggestions for improvement of the motivation systems

2.6. Ethical Considerations

All participants gave their informed consent before taking part in the study. Participants' confidentiality and anonymity were safeguarded through the assignment of unique identification codes and the removal of any personally identifying information from the transcripts. Participation was voluntary, and participants had the right to withdraw from the study at any stage. Finally, all data were stored securely in password-protected files and administered in accordance with institutional guidelines for ethical research.

8 John W Creswell, *A Concise Introduction to Mixed Methods Research* (2nd edn, SAGE 2022).

2.7. Limitations

This study is subject to several limitations. A total of nine interviews were conducted in the Basic Court of Prishtina, a number constrained by limited staff access and the sensitivity of the institutional environment. Interviews were conducted via email, which restricted direct interaction and the opportunity for real-time clarifying questions. However, this method allowed participants more time to reflect and provide more structured answers. Quantitative data were obtained from official sources. While these data offer a general overview of institutional performance, they do not necessarily reflect personal experiences and internal dynamics that affect the efficiency of work. To ensure a more in-depth analysis of this topic, interviews were conducted to gather perceptions and experiences that are not reflected in the official data published by the institution.

3 THE IMPORTANCE OF MOTIVATION IN INSTITUTIONAL PERFORMANCE

Employee motivation is a crucial component for ensuring effective operations in public administration. Motivation directly influences staff commitment, service quality, and the sustainability of organisational performance. According to Pollitt and Bouckaert⁹, performance improvement cannot be achieved solely through formal mechanisms such as evaluation or planning. Rather, it requires a comprehensive approach that incorporates institutional culture, leadership style and attentiveness to human factors.

Herzberg's¹⁰ two-factor theory supports this view by distinguishing between hygiene factors (e.g., salaries, working conditions) and intrinsic factors (e.g., recognition, professional development, sense of achievement). A similar line of reasoning is echoed in the work of Tovmasyan and Minasyan, who highlight the importance of a balanced motivation policy that combines material (salary, rewards, health insurance) with non-material incentives (career advancement opportunities, a positive working environment, flexible working hours, and training opportunities). Their study, conducted during the COVID-19 pandemic, demonstrates that such an approach not only enhances work efficiency but also improves employee satisfaction.¹¹ Moreover, Locke and Latham¹² argue that clear and challenging goals significantly boost both motivation and performance. Together, these perspectives illustrate why motivation cannot be reduced to financial rewards alone.

In the public sector, particularly in the judicial system, leadership plays a key role. For instance, Van Wart¹³ emphasises that leaders who adopt a supportive and inclusive style

9 Pollitt and Bouckaert (n 2).

10 Frederick Herzberg, 'One More Time: How Do You Motivate Employees?' (1987) 65 Harvard Business Review 109.

11 Tovmasyan and Minasyan (n 3).

12 Gary P Latham and Edwin A Locke, 'Self-Regulation through Goal Setting' (1991) 50(2) Organizational Behavior and Human Decision Processes 212. doi:10.1016/0749-5978(91)90021-K.

13 Montgomery Van Wart and Pamela S Medina, *Leadership in Public and Nonprofit Organizations: An introduction* (4th edn, Routledge 2023).

positively influence employee motivation. By contrast, Christensen, Lægheid, and Røvik¹⁴ argue that organisational structures can impose constraints which, if not managed effectively, narrow down the space for initiative and creativity, thereby reducing the sense of autonomy in the workplace. In addition to conventional methods, Lee and Raschke propose using set-theoretic methods to examine how different combinations of factors contribute to high levels of employee performance.¹⁵

3.1. Modern Approaches and Public Service Motivation (PSM)

The Modern Approaches theory, developed by Perry and Wise¹⁶ and later expanded by Perry et al.,¹⁷ argues that public sector employees often possess a sense of civic duty and a desire to contribute to the public good. This theory, therefore, emphasises the importance of altruistic motives in fostering institutional commitment and promoting positive behaviour within public administration.

Various studies reinforce the relevance of Public Service Motivation. In Ghana, for instance, Ashai et al.¹⁸ found that employee motivation increases when individuals feel valued and are given opportunities to contribute to organisational development. Similarly, research conducted in Indonesia by Andreas¹⁹ highlights that workplace respect and access to professional development have a notable impact on employee performance. These findings show that emotional and interpersonal factors are just as critical as material compensation in shaping motivation.

In Kosovo, despite efforts to increase salaries and improve material conditions, motivation levels remain low. The absence of a functional performance appraisal system, combined with deep-rooted bureaucracy and traditional culture in organisations, is continually inhibiting motivation among employees.²⁰

-
- 14 Tom Christensen, Per Lægheid and Kjell Arne Røvik, *Organization Theory and the Public Sector: Instrument, Culture and Myth* (2nd edn, Routledge 2020).
 - 15 Michael T Lee and Robyn L Raschke, 'Understanding Employee Motivation and Organizational Performance: Arguments for a Set-Theoretic Approach' (2016) 1(3) *Journal of Innovation and Knowledge* 162. doi:10.1016/j.jik.2016.01.004.
 - 16 James L Perry and Lois Recascino Wise, 'The Motivational Bases of Public Service' (1990) 50(3) *Public Administration Review* 367.
 - 17 James L Perry, Annie Hondeghem and Lois Recascino Wise, 'Revisiting the Motivational Bases of Public Service: Twenty Years of Research and an Agenda for the Future' (2010) 70(5) *Public Administration Review* 681.
 - 18 Ashai and others (n 5).
 - 19 Deden Andreas, 'Employee Performance: The Effect of Motivation and Job Satisfaction' (2022) 1(1) *Produktif: Jurnal Kepegawaian dan Organisasi* 28.
 - 20 European Commission, 'Kosovo 2023 Report' (n 6); Naim Jakaj and Gzim Shala, *Mungesa e kontratave kolektive: Dështimi për të siguruar dialog social dhe mbrojtje kolektive të punëtorëve* (Instituti i Kosovës për Drejtësi 2024).

3.2. Reforms in Administration and Their Effect on Motivation

The concept of New Public Management (NPM), proposed by Hood²¹ and later developed by Pollitt and Bouckaert²², has prompted administrations to adopt various management practices, including management by results, performance appraisal, and decentralisation of authority. The objective of these reforms is to increase accountability and empower employees through more direct involvement and improved access to decision-making.

In theory, these approaches are expected to increase motivation. However, in transition countries such as Kosovo, their implementation has faced significant challenges. According to Gajduschek,²³ the lack of administrative capacity and the presence of a rigid bureaucratic culture have dampened the impact of reforms. Rather than leading to improvements, many initiatives have created greater uncertainty and, in some cases, employee demotivation.

The Law on Public Officials, passed in Kosovo in 2023, was intended as a move to modernise governance.²⁴ However, recent studies suggest that its impact has been minimal.²⁵ This is due to the absence of meaningful social dialogue, the lack of general application regulation, and the ineffective implementation of articles related to fair and merit-based evaluation.

3.3. Motivation as a Precursor for Institutional Success

The literature consistently emphasises that motivation extends beyond financial compensation. It is shaped by a complex interplay of factors such as organisational justice, a sense of belonging, understanding of mission, and opportunities for professional growth. This is consistent with the findings of Khawaja and Karim (2024), who, through a case study of a service organisation, demonstrated that internal motivation, leadership style, organisational culture, and transparent communication directly impact employee productivity. Moreover, they argued that the combination of these factors not only improves work efficiency but also encourages long-term dedication from employees.²⁶ Staroňová et al.²⁷ highlight that in many countries, performance appraisal systems remain largely formal and have little influence on promotion or remuneration. As a result, such systems

21 Christopher Hood, 'A Public Management for All Seasons?' (1991) 69(1) Public Administration 3. doi:10.1111/j.1467-9299.1991.tb00779.x.

22 Pollitt and Bouckaert (n 2).

23 Gyorgy Gajduschek, 'Bureaucracy: Is It Efficient? Is It Not? Is That the Question? Uncertainty Reduction: An Ignored Element of Bureaucratic Rationality' (2003) 34(6) Administration & Society 700. doi:10.1177/0095399702239171.

24 Law of the Republic of Kosovo No 08/L-197 'On Public Officials' (22 December 2022) [2023] Official Gazette 21/1 <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=81430>> accessed 4 June 2025.

25 Fejzullahu and Belegu (n 6); Jakaj and Shala (n 20).

26 Khawaja and Karimi (n 4).

27 Katarína Staroňová and others, *Individual Performance Appraisal of Employees in Central Public Administration in Western Balkans* (ReSPA 2018).

often diminish morale and weaken employee commitment. Similarly, Qadir et al.²⁸ stress that motivation should be an integral part of any reform. Without it, reforms remain limited to the technical level and fail to shape institutional culture.

In the Kosovo judicial system, the data reveal a contradictory situation: while formal improvements have been implemented, the absence of genuine performance evaluation, limited staff participation in decision-making, and a lack of a human-centred management approach continue to hinder efficiency. Therefore, improving performance cannot rely solely on legal reforms. Instead, it requires fostering an organisational culture that values employees, acknowledges their efforts, and creates the right conditions for sustainable professional development.

Following this line of reasoning, Andersen argues that different managerial motivation profiles, which are based on the needs for achievement, power, and affiliation, have a direct impact on organisational effectiveness. Furthermore, Andersen highlights the importance of accurately measuring these profiles to ensure more effective management processes, thereby opening the door for further research on how individual factors shape organisational performance.²⁹

4 EMPIRICAL ANALYSIS: EFFICIENCY OF BASIC COURTS IN KOSOVO (2020–2024)

Statistics from the Kosovo Judicial Council (KJC) reports indicate that the country's busiest court, the Basic Court of Pristina, experienced a decline in efficiency in 2024, despite infrastructure investments and technological developments. For example, the efficiency rate dropped from 82% in 2021 to 68% in 2024.³⁰ This downward trend coincides with periods characterised by the absence of collective agreements, a lack of a clear performance evaluation system, and growing dissatisfaction among judicial personnel.

In contrast, courts in smaller cities such as Gjakova and Ferizaj, despite being smaller and having more limited resources, have maintained a more stable level of efficiency. This suggests that not only the quantity of resources but also the quality of management and the level of staff motivation can play a crucial role. As illustrated in the table below, data from

28 Ghayyur Qadir, Imran Saeed and Saif Ullah Khan, 'Relationship Between Motivation and Employee Performance, Organizational Goals: Moderating Role of Employee Empowerment' (2017) 3(1) *Journal of Business and Tourism* 93.

29 Jon Aarum Andersen, 'Managers' Motivation Profiles: Measurement and Application' (2018) 8(2) *SAGE Open* doi:10.1177/2158244018771732.

30 'Performance Review' (*Kosovo Judicial Council*, 2024) <<https://www.gjyqesori-rks.org/pasqyra-e-performances/>> accessed 21 March 2025.

these smaller courts illustrate that proactive leadership, combined with staff engagement in decision-making, is a key driver of their performance."

Table 1. The efficiency rates in cases handled over the period 2020–2024

Case Type	2020	2021	2022	2023	2024
Criminal	121.8%	80.6%	99.5%	108.5%	96.0%
Serious Crimes	121.6%	88.0%	94.2%	123.2%	56.0%
Juvenile Criminal	92.0%	62.0%	120.7%	130.4%	102.0%
Civil	73.1%	44.4%	62.7%	62.0%	56.0%
Economic	79.5%	58.1%	38.3%	0.0%	77.0%
Administrative	102.2%	104.8%	84.1%	105.8%	108.0%
Special Department	108.5%	51.4%	48.2%	73.2%	94.0%

Table 1 illustrates the efficiency rates of cases handled over the period 2020–2024.³¹ It provides a good overview of changes in judicial performance. As can be seen, efficiency rates have fluctuated over the years due to numerous factors, including case workload and institutional management.

Overall, criminal and administrative cases maintained a relatively stable level of efficiency, despite a temporary decline in 2021, which was followed by a recovery in subsequent years. Conversely, serious and economic crime cases experienced a significant drop in efficiency in 2024, particularly compared to 2023. Civil cases, meanwhile, demonstrated relative stability, albeit with slightly lower efficiency rates.

These trends underscore the need for a comprehensive analysis of the underlying factors influencing performance, as well as the formulation of targeted strategies to improve case management efficiency. Identifying and implementing best practices, along with resource optimisation within institutions, can contribute to a more efficient and sustainable judicial system in the future.

31 *ibid.*

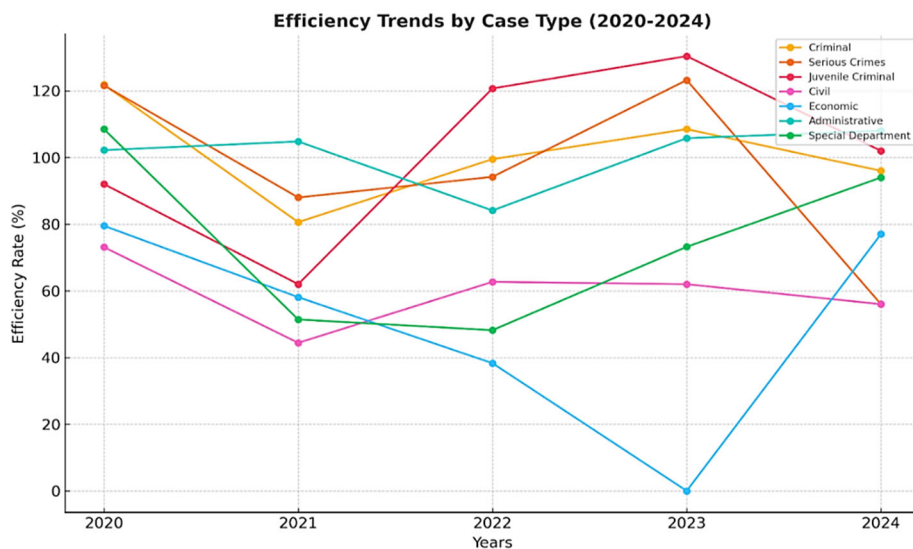


Figure 1. The efficiency trends across all case types from 2020 to 2024

Figure 1 illustrates efficiency trends across all case types from 2020 to 2024 (Figure 1).³² The data indicate that some categories have demonstrated notable improvements, while others have experienced declines in efficiency. These trends can be attributed to a variety of variables, from institutional dynamics to caseload fluctuations to ongoing judicial reform. Further analysis is needed to identify the key drivers that have shaped judicial efficiency over this period.

Table 2 presents the efficiency rates of Basic Courts in Kosovo between 2020 and 2024,³³ highlighting fluctuations in performance over this period. Notably, the Basic Court of Pristina experienced a considerable decline, with efficiency dropping from 103.4% in 2023 to 56.1% in 2024, indicating significant problems in case handling and institutional operations. In contrast, the Basic Court of Peja showed a considerable improvement in 2024, reaching an efficiency rate of 108.0% following a period of relatively minor variations.

The Basic Courts of Mitrovica and Ferizaj demonstrated relatively stable trends, with gradual improvements in efficiency over the observed period. The Basic Court in Prizren, by contrast, experienced fluctuations of decline and recovery, ending 2024 with an efficiency rate of 94.4%.

³² *ibid.*

³³ *ibid.*

Table 2. The efficiency rate of Basic Courts in Kosovo between 2020 and 2024

Court	2020	2021	2022	2023	2024
Basic Court of Pristina	92.0%	81.8%	76.0%	103.4%	56.1%
Basic Court of Mitrovica	79.6%	67.8%	83.1%	90.3%	76.8%
Basic Court of Peja	88.3%	69.3%	85.8%	56.3%	108.0%
Basic Court of Prizren	94.1%	74.3%	59.3%	68.3%	94.4%
Basic Court of Ferizaj	56.3%	92.1%	70.6%	72.1%	86.2%
Basic Court of Gjiilan	94.1%	74.3%	91.0%	100.6%	109.0%
Basic Court of Gjakova	100.3%	62.4%	70.4%	84.3%	74.0%

To understand the reasons behind these variations, a deeper analysis of the factors influencing such changes is required: namely, caseload volume, judicial staffing capacity, and the court management policies implemented by the Kosovo Judicial Council.

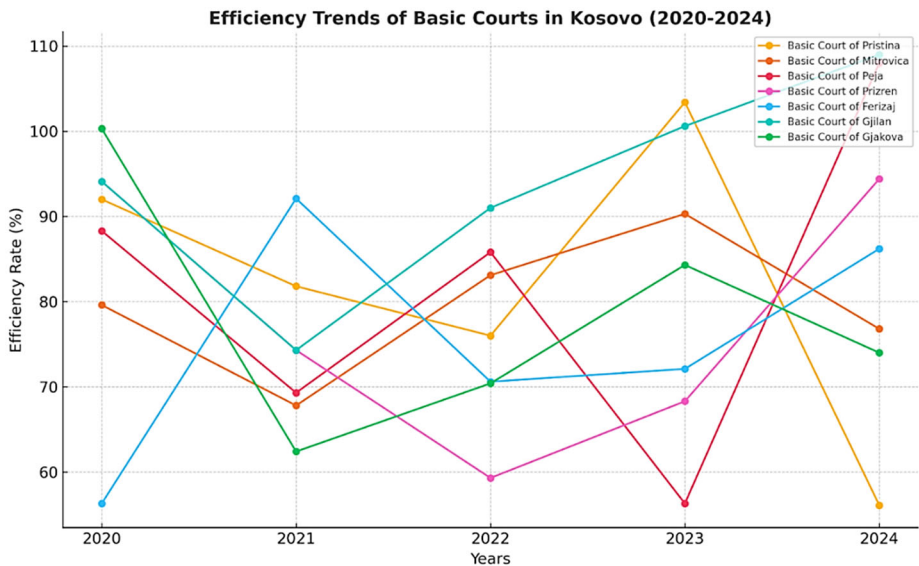


Figure 2. The trends in the efficiency of Basic Courts in Kosovo over the period 2020–2024

Figure 2 illustrates trends in the efficiency of Basic Courts in Kosovo over the period 2020–2024.³⁴ During this timeframe, court performance experienced notable fluctuations, influenced by shifts in caseloads, availability of institutional resources, and the efficiency of judicial management practices. In contrast, courts, such as those in Peja and Gjilan, showed improvements in efficiency through 2024, whereas the Basic Court of Pristina experienced a marked decline.

Further investigation is required to understand the cause of these performance fluctuations, including case management practices and the operational capacities of each court. The observed trend highlights the importance of continuously monitoring court performance and developing strategies to enhance the efficiency of the judicial system.

Thematic Analysis of Interview Data (101-109)

Main themes that emerged from the interviews are:

1. The impact of working conditions on motivation
2. The impact of salary on performance and motivation
3. The impact of leadership and management
4. The impact of bureaucratic culture on motivation
5. Suggestions for improvement of the motivation systems

Theme 1: The impact of working conditions on motivation

A prevailing theme that emerged from interviews is the role of working conditions in employee motivation. Specifically, employees emphasised the importance of physical environment, technology, and collegial support as fundamental factors in maintaining a productive and effective workday.

One Professional Associate (108) stated:

“Working conditions are essential in maintaining motivation. A comfortable, clean, and organised environment can increase both productivity and motivation.”

On the other hand, another respondent, serving as a Judge in the Penal Division (106), reported the absence of some of these elements, noting that this negatively affects productivity and motivation.

In summary, the interviews indicate that, while the institution may not provide these conditions in a consistent manner, they play a critical role in enhancing employee motivation and thus should be taken into consideration in future organisational planning.

34 *ibid.*

Theme 2: The impact of salary on performance and motivation

While all respondents concurred that salary increases have a positive effect on motivation and effectiveness, there were differences in how they explained this relationship.

One Professional Associate (109) stated:

"Salary increases have a significant influence on enhancing performance and motivation...they enhance the sense of commitment."

On the other hand, one Judge (106) provided a perspective emphasising professional ethics, noting that: *"Duties should be carried out responsibly, regardless of salary increases."*

This suggests that while financial compensation may be an essential motivation factor, some employees rely more on the principles of institutional duty and responsibility.

Theme 3: The impact of leadership and management on employee motivation

All participants consistently emphasised the significant role of leadership and managerial support in fostering their motivation and job effectiveness

One Professional Associate (108) stated:

"Leaders create a clear vision and provide guidance that motivates and inspires employees..."

One Judge (106) praised the management's non-bureaucratic approach, describing it as an essential component for promoting open and effective communication within the institution:

"The management's approach is positive and non-bureaucratic... this facilitates communication and contributes to addressing organisational issues."

These findings suggest that a managerial culture characterised by moral support, effective communication, and approachable leadership is perceived as a significant factor in promoting an effective and well-functioning organisation.

Theme 4: The impact of bureaucratic culture on motivation

Bureaucratic culture was frequently mentioned negatively, being perceived as a barrier to initiative and organisational flexibility. One Professional Associate (109) noted:

"Bureaucratic culture... may contribute to creating an environment unsuitable for carrying out job responsibilities."

However, another respondent (108) offered a balanced assessment of bureaucratic practices:

"If successfully managed... it can help in creating a sustainable and safe environment."

These findings indicate that the effects of bureaucracy are not inherently negative but depend on implementation and the level of structural flexibility allowed.

Theme 5: Suggestions for improvement of the motivation systems

Participants offered several concrete suggestions for improving the motivation system in the Court. Importantly, these suggestions highlight the importance of implementing structural and cultural reforms to foster a better work environment:

- Training and professional development
- Performance-based rewards and public acknowledgement
- Improving infrastructure and physical working conditions
- Work schedule flexibility and moral support
- Reduction of unnecessary bureaucracy.

One Professional Associate (108) noted:

“Recognition and performance-based reward... improving working conditions and work schedule flexibility.

Meanwhile, the Executive Clerk (107) highlighted the importance of organisational discipline for maintaining high-quality standards within the institution:

“...disciplinary warnings for employees who fail to demonstrate adequate responsibility.”

Overall, the findings suggest that both external factors (physical environment, technology, and salary increases) and internal factors (leadership, organisational culture, and professional recognition) are directly related to daily employee motivation and institutional performance. Therefore, attention to fairness, open communication, and acknowledgement of high-quality work are essential in creating a more effective, ethical, and enduring work environment.

5 DISCUSSION

The empirical analysis and interview data clearly demonstrate that judicial system efficiency is influenced not only by technical and infrastructural resources but also by motivational and organisational factors. As one judge emphasised: “...even in situations where we face various challenges, adequate communication and moral support help maintain motivation...” (106, Judge).

In the case of the Basic Court of Pristina, interviewees, including administrative support staff and judges, as well as members of the Kosovo Judicial Council, highlighted that one factor contributing to reduced efficiency is the absence of a sustainable system for motivation and performance evaluation. These views are consistent with those of Khawaja and Karim (2021), who argue that the absence of a clear framework for performance evaluation and motivation could undermine employee effectiveness even in cases where technical resources are sufficient.

Despite formal improvements, including salary increases and infrastructure investments, the absence of meritocratic evaluation and the persistence of a bureaucratic culture continue to discourage employee commitment. One employee supported this point, stating: "I didn't think that a salary increase would lead to better performance, but it would affect motivation." (104, Judge).

The findings echo the existing literature, underscoring the importance of organisational justice, job autonomy, and effective communication in improving morale and performance. Another judge reiterated this point, stating: "...even in situations where we face various challenges, appropriate communication and moral support help with motivation..." (106, Judge).

In contrast, other courts with fewer support staff and judges, such as those in Gjakova and Ferizaj, achieved stronger performance. This suggests that leadership style, staff involvement in the decision-making process, and internal motivation may be more decisive than sheer available resources. This observation resonates with Andersen (2019), who highlights the influence of different leadership styles and staff involvement on enhancing organisational effectiveness. It further suggests that cultivating a work environment that values individual contributions and fosters active participation is as crucial as investing in infrastructure.

The interannual performance analysis (2020–2024) reveals that, although formal measures such as salary increases and infrastructure investments have been implemented, their impact on motivation and efficiency has proven to be unsustainable. This stagnation underscores the need for more profound organisational reforms. This is consistent with Herzberg's two-factor theory, which argues that improvements focusing solely on salary are not sufficient to ensure long-term employee motivation and improved performance.

The findings of this study are consistent with insights from international literature. Herzberg's³⁵ two-factor theory, for example, posits that hygiene factors, such as salary, are necessary to prevent dissatisfaction but are insufficient to ensure high performance. Instead, intrinsic factors, such as recognition, responsibility, and opportunities for professional growth, play a more decisive role in sustaining employee motivation. Similarly, Perry and Wise's³⁶ Public Service Motivation (PSM) theory, along with the ReSPA report

35 Herzberg (n 10).

36 Perry and Wise (n 16).

in 2018,³⁷ highlights that the absence of performance-based reward systems and the persistence of rigid bureaucratic practices continue to block efficiency in public administrations across the region. For sustainable improvement, reforms must extend beyond legal and technical dimensions to encompass the development of an institutional culture that fosters motivation, recognition, and professional growth. This requires the establishment of transparent performance appraisal systems, the implementation of regular capacity-building programs, and the reinstatement of collective agreements as both protective mechanisms and instruments of staff incentivisation.

These results address gaps identified by Tovmasyan and Minasyan (2020), who argue that the absence of balanced motivation policies in the public sector, particularly during crisis periods, constitutes a barrier to institutional effectiveness.

5.1. Regional Comparison and Common Challenges in the Western Balkans

The absence of mechanisms to effectively measure employee performance and enhance motivation is not limited to Kosovo but reflects broader regional dynamics. According to the ReSPA report published in 2018, Albania, North Macedonia, Montenegro, and Serbia have faced similar significant challenges in implementing these mechanisms.

Despite the existence of legal frameworks in these countries, performance evaluation processes are often conducted for the sake of formality and are not linked to career advancement, rewards, or professional development. For example:

- In Serbia, reports indicate that ratings were inflated and did not reflect actual performance.
- In North Macedonia, the 360-degree evaluation process was considered complex and ineffective.
- In Montenegro, evaluations were not connected to professional development or job mobility.
- In Albania and Bosnia, reports highlighted a lack of staff training and the absence of strategic analysis of evaluation data.

This situation highlights a common regional challenge, in which limited administrative and organisational capacities constrain the translation of policies into concrete, actionable measures. Similar to Kosovo, these countries lack a functional link between performance and motivation, which directly impacts institutional effectiveness. Herzberg's two-factor theory and Public Service Motivation (PSM) emphasise the critical role of intrinsic factors such as recognition and autonomy in sustaining long-term employee performance. Consequently, for reforms to achieve their intended objectives, they must focus on

37 Staroňová and others (n 27).

developing organisational culture, creating meritocracy mechanisms, and empowering personnel through training and transparent evaluation systems.

In conclusion, developing an efficient judicial system cannot depend solely on regulatory frameworks; it requires sustained investment in personnel and the cultivation of a work culture that genuinely values and meaningfully engages each individual. The findings directly address the research question and support the objectives outlined in the introduction. They demonstrate that employee motivation—including material, psychological, and organisational dimensions—is closely linked to institutional efficiency.

As one respondent noted:

“...collaboration with colleagues is essential, as it directly influences daily motivation...” (109, Professional Associate).

This connection is particularly evident in the comparative analysis of different courts and in the perceptions expressed by interview participants.

6 CONCLUSION

This study demonstrates that employee motivation is a key factor in the effectiveness of the judicial system. However, a deeper understanding of the drivers of employee motivation requires moving beyond legal reforms and technical investments. The findings reveal that the absence of effective mechanisms for performance evaluation, the prevalence of bureaucratic culture, and limited staff involvement in decision-making negatively affect not only employees' commitment to institutional objectives but also the capacity of the institution to perform its daily functions effectively.

Conversely, the positive outcomes observed in courts operating with fewer judges and limited support staff highlight the importance of non-material factors in shaping organisational performance. Specifically, they suggest that leadership style and intrinsic motivation are critical for achieving successful outcomes, opening avenues for further research.

In conclusion, this study underscores that sustained investment in employee motivation—through improved working conditions, opportunities for professional development, and formal recognition—is essential for enhancing performance and ensuring the long-term effectiveness of the institution. Future research aimed at deepening the understanding of employee motivation should adopt mixed methods approaches, incorporating qualitative and quantitative analyses. Additionally, conducting additional case studies within the country, as well as comparative studies across different national contexts, would provide valuable insights and advance knowledge in this field. Finally, as judicial institutions continue to implement new reforms, analysing their impact would offer a significant contribution to the field.

REFERENCES

1. Adams JS, 'Toward an Understanding of Inequity' (1963) 67 *Journal of Abnormal and Social Psychology* 422. doi:10.1037/h0040968
2. Andersen JA, 'Managers' Motivation Profiles: Measurement and Application' (2018) 8(2) *SAGE Open* doi:10.1177/2158244018771732.
3. Andreas D, 'Employee Performance: The Effect of Motivation and Job Satisfaction' (2022) 1(1) *Produktif: Jurnal Kepegawaian dan Organisasi* 28.
4. Ashai DT and others, 'Motivation and its influence on task performance in a workplace: A study of Access Bank Ghana' (2023) 7(1) *European Journal of Human Resource Management Studies* 163. doi:10.46827/ejhrms.v7i1.1577
5. Christensen T, Lægrend P and Røvik KA, *Organization Theory and the Public Sector: Instrument, Culture and Myth* (2nd edn, Routledge 2020).
6. Creswell JW, *A Concise Introduction to Mixed Methods Research* (2nd edn, SAGE 2022).
7. Fejzullahu A and Belegu B, 'The Challenges of Public Administration Reforms in Kosovo in the Context of Eurointegration Process' (2022) 8(1) *Journal of Liberty and International Affairs* 292. doi:10.47305/JLIA2281292f.
8. Gajduschek G, 'Bureaucracy: Is It Efficient? Is It Not? Is That the Question? Uncertainty Reduction: An Ignored Element of Bureaucratic Rationality' (2003) 34(6) *Administration & Society* 700. doi:10.1177/0095399702239171.
9. Herzberg F, 'One More Time: How Do You Motivate Employees?' (1987) 65 *Harvard Business Review* 109.
10. Hood C, 'A Public Management for All Seasons?' (1991) 69(1) *Public Administration* 3. doi:10.1111/j.1467-9299.1991.tb00779.x.
11. Jakaj N and Shala G, *Mungesa e kontratave kolektive: Dështimi për të siguruar dialog social dhe mbrojtje kolektive të punëtorëve* (Instituti i Kosovës për Drejtësi 2024).
12. Khawaja S and Karimi H, 'Exploring Factors Influencing Work Productivity: A Qualitative Case Study of Employee Motivation and Leadership Practices' (2024) 8(4) *Edelweiss Applied Science and Technology* 727. doi:10.55214/25768484.v8i4.1451
13. Latham GP and Locke EA, 'Self-Regulation through Goal Setting' (1991) 50(2) *Organizational Behavior and Human Decision Processes* 212. doi:10.1016/0749-5978(91)90021-K.
14. Lee MT and Raschke RL, 'Understanding Employee Motivation and Organizational Performance: Arguments for a Set-Theoretic Approach' (2016) 1(3) *Journal of Innovation and Knowledge* 162. doi:10.1016/j.jik.2016.01.004
15. Locke EA and Latham GP, *A Theory of Goal Setting and Task Performance* (Prentice Hall 1990)

16. Maslow AH, 'A Theory of Human Motivation' (1943) 50(4) Psychological Review 370. doi:10.1037/h0054346.
17. Perry JL and Wise LR, 'The Motivational Bases of Public Service' (1990) 50(3) Public Administration Review 367.
18. Perry JL, Hondeghem A and Wise LR, 'Revisiting the Motivational Bases of Public Service: Twenty Years of Research and an Agenda for the Future' (2010) 70(5) Public Administration Review 681.
19. Pollitt C and Bouckaert G, *Public Management Reform: A Comparative Analysis – Into the Age of Austerity* (4th edn, OUP 2017).
20. Qadir G, Saeed I and Khan SU, 'Relationship Between Motivation and Employee Performance, Organizational Goals: Moderating Role of Employee Empowerment' (2017) 3(1) Journal of Business and Tourism 93.
21. Staroňová K and others, *Individual Performance Appraisal of Employees in Central Public Administration in Western Balkans* (ReSPA 2018).
22. Tovmasyan G and Minasyan D, 'The Impact of Motivation on Work Efficiency for Both Employers and Employees also During COVID-19 Pandemic: Case Study from Armenia' (2020) 4(3) *Business Ethics and Leadership* 25. Doi:10.21272/bel.4(3).25-35.2020
23. Van Wart M and Medina PS, *Leadership in Public and Nonprofit Organizations: An introduction* (4th edn, Routledge 2023).
24. Vroom VH, *Work and Motivation* (Wiley and Sons 1964).

AUTHORS INFORMATION

Besard Belegu

PhD in Public Administration, Assistant Professor, AAB College, Kosovo.

besard.belegu@aab-edu.net

<https://orcid.org/0000-0002-1870-4917>

Author, responsible for writing this article – original draft.

Lavdim Terziu*

PhD in Public Administration, Assistant Professor, AAB College, Kosovo.

lavdim.terziu@aab-edu.net

<https://orcid.org/0000-0002-1297-8298>

Corresponding author, responsible for writing this article - reviewing and editing.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are free from any influence of any organization.

RIGHTS AND PERMISSIONS

Copyright: © 2025 Besard Belegu and Lavdim Terziu. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.

Ukrainian language Editor – Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Belegu B and Terziu L, ‘Perceptions of Employee Motivation and Its Role in Work Efficiency: a Qualitative Case Study in the Basic Court of Pristina’ (2025) 8(4) Access to Justice in Eastern Europe 436-58 <<https://doi.org/10.33327/AJEE-18-8.4-c000128>> Published

DOI: <https://doi.org/10.33327/AJEE-18-8.4-c000128>

Summary: 1. Introduction. – 2. Research Methodology. – 3. The Importance of Motivation in Institutional Performance. – 3.1. *Modern Approaches and Public Service Motivation (PSM)*. – 3.2. *Reforms in Administration and Their Effect on Motivation*. – 3.3. *Motivation as a Precursor for Institutional Success*. – 4. Empirical Analysis: Efficiency of Basic Courts in Kosovo (2020–2024). – 5. Discussion. – 5.1. *Regional Comparison and Common Challenges in The Western Balkans*. – 6. Conclusions.

Keywords: *Motivation, Efficiency, Judicial System, Public Administration, Performance, Leadership, Organizational Culture.*

DETAILS FOR PUBLICATION

Date of submission: 04 Jun 2025

Date of acceptance: 27 Aug 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - No

Number of reviewer report submitted in first round: 4 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>
Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

We confirm that we have not used any AI tools for writing, translating, or editing the manuscript, submitted to the Access to Justice in Eastern Europe journal for publication. We understand that if AI usage is discovered without notifying the editor, the article may be retracted. We affirm that the research and content of the manuscript are solely our own work. The corresponding author is responsible for ensuring that all co-authors adhere to this declaration.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

УЯВЛЕННЯ ПРО МОТИВАЦІЮ ПРАЦІВНИКІВ ТА ЇЇ РОЛЬ В ЕФЕКТИВНОСТІ РОБОТИ:
ЯКІСНЕ ТЕМАТИЧНЕ ДОСЛІДЖЕННЯ ПРАКТИКИ МІСЦЕВОГО СУДУ ПРИШТИНИ

Бесард Белегу та Лавдім Терзіу*

АНОТАЦІЯ

Вступ. Судова система Косова зазнавала постійних правових реформ та вдосконалення інфраструктури. Однак, незважаючи на ці зусилля, загальна ефективність залишається значним викликом для державних установ, що підкреслює необхідність вивчення факторів, які впливають на інституційну ефективність. Серед них – мотивація працівників, яка є особливо важливою через прямий вплив на щоденну діяльність судової системи.

Хоча міжнародна академічна література широко визнає вирішальну роль мотивації працівників в інституційній ефективності, у цьому дослідженні спеціально вивчається, чи працівники місцевого суду Приштини сприймають мотивацію як фактор, що впливає на ефективність їхньої роботи.

Методи. У дослідженні, що ґрунтується на результатах напівструктурованих інтерв'ю з працівниками суду, було використано порівняльний метод, що дав змогу зіставити ці уявлення з опублікованими офіційними даними про інституційну ефективність.

Результати та висновки. Аналіз виявляє відсутність стійких механізмів для сприяння мотивації працівників в місцевому суді Приштини. Постійні реформи не дали очікуваних результатів, головним чином через переважання бюрократичної культури в установі. Результати цього дослідження тісно узгоджуються з міжнародною академічною літературою та теорією мотивації персоналу у сфері державної служби (PSM), яка стверджує, що мотивація — це не просто питання фінансової компенсації, а що вона тісно пов'язана з визнанням, інклюзією та можливостями професійного розвитку.

Результати цього дослідження підкреслюють необхідність реформ, які враховують людські та культурні виміри державних установ, пропонуючи практичні рекомендації щодо створення ефективної довгострокової мотивації в судовій системі.

Ключові слова: мотивація, ефективність, судова система, державне управління, результативність, лідерство, організаційна культура.

Case Study

REGARDING THE IMPLEMENTATION OF THE EU'S PRIORITY RECOMMENDATIONS ON THE IMPLEMENTATION OF THE LAW OF UKRAINE "ON ADMINISTRATIVE PROCEDURE"

Viktor Tymoshchuk

ABSTRACT

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-c000127>

Date of submission: 07 Jul 2025

Date of acceptance: 04 Aug 2025

Last Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Viktor Tymoshchuk

Background: This publication examines several recommendations of the European Commission (EC) as set out in the 2023 and 2024 Enlargement Reports concerning Ukraine. Specifically, these recommendations relate to the implementation of the Law of Ukraine "On the Administrative Procedure" (LAP) and the EC recommendations: to prevent the introduction of new exemptions from its scope, the need to harmonise the Tax Code, the land sector, and digital procedures with the LAP, as well as the adoption of a new law on appeals.

The publication explains why the European Union is paying special attention to these issues. Ukraine faces a genuine challenge in protecting the LAP from "new exceptions" (i.e. additional excluded sectors of public administration from the LAP area). For example, rather than aligning tax legislation with the LAP, at least one new legal conflict has already emerged. The land sector also presents difficulties, as the often suboptimal quality of "special provisions" may unjustifiably restrict the application of the LAP.

Methods: The study employed analytical, normative and comparative methods. The analytical method was used to examine the practice of implementing individual provisions of legislation that were in force before the adoption of the LAP, as well as the underlying reasons for the formation of relevant recommendations of the European Union. The normative method enabled a review of individual norms regulating tax administration, land administration, the digital sphere, and legislation on citizens' appeals. The comparative method was applied to assess the impact of implementing the LAP and to anticipate the changes required to fulfil the EU's recommendations.

Results and Conclusions: The article identifies the problems created by the introduction of "new exceptions" to the scope of the LAP and outlines the steps the Ukrainian government should take to implement the EC's recommendations. It also justifies the need for a new law on appeals, particularly in terms of clearly distinguishing its scope from that of the LAP and optimising the system of appeals more broadly. The study concludes that the process of Ukraine's European integration is, above all, an opportunity for Ukrainians to secure the right to good administration. In turn, this will reduce the need for private individuals to seek protection through the courts.

1 INTRODUCTION

The country's focus on membership in the European Union (hereinafter, the EU) is both a goal and a means that drives the modernisation of all areas of the state's organisation and functioning, as well as public life. Ukraine's public administration, specifically in terms of its rules for interaction with private individuals (citizens and business entities), also requires change and is undergoing such change. The current guide for these changes is the annual assessment of Ukraine conducted by the European Commission. In this publication, the focus will be on one issue—the introduction of a general administrative procedure in Ukraine.

In the 2023 Enlargement Report, the European Commission described the Law of Ukraine "On the Administrative Procedure"¹ as a key law for ensuring the right to good administration and called on Ukraine to refrain from introducing new exemptions from the LAP. The tax sphere was emphasised in particular.²

The 2024 Enlargement Report, essentially confirming and expanding upon these points, stated: "The Law 'On the Administrative Procedure', which entered into force in December 2023, unified administrative procedures with the aim of further aligning them with EU practice and strengthening the right to good administration. <...> In October 2024, the law

1 Law of Ukraine No 2073-IX 'On the Administrative Procedure' (17 February 2022) [2022] Official Gazette of Ukraine 49/2675 <<https://zakon.rada.gov.ua/laws/show/2073-20#Text>> accessed 25 June 2025.

2 European Commission, 'Ukraine 2023 Report' SWD(2023) 699 final (8 November 2023) <https://neighbourhood-enlargement.ec.europa.eu/ukraine-report-2023_en> accessed 25 June 2025.

was adopted that harmonised around 200 laws with the Law “On the Administrative Procedure” and brought existing exemptions back under its scope of application. Further harmonisation is still needed regarding the Tax Code, the land relations sector, and digital procedures. <...> The adoption of the Law “On Citizens’ Appeals” should help distinguish cases of administrative procedure from other forms of public appeals.”³

Despite the conciseness of the EU’s evaluations and recommendations on the functioning of public administration, from the perspective of the state’s relationship with citizens and businesses, it is worth analysing and clarifying the following: why exactly these issues are now among the priorities; what is the status of the development of this topic in theoretical and practical terms, and what are the prospects for the development of the relevant legislation.

At the same time, it is worth noting that without robust support from the academic community, particularly administrative law scholars, and without appropriate theoretical elaboration of these issues, it will be extremely challenging to achieve high-quality legislation and ensure its effective and impactful implementation. Moreover, relevant judicial practice and discourse on the impact of the Law of Ukraine “On the Administrative Procedure” (hereinafter, the LAP) are already being formed.⁴ Let us consider each of these tasks in detail.

2 HARMONISING THE TAX CODE WITH THE LAW OF UKRAINE “ON THE ADMINISTRATIVE PROCEDURE”

The first issue, therefore, concerns the proper implementation of the LAP and the prevention of exemptions from its scope of application. Each new exemption diminishes the regulatory value of the LAP as a general law on the administrative procedure that applies to all sectors of public administration. Despite significant efforts undertaken by the Ukrainian Government and Parliament to harmonise sectoral legislation with the LAP—culminating in the adoption on 10 October 2024 of the Law No. 4017⁵—the tax sector remains problematic.

3 European Commission, ‘Ukraine 2024 Report’ SWD(2024) 699 final (30 October 2024) <https://neighbourhood-enlargement.ec.europa.eu/ukraine-report-2024_en> accessed 25 June 2025.

4 Dmytro V Luchenko, Iryna V Boiko and Olha M Soloviova (eds), *Application of the Law of Ukraine “On Administrative Procedure” in the Resolution of Public-Law Disputes by Administrative Courts: Conceptual Approaches and Practical Problems: Collection of Abstracts Based on the Materials of the All-Ukrainian Round Table, December 12, 2024* (Yaroslav Mudryi National Law University 2024).

5 Law of Ukraine No 4017-IX ‘On Amendments to Certain Legislative Acts of Ukraine in Connection with the Adoption of the Law of Ukraine “On the Administrative Procedure”’ (10 October 2024) [2024] Official Gazette of Ukraine 104/6632 <<https://zakon.rada.gov.ua/laws/show/4017-20#Text>> accessed 25 June 2025.

In 2023, the State Tax Service of Ukraine (hereinafter, the STS), at the initiative of the business community (including through the Business Ombudsman Council) and with the support of Ukrainian and international experts, participated in drafting amendments to the Tax Code of Ukraine.⁶ By the end of that year, a working draft had been prepared; however, it was never submitted to Parliament. Instead, in the summer of 2024, the Ministry of Finance of Ukraine articulated a new position following the adoption of Law No. 3813.⁷ In interdepartmental communications, the Ministry of Finance asserted that there was no necessity to align the provisions of the Tax Code of Ukraine (hereinafter, the TCU) with the LAP, on the grounds that the latter does not regulate the administration of taxes, fees, or other payments. This position rests upon Law No. 3813, which amended Article 3 of the TCU by introducing Paragraph 3.3, stipulating that “the procedure for the administration of taxes, fees, and other payments <...> shall be determined exclusively by tax legislation” (all emphases are made by the author).

Thus, the provision introduced into Paragraph 3.3 of Article 3 of the Tax Code of Ukraine (TCU) by Law No. 3813 directly contradicts the European Commission’s recommendation. As noted above, the European Commission, in its latest Enlargement Report of 30 October 2024 (Ukraine Report 2024), once again highlighted—specifically in response to the current situation—the need to harmonise the TCU with the LAP.

From the perspective of European integration, the current situation implies that, in order to comply with the EU’s recommendation, Paragraph 3.3 of Article 3 of the TCU must be reviewed (amended), and broader amendments to tax legislation must be introduced.

From a purely legal standpoint, Paragraph 3.3 of Article 3 of the TCU also carries a high level of risk and legal inconsistency. It poses a direct risk of conflict in situations where tax authorities may refuse to apply the LAP in their activities, while taxpayers and administrative courts may insist on its application. There are at least two reasons why taxpayers and administrative courts might reasonably adopt this position:

1) Part 2 of Article 1 of the LAP contains no explicit exemption for tax relations (including tax administration). Accordingly, any private individual could legitimately demand the application of the LAP in tax matters;

6 Tax Code of Ukraine No 2755-VI (2 December 2010) [2010] Official Gazette of Ukraine 92-1/3248 <<https://zakon.rada.gov.ua/laws/show/2755-17#top>> accessed 25 June 2025.

7 Law of Ukraine No 3813-IX ‘On Amendments to the Tax Code of Ukraine Regarding the Specifics of Tax Administration during Martial Law for Taxpayers with a High Level of Voluntary Tax Compliance’ (18 June 2024) [2024] Official Gazette of Ukraine 70/4200 <<https://zakon.rada.gov.ua/laws/show/3813-IX#Text>> accessed 25 June 2025.

2) Part 2 of Article 2 of the Code of Administrative Court Proceeding of Ukraine (CACPU)⁸ obliges administrative courts to apply the LAP when resolving tax disputes. Since 2005, the CACPU has set out criteria for evaluating decisions, actions, and omissions of public authorities, which have subsequently been substantiated in the principles of the LAP (Article 4 and Articles. 5–18). Administrative courts are therefore required to assess compliance with these principles by all public authorities, including tax authorities. Accordingly, tax authorities must properly observe these principles.

This is an extensive sphere in which the consideration and resolution of cases often culminate in the issuance of administrative acts unfavourable to the individual. Therefore, the principles and rules of the LAP must apply in this sphere to protect taxpayers' rights and to ensure the objective and fair resolution of relevant cases.

By harmonising the TCU with the LAP, compliance could be ensured within the tax sector with Article 41 of the Charter of Fundamental Rights of the European Union, which defines the right to good administration as “the right of every person to have their affairs <...> handled impartially, fairly and within a reasonable time. This right includes: the right to be heard before any individual measure which would affect them adversely is taken; the right of access to their file <...> and the obligation of the administration to give reasons for its decisions.”⁹

It is important to recall that, while the LAP establishes the general administrative procedure, it also permits the establishment of specific rules for certain categories of cases (Part 2 of Article 3 of the LAP).

Preliminary expert analyses indicate that relatively few actual conflicts exist between the TCU and the LAP. Accordingly, what is required at this stage is not a comprehensive revision, but rather a targeted harmonisation of the Tax Code and the LAP.

Foremost, it is necessary to emphasise the importance of the subsidiary application of the LAP's principles to relationships involving the adoption of administrative acts in the tax sphere, as well as to other administrative activities of the State Tax Service. As already noted, this has been a requirement of the CACPU since 2005 (formerly Part 3, now Part 2 of Article 2). The added value of the LAP lies in the fact that, whereas the CACPU merely enumerates these principles, the LAP elaborates upon them in detail.

One of the most frequently cited mechanisms with significant potential for improvement through the LAP is administrative appeals. According to reports from the STS—for

8 Code of Administrative Court Proceedings of Ukraine No 2747-IV (6 July 2005) [2005] Official Gazette of Ukraine 32/1918 <<https://zakon.rada.gov.ua/laws/show/2747-15#Text>> accessed 25 June 2025.

9 Charter of Fundamental Rights of the European Union (2000/C 364/01) [2000] Official Journal of the European Communities 43/1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2000_364_R_TOC> accessed 25 June 2025.

example, for 2021—only about 7% of appeals¹⁰ were upheld in terms of “monetary obligations”. In contrast, the percentage of successful claims increases substantially when cases are brought before the courts. One of the underlying reasons for this discrepancy is the current structure of the existing administrative appeals mechanism, under which complaints are reviewed exclusively by STS staff. Under such an arrangement, it is difficult to ensure impartiality and objectivity in the consideration of complaints.

The LAP provides an opportunity to improve this mechanism, primarily through the introduction of collegial review of complaints and by involving representatives of civil society organisations in appeals committees. Applying LAP approaches to bodies considering administrative appeals—and involving representatives from business associations, academia, and independent experts—could significantly enhance the impartiality, objectivity, and fairness of complaint reviews within the STS system.

The Tax Code must also be refined in terms of mechanisms and terminology relating to the termination of tax notices, decisions, and other individual decisions of the State Tax Service. Certain procedures under the TCU may further require alignment with the LAP—for example, the procedure for “returning documents for correction” when registering for tax accounting (Article 63 of the TCU) and “refusal to consider documents” for self-employed persons (Article 65 of the TCU).

In sum, the TCU, as a specialised regulatory act, is generally well-developed and unlikely to require extensive amendments. However, it unequivocally requires harmonisation with the LAP.

The Ministry of Finance and the STS must therefore renew their efforts to draft amendments to the TCU to ensure alignment with the LAP, and Parliament must act swiftly to correct the error introduced by the conflicting provision in Paragraph 3.3 of Article 3 of the TCU.

3 HARMONISING THE LAND SECTOR WITH THE LAP

The next area specifically highlighted in the EU Report concerns land relations (the land sector). This is a particularly pressing matter for Ukraine. The land sector encompasses a vast range of relationships, including the acquisition of land plots for ownership and use, the large-scale market for agricultural land leases, and the complexities of obtaining land plots for construction, among other aspects. Instead of addressing land issues comprehensively in the general harmonisation law (enacted as Law No. 4017), the Ukrainian Parliament dealt with this matter separately and, unfortunately, did so with

10 State Tax Service of Ukraine, ‘Report on the Fulfilment of the Action Plan of the State Tax Service of Ukraine for 2021’ (7 February 2022) <<https://tax.gov.ua/diyalnist-/plani-ta-zviti-roboti-/396505.html>> accessed 25 June 2025.

significantly poorer communication. Work proceeded instead on another draft law—No. 11150—which ultimately became Law No. 3993.¹¹

Its initial version contained an unacceptable number of “special provisions” on the application of the LAP. Following the President’s veto, the text of the new Article 17-2 of the Land Code of Ukraine (hereinafter, LCU), introduced by Law No. 3993, was significantly revised. Nevertheless, at least three provisions continue to raise significant concerns.

Part 2 of Article 17-2 of LCU provides that “appeals against decisions of state authorities, the Verkhovna Rada [Parliament] of the Autonomous Republic of Crimea, the Council of Ministers of the Autonomous Republic of Crimea, local self-government bodies, and their officials in the field of land relations shall be carried out *exclusively in court proceedings*, unless otherwise provided for by this Code, the Law of Ukraine “On the Administrative Procedure”, or other regulatory legal acts in the said sphere.”

This provision only partially resolves the issue of administrative appeals in the land sector. The reference to the LAP does not sufficiently remedy the situation, since the LAP does not list specific sectors of public administration. As a result, the appeal of administrative acts in the land sector may be hindered. At the very least, such a negative (bad-faith) interpretation cannot be ruled out. To resolve this issue, Part 2 of Article 17-2 LCU should either be deleted entirely or substantially revised.

Part 3 of Article 17-2 of LCU provides that “decisions <...> in the field of land relations <...> *may be declared invalid or unlawful exclusively by a court decision*, except where the annulment of unlawful decisions in an extrajudicial procedure is provided for by legislative acts in the field of land relations, as well as by the Law of Ukraine “On the Administrative Procedure.”

This provision likewise fails to achieve the intended application of the LAP due to its flawed wording. Even in cases of manifest unlawfulness, administrative bodies would be unable to correct their own errors, being compelled instead to resolve such issues solely through court proceedings. Therefore, Part 3 of Article 17-2 LCU should also either be deleted or significantly redrafted.

Part 10 of Article 17-2 of the Land Code of Ukraine (LCU) stipulates that “an administrative act in the field of land relations *shall enter into force from the moment of its adoption*, unless otherwise provided for by this Code, the Law of Ukraine “On the Administrative Procedure”, or other legislative acts in the field of land relations, and must be communicated to those to whom it pertains”.

11 Law of Ukraine No 3993-IX ‘On Amendments to Certain Legislative Acts of Ukraine Regarding the Protection of the Interests of Land Share Owners and the Application of Administrative Procedure in the Field of Land Relations’ (8 October 2024) [2024] Official Gazette of Ukraine 102/6501 <<https://zakon.rada.gov.ua/laws/show/3993-20#Text>> accessed 25 June 2025.

This provision does not align with the LAP, which establishes the general rule that an administrative act enters into force from the moment it is communicated to the individual concerned (taking into account the relevant presumptions and notification rules), or from a *later date* specified in the act itself. An individual cannot comply with or challenge an administrative act if they are unaware of its existence and have no opportunity to examine its text. Therefore, Part 10 of Article 17-2 LCU should likewise be deleted or reworded to clearly link its entry into force to the procedure established by the LAP.

The sensitivity of land issues in Ukraine is such that, in 2024, yet another draft law on land matters emerged (registration No. 12089 of 3 October 2024). By 12 March 2025, this was enacted as Law No. 4292-IX.¹² This Law introduced a maximum ten-year limitation period for the state or a local government body to file a lawsuit to reclaim unlawfully allocated land. It also imposed a condition: the relevant state or local body must compensate the bona fide purchaser for the value of the property. Statutes of limitations do not apply only to certain lands, such as “land for defence facilities; land or territories of the nature reserve fund; hydrotechnical structures...; cultural heritage monuments that were not subject to privatisation”.

This entire mechanism warrants critical scrutiny. The requirement that the state or community reimburse the value of the property makes the restoration of legality nearly unfeasible in these cases. A key concern from the perspective of the LAP is that, in effect, the mechanism for recognising unlawful administrative acts as invalid—that is, the mechanism for restoring legality by the public administration itself—is further blocked in the sphere of land relations.

Accordingly, in this area, the Ukrainian Government and Parliament must undertake further work to ensure the alignment of land legislation with the LAP.

4 ADOPTION OF THE NEW LAW ON APPEALS

The adoption and entry into force of the Law “On the Administrative Procedure” (LAP) necessitated a substantial revision of numerous other legislative acts. One of the priority laws requiring amendment is the Law of Ukraine “*On Citizens’ Appeals*” of 1996,¹³ since both laws govern relations concerning the consideration of applications and complaints.

12 Law of Ukraine No 4292-IX ‘On the Introduction of Amendments to the Civil Code of Ukraine to strengthen the protection of bona fide purchasers’ (12 March 2025) [2025] Official Gazette of Ukraine 36/2370 <<https://zakon.rada.gov.ua/laws/show/4292-20#Text>> accessed 25 June 2025.

13 Law of Ukraine No 393/96-BP ‘On Citizens’ Appeals’ (2 October 1996) [1996] Official Bulletin of the Verkhovna Rada of Ukraine 47/256 <<https://zakon.rada.gov.ua/laws/show/393/96-%D0%B2%D1%80#Text>> accessed 25 June 2025.

To date, the Law of Ukraine “*On Citizens’ Appeals*” of 1996 has been amended only once—by introducing a change to Article 12, which formally and generally delineates the respective scopes of the LAP and this Law. However, from a practical standpoint, a clearer demarcation of the subject matter governed by these two laws is required.

Furthermore, the mechanism for handling appeals submitted by private individuals to public authorities requires optimisation in light of the extensive experience accumulated through the long-term application of the Law of Ukraine “*On Citizens’ Appeals*”. Well-known problematic issues include: the excessive volume of appeals, which imposes a significant burden on public authorities; the frequent submission of appeals to higher-level authorities without regard to jurisdiction; the obligation of heads of public bodies to conduct in-person meetings with citizens; and the requirement that the head of an authority personally sign all responses to appeals. These factors considerably affect the efficiency of public administration, consuming substantial resources.

In 2023, the Ministry of Justice intensified its efforts to prepare a new version of the law under a new title—the draft Law “*On Appeals*”. The corresponding draft was submitted to Parliament¹⁴ (registration number 11082, dated 13 March 2024) and adopted at first reading on 24 April 2024. However, further progress has effectively stalled, despite the fact that, in the context of European integration, there is a clear need to expedite this work. It is worth reiterating that this task is included in the Ukraine Report 2024.

Several issues demand reconsideration in light of the need to optimise the appeal mechanism. One such issue is the necessity, on the one hand, to extend the right of appeal not only to citizens (natural persons) but also to business entities and all civil society associations. On the other hand, it is imperative to align the regulation of the range of entities obliged to consider appeals and provide responses with the Constitution. In particular, the imposition of such an obligation on all enterprises, institutions, and organisations—regardless of their form of ownership, including civil society associations and the media—represents a post-Soviet relic. Private entities should not bear the same public-law obligations as state authorities, particularly if they do not perform any public functions or tasks. Regarding the media and non-governmental organisations, such an obligation constitutes undue interference in their activities.

Accordingly, in revising the legislation, it is essential to take into account Article 40 of the Constitution of Ukraine, which stipulates that “everyone has the right to submit individual or collective written appeals or to personally address *state authorities, local self-government bodies*, and officials and officers of these bodies, who are obliged to consider the petitions and provide a substantiated response within the time frame established by law.” The Constitution clearly provides that what must be given is a *response* (rather than a decision), and that such a response must be *substantiated*.

14 Draft Law No 11082 ‘On Appeals’ (13 March 2024) <<https://itd.rada.gov.ua/billInfo/Bills/pubFile/2254977>> accessed 25 June 2025.

Article 3 of the Law of Ukraine “*On Citizens’ Appeals*” of 1996 provides that “appeals submitted by citizens shall be understood as *proposals (comments), applications (requests), and complaints* set out in written or oral form”. A closer analysis of these distinct types of appeals, particularly in the context of the LAP, yields the following observations.

The definition of an application requires a different emphasis: it should not merely be framed as “*a request for assistance* in exercising ... rights and interests”. Through an application, an individual exercises a *subjective public right*, i.e., the legal right to make a *claim* against a public authority grounded in law. On this basis, applications fall within the scope of the LAP and are excluded from the scope of the Law of Ukraine “*On Citizens’ Appeals*”.

Under the Law of Ukraine “*On Citizens’ Appeals*” of 1996, a “complaint” is defined as “an appeal containing a *demand to restore rights* and protect the legitimate interests of citizens violated by acts (or omissions) or decisions of state bodies, local self-government bodies...” (Part 4 of Article 3). This definition is largely acceptable. The LAP, in Part 1 of Article 78, places particular emphasis on the fact that the right to administrative appeal under this Law is vested in a person who considers that an *administrative act* or its implementation has violated or may violate their right, freedom, or legitimate interest. This is a more precise definition, which also structures the hierarchy of review.

Since 15 December 2023, all applications and complaints that fall under the LAP have been expressly excluded from the scope of the Law of Ukraine “*On Citizens’ Appeals*”.

From this, several conclusions follow. Under the Law of Ukraine “*On Citizens’ Appeals*” of 1996 and under the forthcoming Law “*On Appeals*”—the scope should remain limited to proposals, recommendations, comments, and petitions.

At the same time, during the preparation of the draft Law “*On Appeals*”, some resistance was voiced by certain experts who argued that the draft narrows the circle of entities obliged to consider petitions and provide responses, reduces the range of petition types that may be submitted to such entities, and contains provisions that limit the mandatory in-person reception of citizens by the heads of state bodies, as well as the personal signing of responses by these officials.

Before addressing these concerns in greater detail, it is worth reiterating that, since its entry into force, the LAP has provided private individuals with broad rights in their interactions with the state, specifically for the encashment and protection of their rights. In other words, the LAP should serve as a far more effective instrument than the Law of Ukraine “*On Citizens’ Appeals*”. By contrast, the Law “*On Appeals*” is primarily an instrument of participation—a democratic mechanism for interaction between the state and the individual—rather than an administrative tool for resolving an individual’s specific legal matter.

In terms of the range of obligated entities, the Law of Ukraine “*On Citizens’ Appeals*” of 1996 substantially expanded the scope of addressees compared to the constitutional framework. As previously noted, such an expansion is not well-founded. It is not justifiable to impose identical legal regimes and obligations on public authorities and private individuals alike. Any imposition of such obligations must be duly substantiated. Specifically, this may be warranted in relation to enterprises, institutions, and organisations that are state- or municipally owned, as they operate to perform certain public tasks. In exceptional cases, it may also apply to certain private entities which, on the basis of the law—i.e., through legitimate authorisation—perform public functions (this may include the provision of “services of general economic interest”).

With respect to procedural differences, under the LAP, the response to an application or complaint entails a procedure that guarantees the individual the right to participate—to be heard and to present evidence. By contrast, under the Law “*On Citizens’ Appeals*” (and the future Law “*On Appeals*”), the individual is not guaranteed the right to participate in the consideration of their submission. This approach aligns with the principles of efficient governance and the prudent use of public resources.

This brings us to another desirable change. When considering petitions under the Law “*On Appeals*”, an individual should not have the right to demand an in-person meeting with specific officials, especially senior officials. For the purpose of recording oral petitions during in-person meetings, designated staff members appointed by the relevant body should suffice. Heads of bodies should retain the right—but not the obligation—to conduct such personal receptions.

Another flaw of the Law of Ukraine “*On Citizens’ Appeals*” of 1996 should also be addressed. It currently requires that the response must “without fail be given *under the signature of the head* or a person acting on their behalf” (Part 3 of Article 15). It should be sufficient for the response to bear the signature of a duly authorised person of the competent entity, ideally the person who actually handled the petition.

It is also clear that a response itself should not be subject to administrative or judicial appeal. What may be challenged is only the failure to provide a response—that is, inaction. The information that a proposal or comment has or has not been taken into account cannot be challenged.

This issue should be viewed in conjunction with other problems that have rendered the petition mechanism an often inefficient and resource-intensive aspect of public administration. This includes the abuse of the right to petition—for example, when an individual submits numerous appeals to the same authority within a short period of time, or when a single appeal is excessive in volume and raises an unreasonably large number of questions. There should be a mechanism to counter such abuses.

In any event, the Ukrainian Parliament must accelerate the adoption of the new Law “On Appeals,” namely, its consideration in the second reading. It is, however, fundamentally important to preserve the sound conceptual framework of the draft law and its innovative elements.

5 HARMONISATION OF DIGITAL PROCEDURES

In this sector, developments are currently moving in a direction that aligns with the values of the LAP and are, overall, constructive. Immediately after the adoption of the LAP, however, not all leaders of Ukraine’s digital transformation perceived it as a positive and useful development. When properly grounded, both the LAP and digitalisation share more commonalities than differences. Both are citizen-centred— that is, they embrace a human-centred approach; they uphold the principle of officiality (expressed as “data should move, not people”); and they also share the principle of efficiency, among others.

In the sphere of digital procedures, it is vital to ensure digital non-discrimination; to guarantee the right to participate in cases involving negative decision; to provide advisory support to private individuals when using digital services; and, critically, to ensure that negative administrative acts (such as refusals or obligations) are properly reasoned and that the procedure for their appeal is clearly indicated.

It is equally important to take into account the experience of countries with longer-standing practice. For instance, Estonian scholar and administrative justice judge Ivo Pilving outlines a vision for the rational and lawful integration of administrative procedure and digitalisation, emphasising the need for legislative adjustments in Estonia. Among his key positions is the view that “the right to be heard, to reflect, and to communicate with an official must be guaranteed — without such guarantees, automation will not be permitted, except in narrowly defined cases”.¹⁵

the right to be heard, the right to communication between an individual and an authority and the right to have reasons given for automated decisions must be guaranteed, save for some limited exceptions;

In Ukraine, harmonisation with the LAP has not yet been achieved for a law of fundamental importance to the digital sector: the Law of Ukraine “On the Specifics of Providing Public (Electronic Public) Services” No. 1689-IX, dated 15 July 2021.¹⁶ This may help explain why the European Union’s 2024 Enlargement Report and the SIGMA Programme have attached

15 Ivo Pilving, ‘The Effect of Automated Decision-Making Systems on Basic Principles of EU Public Law: An Estonian Perspective’ (2023) 1 Fascicolo 60. doi:10.13130/2723-9195/2023-1-105.

16 Law of Ukraine No 1689-IX ‘On the Specifics of Providing Public (Electronic Public) Services’ (15 July 2021) [2021] Official Gazette of Ukraine 64/4012 <<https://zakon.rada.gov.ua/laws/show/1689-20#Text>> accessed 25 June 2025.

priority in their recommendations to the need to combine digitalisation with the implementation of the LAP. The most recent SIGMA Monitoring Report on Ukraine (December 2023) makes the following recommendation: “[to] maintain the trend towards increased digitalisation, quality, and accessibility of services, *while simultaneously ensuring the proper implementation of the Law of Ukraine “On the Administrative Procedure”* for the effective upholding of the rule of law and the protection of parties’ rights in administrative procedures <...>”¹⁷.

Due to a lag in the full harmonisation of digital procedures with the LAP, the latter in practice sometimes functions in a limited manner—particularly in contexts where activities occur exclusively within state or other public registers (for example, information systems in the field of social protection, among others). In such areas, public officials often lack the technical means to apply mechanisms envisaged by the LAP, since the relevant functions have not yet been implemented at the technical level—for instance, the basic ability to “leave an application without action” to allow for the correction of deficiencies. This technical dimension—the modernisation of the information systems themselves—must therefore remain at the centre of policymakers’ attention. Otherwise, the LAP will function only partially or even generate normative conflicts, which is unacceptable and will inevitably lead to disputes.

At present, it is known that Ukraine’s Ministry of Digital Transformation is finalising the drafting of an appropriate bill outlining its vision for aligning the country’s digital transformation policy, relevant legislation, and practice with the LAP.

6 CONCLUSIONS

To become a full-fledged member of the European Union, Ukraine must establish an effective system of public administration. The recommendations of the European Commission, set out in its enlargement reports, serve as an invaluable guide in this process. Among the most recent recommendations concerning the implementation of the general administrative procedure are: the harmonisation of the Tax Code, the land sector, and digital procedures with the Law of Ukraine “On the Administrative Procedure”; the prevention of new exceptions from the scope of the LAP; and the adoption of a new law on appeals and petitions. Collectively, these measures are intended to ensure the effective operation of the LAP—that is, to create the appropriate legal conditions for individuals to exercise their rights in relations with public administration, and better protection for these individuals against possible arbitrariness on the part of public authorities. This is crucial for realising the overall regulatory value of the LAP, and for ensuring the sound design of Ukraine’s digital transformation of public administration. Within this same context,

17 OECD, *Public Administration in Ukraine: Assessment against the Principles of Public Administration* (SIGMA Monitoring Reports, OECD Publishing 2024). doi.org/10.1787/078d08d4-en.

legislation on petitions also requires amendment, primarily to eliminate inconsistencies with the LAP and to ensure the rational use of limited public resources for the consideration of proposals and similar submissions.

Finally, it must be stressed that the effectiveness of Ukraine's European integration process lies not only in its ultimate goals of accession to the European Union. Its deeper value rests in enabling the state to provide its citizens and businesses with standards of living that guarantee democracy, the rule of law, and good governance. In other words, these changes and reforms are needed first and foremost by Ukrainians themselves, making it vital to adopt appropriate legislation and ensure its effective implementation.

Legal scholarship—including administrative law—must continue to provide the theoretical support necessary to support these processes.

REFERENCES

1. Luchenko DV, Boiko IV and Soloviova OM (eds), *Application of the Law of Ukraine "On Administrative Procedure" in the Resolution of Public-Law Disputes by Administrative Courts: Conceptual Approaches and Practical Problems: Collection of Abstracts Based on the Materials of the All-Ukrainian Round Table, December 12, 2024* (Yaroslav Mudryi National Law University 2024).
2. Pilving I, 'The Effect of Automated Decision-Making Systems on Basic Principles of EU Public Law: An Estonian Perspective' (2023) 1 Fascicolo 51. doi:10.13130/2723-9195/2023-1-105.

AUTHORS INFORMATION

Viktor Tymoshchuk,

Senior Research Scientist at the Department of Public Administration and Administrative Law of the V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Candidate of Law,
vtymoschuk@gmail.com

<http://orcid.org/0000-0001-6109-0909>

Corresponding author, solely responsible for conceptualization, data curation, formal analysis, funding acquisition, methodology, resources, validation and writing – original draft.

Competing interests: No competing interests were disclosed.

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Viktor Tymoshchuk. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing editor – Mag. Bohdana Zahrebelna. **English Editor** – Julie Bold.
Ukrainian language Editor – Mag. Lilia Hartman.

ABOUT THIS ARTICLE

Cite this article

Tymoshchuk V, 'Regarding The Implementation Of The EU's Priority Recommendations On The Implementation Of The Law Of Ukraine "On Administrative Procedure' (2025) 8(4) Access to Justice in Eastern Europe 459-75 <<https://doi.org/10.33327/AJEE-18-8.4-c000127>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-c000127>

Summary: 1. Introduction. – 2. Harmonising the Tax Code with the Law of Ukraine “On the Administrative Procedure”. – 3. Harmonising the Land Sector with the LAP. – 4. Adoption of the New Law on Appeals. – 5. Harmonisation of Digital Procedures. – 6. Conclusions.

Keywords: *Administrative Procedure, European Integration, Tax Sector, Tax Code Of Ukraine, Land Sector, Land Law, Digital Transformation, Citizens' Appeals.*

AI DISCLOSURE STATEMENT

The author confirms that no artificial intelligence tools or services were used at any stage of writing, translating, editing, or analyzing content for this manuscript.

DETAILS FOR PUBLICATION

Date of submission: 07 Jul 2025

Date of acceptance: 04 Aug 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - Yes

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with minor revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>
Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

ЩОДО ВИКОНАННЯ ПРІОРИТЕТНИХ РЕКОМЕНДАЦІЙ ЄС ІЗ ВПРОВАДЖЕННЯ ЗАКОНУ УКРАЇНИ “ПРО АДМІНІСТРАТИВНУ ПРОЦЕДУРУ”

Віктор Тимощук

АНОТАЦІЯ

Вступ: У цій публікації розглядається кілька рекомендацій Європейської Комісії (ЄК), викладених у Звітах про розширення за 2023 та 2024 роки щодо України. Зокрема, ці рекомендації стосуються впровадження Закону України «Про адміністративну процедуру» (ЗАП) та рекомендацій ЄК: запобігання введенню нових винятків зі сфери його дії, необхідності гармонізації Податкового кодексу, земельного сектору та цифрових процедур із ЗАП, а також прийняття нового закону про звернення.

У публікації пояснюється, чому Європейський Союз приділяє особливу увагу цим питанням. Адже Україна стикається з реальним викликом у захисті ЗАП від «нових винятків» (тобто додаткових виключених окремих секторів публічного адміністрування зі сфери дії ЗАП). Наприклад, замість узгодження податкового законодавства з ЗАП, вже виникла щонайменше одна нова правова колізія. Земельний сектор також має труднощі, оскільки часто неоптимальна якість «особливостей» може невиправдано обмежувати застосування ЗАП.

Методи: У дослідженні використовувалися аналітичний, нормативний та порівняльний методи. Аналітичний метод було застосовано для вивчення практики реалізації окремих положень законодавства, що діяло до прийняття ЗАП, а також до аналізу причин формування відповідних рекомендацій Європейського Союзу. Нормативний метод дозволив розтлумачити окремі норми, що регулюють податкове адміністрування, адміністрування земельними ресурсами, цифрову сферу та законодавство про звернення громадян. Порівняльний метод було застосовано для оцінки впливу впровадження ЗАП та прогнозування змін, необхідних для виконання рекомендацій ЄС.

Результати та висновки: У статті визначено проблеми, спричинені запровадженням «нових винятків» зі сфери дії ЗАП, та окреслено кроки, які уряд України має вжити для

виконання рекомендацій ЄК. Також обгрунтовано необхідність прийняття нового закону про звернення, зокрема з погляду чіткого розмежування його сфери застосування від предмета ЗАП та оптимізації системи звернень у широкому сенсі. У дослідженні зроблено висновок, що процес європейської інтеграції України – це, перш за все, можливість для українців забезпечити право на належне адміністрування. У свою чергу, це зменшить потребу приватних осіб звертатися за захистом до суду.

Зміст: 1. Вступ. – 2. Гармонізація Податкового кодексу з Законом України «Про Адміністративну Процедуру». – 3. Гармонізація Земельного Сектору з ЗАП. – 4. Ухвалення Нового Закону Про Звернення. – 5. Гармонізація Цифрових Процедур. – 6. Висновки.

Ключові слова: *Адміністративна Процедура, Європейська Інтеграція, Податковий сектор, Податковий кодекс України, Земельний сектор, Земельне право, Цифрова трансформація, Звернення громадян.*

Case Study

CAN TORT LAW HANDLE WAR? REFLECTIONS ON PRIVATE LITIGATION FOR WAR-RELATED DAMAGES IN UKRAINE

Bohdan Karnaukh

ABSTRACT

Background: Russia's full-scale invasion of Ukraine has caused widespread destruction and immense harm to civilians, prompting individuals and legal entities to seek compensation through tort litigation. The pressing question arises: can tort law offer an effective remedy for war-related damage? While international law affirms the obligation to make reparation for internationally wrongful acts, individual victims often face significant legal and practical barriers when seeking redress in domestic courts. This study examines whether private tort claims can serve as a viable path to reparation for victims of war-related harm, using the jurisprudence of Ukrainian courts as a case study.

Methods: This study employs a qualitative doctrinal methodology grounded in case law analysis. It examines a broad range of Ukrainian court decisions involving tort claims brought by individuals against both the Russian Federation and the Ukrainian state. The analysis distinguishes between claims filed under specific legislative provisions—such as the Law of Ukraine “On Combating Terrorism”—and those based on general tort principles. The study also traces the legal

DOI:

<https://doi.org/10.33327/AJEE-18-8.4-c000130>

Date of submission: 06 Aug 2025

Date of acceptance: 08 Sep 2025

Last Publication: 18 Nov 2025

Disclaimer:

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

Copyright:

© 2025 Bohdan Karnaukh

evolution regarding Russia's jurisdictional immunity and explores issues related to procedural fairness, the substantiation of claims, and the enforceability of judgments.

Results and Conclusions: *The analysis reveals that private tort litigation has proven largely ineffective in practice and conceptually ill-suited to war-related claims. Although recent rulings have lifted Russia's jurisdictional immunity, serious challenges remain: judgments are consistently not enforced, evidentiary standards are inconsistently applied, and individual litigation fails to ensure equitable distribution of limited resources. Moreover, lawsuits against Ukraine under both specific statutes and general tort law have also yielded limited results due to legislative gaps and the absence of effective enforcement mechanisms. The study concludes that private tort claims, while symbolically important, cannot serve as a sustainable vehicle for post-war justice. Instead, a centralised reparations mechanism, such as the emerging International Compensation Mechanism, offers a more just and effective model for distributing reparations in a manner consistent with principles of distributive justice.*

1 INTRODUCTION

Tort law rests on a cornerstone principle: one who has unlawfully caused harm to another bears a duty to compensate for that harm. Tort liability consists of three essential elements: fault, damage, and causation. When an injured party successfully proves that she has suffered legally cognizable losses caused by wrongful acts committed against her, she is entitled to claim compensation for those losses at the wrongdoer's expense.

This logic would seem to apply in the context of full-scale war. The three elements of tort appear present: damage of enormous magnitude, the gravest of all wrongful acts, and an undeniable causal nexus between the two. Indeed, international law clearly states that a state responsible for an internationally wrongful act is obliged to make reparation for the damage it has caused.¹

Yet no victim of Russian aggression has received compensation from the invading state.² What, then, is missing from this arrangement? That is the question that drives this research.

1 See: Responsibility of States for Internationally Wrongful Acts (2001) art 31 <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 4 August 2025.

2 See: Council of Europe, *Expert Report on Remedies and Redress Mechanisms for War-Affected Individuals in Ukraine* (Co-operation Programmes Division of the Council of Europe 2023) 62 <<https://rm.coe.int/council-of-europe-expert-report-on-national-remedies-in-ukraine-2775-2/1680adebf5>> accessed 4 August 2025.

2 METHODOLOGY

This article examines whether tort litigation brought by private individuals can serve as a reliable route for securing reparation for war-related damage. To address this question, the analysis focuses on Ukrainian jurisprudence, with findings limited to the context of the ongoing Russo-Ukrainian war.

The primary emphasis is placed on judicial practice in cases involving claims by private persons against the Russian Federation seeking compensation for war-related damage. Additionally, this article considers lawsuits brought by Ukrainians against the Ukrainian state itself, wherein claimants sought compensation for damage caused by Russia.

The discussion begins with claims against Ukraine (as they arose chronologically first), which are divided into two categories: claims under the Law of Ukraine No. 638-IV "On Combating Terrorism"³ and claims based on general tort principles. The article then turns to claims against the aggressor state. In this regard, case law has undergone significant changes: prior to 2022, such claims were dismissed based on the defendant's jurisdictional immunity; however, following the onset of the full-scale invasion, courts reversed course and began hearing such claims. However, this shift did not eliminate all problems associated with suing a foreign state with which the forum state is at war.

Nevertheless, since 2022, lawsuits against Russia have become commonplace. Yet, the judgments rendered in such cases are not actually enforced. The article argues that their actual enforcement could present an even greater problem than non-enforcement, insofar as it would result in an inequitable distribution of the aggressor state's limited available assets among numerous victims. To support this argument, the final section provides an overview of current judgments against Russia in relevant cases.

3 LAWSUITS AGAINST UKRAINE

3.1. Claims Based on the Law of Ukraine "On Combating Terrorism"

In 2014, Ukraine's initial response to the military actions of Russian and pro-Russian armed groups in the eastern part of the country was the launch of the Anti-Terrorist Operation (ATO). The ATO lasted from 14 April 2014 until 30 April 2018, when it was replaced by the Joint Forces Operation.

As the actions of enemy armed groups were recognised as terrorist acts, it justified the use of the provisions of the relevant anti-terrorism legislation. In particular, Article 19 of the Law of Ukraine "On Combating Terrorism" reads as follows:

3 Law of Ukraine No 638-IV 'On Combating Terrorism' (20 March 2003) [2003] Official Gazette of Ukraine 16/697 <<https://zakon.rada.gov.ua/laws/show/638-15#top>> accessed 4 August 2025.

"Compensation for damage caused to citizens by a terrorist act shall be made at the expense of the State Budget of Ukraine in accordance with the law and with subsequent recovery of the amount of this compensation from the persons who caused the damage in accordance with the procedure established by law.

Compensation for damage caused to an organisation, enterprise or institution by a terrorist act shall be made in accordance with the procedure established by law."⁴

Through this provision, the State of Ukraine effectively promised its citizens that if they suffered damage at the hands of terrorists, they could expect state support in the form of compensation from the state budget. Simultaneously, the state promised to seek recovery of the relevant funds from the actual perpetrators.

The Law of Ukraine "On Combating Terrorism" was adopted in 2003, well before the war began, and the relevant compensation provision existed from its inception. For years, it remained dormant. However, with the launch of the ATO, it was time to test the effectiveness of this provision.

Persons who suffered from the actions of enemy armed forces began filing lawsuits against Ukraine, demanding that the promise enshrined in Article 19 be honoured and that damages be compensated from the state budget.⁵ However, courts dismissed such claims, noting that the article contains the phrase "in accordance with the law." This wording was interpreted to mean that the provision's implementation requires the adoption of a special statute specifying the procedure for such compensation, including its substantive and procedural parameters. In the absence of such a law, the plaintiffs' claims could not be sustained.

The Grand Chamber of the Supreme Court affirmed this reasoning.⁶ In doing so, it invoked the concept of "legitimate expectation" established in ECtHR jurisprudence, noting that the right to compensation is conditional upon the adoption of special legislation. Therefore, until such legislation is in place, one cannot "legitimately expect" compensation based on Article 19 alone (para. 32).

The Grand Chamber went further, however, by emphasising the state's positive obligations. While a person cannot claim compensation for real estate destroyed by terrorists in the absence of implementing legislation, they can claim compensation from the state for the

4 ibid, art 19.

5 For the analysis of these cases, see also: NRC, 'Pursuing Compensation for Properties Damaged or Destroyed as a Result of Hostilities in the Armed Conflict in Eastern Ukraine: Gaps and Opportunities, March-October 2018' (NRC Norwegian Refugee Council, 15 January 2019) <<https://www.nrc.no/resources/reports/pursuing-compensation-for-properties-damaged-or-destroyed-as-a-result-of-hostilities-in-the-armed-conflict-in-eastern-ukraine-gaps-and-opportunities>> accessed 4 August 2025.

6 Case No 265/6582/16-ц (Supreme Court of Ukraine (Grand Chamber), 4 September 2019) <<https://reyestr.court.gov.ua/Review/86310215>> accessed 4 August 2025.

delay in adopting the requisite law. In other words, a person is entitled to compensation for the state's failure to fulfil its positive duty to protect private property (para. 51). This duty included introducing mechanisms that would allow people to vindicate their property rights in the event of violation. No such mechanism existed for those who suffered from terrorists, and for this omission, the state owes compensation.

It must be emphasised, however, that such compensation does not equal the amount of damage caused by terrorists. For example, in the case considered by the Grand Chamber, the claimant estimated the value of destroyed real estate at UAH 888,000. The compensation awarded for the delay in adopting relevant legislation ultimately amounted to UAH 80,000.⁷ Thus, a distinction must be made between compensation for real estate destroyed by terrorists (where compensation equals the property's value) and compensation for the state's delay in adopting legislation that would enable compensation for real estate destroyed by terrorists. In the latter case, compensation will be significantly less.⁸ This also means that, having received compensation for the legislative delay, a person does not lose the right to subsequently claim compensation for destroyed real estate if such legislation is eventually adopted.

The ECtHR confirmed this approach in *Futornyak v. Ukraine*.⁹ In this case, the applicant sought compensation from Ukraine for his car, which was destroyed in a fire caused by enemy shelling. The national courts rejected his claim based on the arguments outlined above. The ECtHR declared the application inadmissible, holding, first, that there was no firm basis for legitimate expectations in either national legislation or case law, and second, that the applicant had lost his victim status after receiving compensation for the state's delay in adopting the requisite legislation.

3.2. Claims Based on General Tort Law Principles

Regarding claims against Ukraine based on general tort principles, the central question is whether the state may be held liable for damage caused by Russia on the grounds that it failed to protect its citizens from Russian aggression.

This question builds upon the distinction between negative and positive obligations under the right to life enshrined in Article 2 of the ECHR.¹⁰ A negative obligation requires the

7 Case No 265/6582/16-11 (Ordzhonikidze District Court of Mariupol city (Donetsk region), 27 April 2021) <<https://reyestr.court.gov.ua/Review/96765879>> accessed 4 August 2025.

8 The same approach was confirmed obiter dictum in the case concerning the death of the claimant's husband. See: Case No 242/2367/21 (Supreme Court of Ukraine (Civil Court of Cassation), 2 February 2024) <<https://reyestr.court.gov.ua/Review/116731841>> accessed 4 August 2025.

9 *Futornyak v Ukraine* App no 41678/20 (ECtHR, 4 June 2024) <<https://hudoc.echr.coe.int/eng?i=001-235004>> accessed 4 August 2025.

10 ECtHR, *Guide on Article 2 of the of the European Convention on Human Rights – Right to life* (Council of Europe 2025).

state to refrain from certain actions, namely, from unlawfully taking life. A positive obligation, by contrast, requires the state to take active steps to ensure that the right to life within its jurisdiction is not violated by third parties. These positive obligations contain both substantive and procedural components. The substantive component requires the state to introduce legislation prohibiting murder and to maintain effective law enforcement and other bodies to ensure such legislation's effectiveness. The procedural component requires the state to conduct timely and effective investigations into murders to establish the truth and bring perpetrators to justice.¹¹

The doctrine of positive obligations under Article 2 thus permits holding a state liable for deaths caused by third parties who are not state representatives or agents. However, it would be an overextension of this doctrine to maintain that a state should be responsible for any murder committed on its territory on the basis that it failed to prevent it. As the ECtHR has emphasised, "bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."¹²

According to ECtHR jurisprudence, a positive obligation arises only where two conditions are satisfied: (a) the authorities knew or should have known about the existence of a genuine and immediate threat to the life of a particular person or persons from the criminal acts of a third party; and (b) they failed to take measures within their power that could reasonably have prevented this threat.¹³ Moreover, the obligation is one of means rather than of result.¹⁴ Even if authorities were aware of a genuine threat and that person was subsequently killed, the state will not be held liable if it demonstrates that, given the information available at the time, it acted in a timely, competent manner, and did everything possible within its powers to prevent the murder.

Whether these conditions are met in cases where a person is killed by terrorists or in an attack by an enemy army depends on the specific circumstances of each case.

11 *Armani Da Silva v the United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) para 229 <<https://hudoc.echr.coe.int/eng?i=001-161975>> accessed 4 August 2025.

12 *Osman v the United Kingdom* App no 87/1997/871/1083 (ECtHR, 28 October 1998) para 116 <<https://hudoc.echr.coe.int/fre?i=001-58257>> accessed 4 August 2025; *Choreftakis and Choreftaki v Greece*, App no 46846/08 (ECtHR, 17 January 2012) para 46 <<https://hudoc.echr.coe.int/eng?i=001-108625>> accessed 4 August 2025.

13 *Mastromatteo v Italy* App no 37703/97 (ECtHR, 24 October 2002) para 68 <<https://hudoc.echr.coe.int/fre?i=001-60707>> accessed 4 August 2025; *Paul and Audrey Edwards v the United Kingdom* App no 46477/99 (ECtHR, 14 March 2002) para 55 <<https://hudoc.echr.coe.int/eng?i=001-60323>> accessed 4 August 2025.

14 *Kurt v Austria* App no 62903/15 (ECtHR, 15 June 2021) para 159 <<https://hudoc.echr.coe.int/eng?i=001-210463>> accessed 4 August 2025.

The Grand Chamber of the Supreme Court addressed this issue in a landmark case.¹⁵ In 2015, a woman was killed in the Donetsk region in temporarily occupied Ukrainian territory during the ATO period. The circumstances of her death were unclear. According to one version, she died when the car in which she was driving struck a mine near a checkpoint in non-government-controlled territory. According to another, she was killed when illegal armed formations of the "Donetsk People's Republic" shelled the village in which she resided. The deceased's son filed suit against the State of Ukraine seeking compensation for moral damages caused by his mother's death in a terrorist attack.

The Grand Chamber dismissed the claim, holding that the state is only liable for its own actions or omissions (para. 103). The mere fact that the applicant's mother died on Ukrainian territory was insufficient to hold Ukraine liable (para. 102). Moreover, the Court found that the territory where the applicant's mother died was temporarily occupied at the time. Consequently, the State of Ukraine did not control that part of its territory to such an extent as to prevent the applicant's mother's death, even if, under other circumstances, it could and should have done so (para. 65).¹⁶

4 LAWSUITS AGAINST THE RUSSIAN FEDERATION

4.1. Jurisprudence before 2022

Prior to the full-scale invasion in 2022, Ukrainian courts maintained that lawsuits against the Russian Federation were not justiciable, on the grounds that, as a sovereign state, Russia enjoyed jurisdictional immunity.¹⁷

15 Case No 635/6172/17 (Supreme Court of Ukraine (Grand Chamber), 12 May 2022) <<https://reyestr.court.gov.ua/Review/104728593>> accessed 4 August 2025.

16 *ibid.*

17 See: Case No 265/7703/19 (Supreme Court of Ukraine (Civil Court of Cassation), 9 June 2021) <<https://reyestr.court.gov.ua/Review/97628320>> accessed 4 August 2025; Case No 280/1380/19 (Supreme Court of Ukraine (Civil Court of Cassation), 4 November 2020) <<https://reyestr.court.gov.ua/Review/92747065>> accessed 4 August 2025; Case No 711/17/19 (Supreme Court of Ukraine (Civil Court of Cassation), 13 May 2020) <<https://reyestr.court.gov.ua/Review/89509134>> accessed 4 August 2025; Case No 613/924/19 (Supreme Court of Ukraine (Civil Court of Cassation), 3 November 2021) <<https://reyestr.court.gov.ua/Review/101138310>> accessed 4 August 2025; Case No 943/1741/19 (Supreme Court of Ukraine (Civil Court of Cassation), 22 September 2021) <<https://reyestr.court.gov.ua/Review/100109038>> accessed 4 August 2025; Case No 712/10119/20 (Supreme Court of Ukraine (Civil Court of Cassation), 22 September 2021) <<https://reyestr.court.gov.ua/Review/99926535>> accessed 4 August 2025; Case No 357/13182/18 (Supreme Court of Ukraine (Civil Court of Cassation), 3 June 2020) <<https://reyestr.court.gov.ua/Review/89928706>> accessed 4 August 2025.

A significant reversal in judicial practice occurred shortly after the full-scale invasion, on 14 April 2022, when the Supreme Court ruled on case No. 308/9708/19.¹⁸ This was the first case in which the Supreme Court found that the Russian Federation could not invoke jurisdictional immunity in cases involving claims for damages caused by Russian aggression. The primary justification for this conclusion was the concept of "territorial tort exception."¹⁹

In a subsequent judgment of 18 May 2022, in case No. 760/17232/20-ц,²⁰ the Supreme Court reaffirmed its earlier finding while supplementing it with additional reasoning. This time, the Court considered the issue from the perspective of the right to a fair trial (Article 6 of the ECHR). It emphasised that recognising the Russian Federation's jurisdictional immunity would restrict war victims' right of access to court.

Following these landmark rulings, jurisdictional immunity was effectively set aside, and lawsuits against the Russian Federation became commonplace. According to OpenDataBot, as of April 2025, 1,482 rulings had been issued on lawsuits against Russia.²¹ While there were only 52 such lawsuits in 2022, the number rose to 405 in 2023 and to 812 in 2024.²²

However, this emerging case law has exposed several acute problems, notably: the proper notification of the defendant state, the quantification and substantiation of claimed compensation amounts, and the (non)enforcement of judgments.

4.2. Proper Notification

The Supreme Court has held that the Russian Federation's consent is not a prerequisite for cases to be heard. However, this does not negate the other procedural rights to which the Russian Federation is entitled as a party to judicial proceedings. The right to a fair trial encompasses the principle of equality of arms, which requires that each party be given the opportunity to present its case before the court and be heard.²³ To this end, the court must first ensure that the party is duly notified of the time and place of trial. However, given the ongoing war, notification of the official authorities of the enemy state presents considerable challenges.

18 Case No 308/9708/19 (Supreme Court of Ukraine (Civil Court of Cassation), 14 April 2022) <<https://reyestr.court.gov.ua/Review/104086064>> accessed 4 August 2025.

19 For the detailed analysis of the Court's reasoning in this case see: Bohdan Karnaikh, 'Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with regard to Tort Claims Brought by the Victims of the Russia-Ukraine War' (2022) 5(3) Access to Justice in Eastern Europe 165. doi:10.33327/AJEE-18-5.2-n000321.

20 Case No 760/17232/20-ц (Supreme Court of Ukraine (Civil Court of Cassation), 18 May 2022) <<https://reyestr.court.gov.ua/Review/104635312>> accessed 4 August 2025.

21 'A Ukrainian Tried to Sue Russia for 999 Quadrillion UAH in War Damages' (OpenDataBot, 23 April 2025) <<https://opendatabot.ua/en/analytics/court-against-rf>> accessed 4 August 2025.

22 *ibid.*

23 *Dombo Beheer BV v The Netherlands* App no. 14448/88 (ECtHR, 27 October 1993) para 33 <<https://hudoc.echr.coe.int/eng?i=001-57850>> accessed 4 August 2025.

On 24 February 2022, the day of the full-scale invasion, Ukraine severed diplomatic relations with the Russian Federation.²⁴ Consequently, notification pursuant to the procedure established by the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention) became impossible. Nor can reliance be placed on conventions on legal assistance, such as the Minsk Convention²⁵ or the Kyiv Agreement,²⁶ as Ukraine has withdrawn from both. Postal communication with Russia has likewise been suspended since the first days of the invasion.

In these circumstances, Ukrainian courts employ all available means to inform the Russian Federation of pending proceedings. These methods include sending emails to official email addresses of respective Russian authorities²⁷ and publishing announcements on the official website of the Ukrainian judiciary.²⁸ In some instances, plaintiffs have resorted to transmitting documents via Russian diplomatic missions in third countries,²⁹ while experts recommend using international delivery services still operating in the Russian Federation.³⁰

-
- 24 Ministry of Foreign Affairs of Ukraine, 'Statement by the Ministry of Foreign Affairs of Ukraine Regarding the Severance of Diplomatic Relations with the Russian Federation' (*UKR Government Portal*, 24 February 2022) <<https://www.kmu.gov.ua/en/news/zayava-mzs-ukrayini-shchodorozrivu-diplomatichnih-vidnosin-z-rosijskoyu-federaciyeyu>> accessed 4 August 2025.
- 25 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (22 January 1993) <<https://www.unhcr.org/media/convention-legal-aid-and-legal-relations-civil-family-and-criminal-cases-adopted-minsk-22>> accessed 4 August 2025.
- 26 Agreement on the Procedure for the Resolution of Disputes Connected with Implementation of Economic Activity (20 March 1992) <<https://cis-legislation.com/document.fwx?rgn=4713>> accessed 4 August 2025.
- 27 See: Case No 331/4791/23 (Zhovtnevyi District Court of Zaporizhzhia, 28 June 2023) <<https://reyestr.court.gov.ua/Review/112549311>> accessed 4 August 2025; Case No 367/3431/23 (Irpri City Court of Kyiv Region, 24 May 2023) <<https://reyestr.court.gov.ua/Review/111061387>> accessed 4 August 2025; Case No 331/4708/23 (Zhovtnevyi District Court of Zaporizhzhia, 28 July 2023) <<https://reyestr.court.gov.ua/Review/112534331>> accessed 4 August 2025.
- 28 See: Case No 201/5634/24 (Zhovtnevyi District Court of Dnipropetrovsk, 21 May 2024) <<https://reyestr.court.gov.ua/Review/119157942>> accessed 4 August 2025; Case No 682/2464/22 (Slavuta City District Court of Khmelnytskyi Region, 14 February 2023) <<https://reyestr.court.gov.ua/Review/108952782>> accessed 4 August 2025; Case No 459/1532/23 (Chervonohrad City Court of Lviv Region, 15 May 2023) <<https://reyestr.court.gov.ua/Review/110871711>> accessed 4 August 2025.
- 29 See: Case No 635/7195/2 (Kharkiv District Court of Kharkiv Region, 21 August 2023) <<https://reyestr.court.gov.ua/Review/112947546>> accessed 4 August 2025; Case No 127/876/24 (Vinnytsia City Court of Vinnytsia Region, 5 March 2024) <<https://reyestr.court.gov.ua/Review/118094841>> accessed 4 August 2025; Case No 487/7568/23 (Zavodskiy District Court of Mykolaiv, 22 April 2024) <<https://reyestr.court.gov.ua/Review/118569369>> accessed 4 August 2025.
- 30 Ukrainian Arbitration Association and Institute of Legislative Ideas, *Recommendations on Ensuring Fair Trial Standards in Cases Brought Against the Russian Federation* (AVELLUM 2024) <https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/2024_prezent/Rekomend_spravedl_sud_vo.pdf> accessed 4 August 2025.

Proper notification to the Russian Federation is important not only to ensure compliance with national procedural law but also for the potential prospects for recognition and enforcement of Ukrainian court judgments abroad. This issue is particularly significant for plaintiffs (usually legal entities and entrepreneurs) who are considering the possibility of enforcing Ukrainian court decisions against Russian property in foreign jurisdictions. For such efforts to have any prospect of success, all fair trial standards must be observed during the Ukrainian court's consideration of the case.

4.3. Compensation Amounts

A second, equally pressing problem concerns the quantification and substantiation of damages in such proceedings. Plaintiffs frequently demand compensation in amounts that are, to put it mildly, insufficiently supported by evidence, and sometimes completely absurd.³¹ As the competent Russian Federation authorities predictably fail to appear in proceedings, there is no opposing party to contest the sums claimed. Moreover, many courts are uncritical of claimed amounts and show a superficial approach to assessing evidence presented to substantiate claimed amounts. Combined with the lack of actual adversarial proceedings, this leads the judicial system to produce numerous judgments granting claims against the Russian Federation in circumstances where neither the amount claimed nor the very right to compensation was adequately established.

Illustrative examples underscore the gravity of the problem. In one case, the plaintiffs, citing a publication in *The Washington Post*,³² argued that as a result of armed aggression, the Russian Federation effectively controls Ukrainian territories with deposits of energy resources, metals, and minerals worth approximately \$36.7 trillion. Dividing this amount by the number of Ukrainian citizens, the plaintiffs arrived at a figure of \$1,990,149.79, which they claimed as compensation for damages for each plaintiff. The court of first instance ruled in favour of the plaintiffs.³³ In another case, a court upheld a claim for moral damages relating to property loss and internal displacement in the amount of UAH 130 million, equivalent to approximately \$3.367 million.³⁴ One claimant notably surpassed all others, demanding 999 quadrillion UAH; this claim was dismissed,³⁵ as was

31 See: 'A Ukrainian Tried to Sue Russia (n 21).

32 Anthony Faiola and Dalton Bennett, 'In the Ukraine War, a Battle for the Nation's Mineral and Energy Wealth' *The Washington Post* (Washington, 10 August 2022) <<https://www.washingtonpost.com/world/2022/08/10/ukraine-russia-energy-mineral-wealth/>> accessed 4 August 2025.

33 Case No 216/5656/22 (Central City District Court of Kryvyi Rih, 24 November 2023) <<https://reyestr.court.gov.ua/Review/115455341>> accessed 4 August 2025.

34 Case No 638/12435/23 (Dzerzhynskiy District Court of Kharkiv, 22 November 2023) <<https://reyestr.court.gov.ua/Review/115160289>> accessed 4 August 2025.

35 Case No 686/26564/22 (Khmelnitskyi Court of Appeal, 27 April 2023) <<https://reyestr.court.gov.ua/Review/110547363>> accessed 4 August 2025.

that of a claimant who sought 962 billion UAH on the basis that the destruction of Ukraine's environment had inflicted upon her "inhuman suffering."³⁶

A common category of claims concerns moral damages for forced displacement.³⁷ Many plaintiffs appear to treat €35,000 as a "standard rate" for such claims,³⁸ deriving this figure from the case of *Loizidou v. Turkey*.³⁹ Even more controversial are cases where plaintiffs seek compensation based solely on the fact of Russian aggression,⁴⁰ without demonstrating any specific harm such as damage to health, loss of property, or forced relocation. These claimants allege that the war causes them to live under constant stress. While this assertion may be true, it is insufficient to warrant a tort claim. Courts have generally rejected such claims, reasoning that acts of aggression constitute an attack on state sovereignty and territorial integrity rather than on individual rights of every citizen. Accordingly, a person who files a claim without demonstrating how the war has directly affected their personal rights is not entitled to compensation.⁴¹

4.4. (Non)enforcement

Finally, the third problem in this category of cases is that court judgments against Russia are not enforced. To date, none of these judgments has been implemented in Ukraine.⁴²

From a formal perspective, it can be argued that the Supreme Court lifted the Russian Federation's immunity from involvement in court cases but did not lift its immunity from

36 Case No 552/6293/22 (Kyiv District Court of Poltava, 16 January 2023) <<https://reyestr.court.gov.ua/Review/108630477>> accessed 4 August 2025.

37 See: Case No 344/10421/22 (Ivano-Frankivsk City Court, 5 October 2022) <<https://reyestr.court.gov.ua/Review/106742828>> accessed 4 August 2025; Case No 686/26852/21 (Khmelnitskyi City and District Court, 21 July 2022) <<https://reyestr.court.gov.ua/Review/105448637>> accessed 4 August 2025; Case No 521/18236/21 (Malynovskyi District Court of Odesa, 22 June 2022) <<https://reyestr.court.gov.ua/Review/104872694>> accessed 4 August 2025.

38 See: Case No 521/18236/21 (n 37); Case No 521/18230/21 (Malynovskyi District Court of Odesa, 10 November 2022) <<https://reyestr.court.gov.ua/Review/107405119>> accessed 4 August 2025; Case No 405/5528/22 (Leninsky District Court of Kirovohrad, 20 December 2022) <<https://reyestr.court.gov.ua/Review/108230977>> accessed 4 August 2025; Case No 405/5495/22 (Leninsky District Court of Kirovohrad, 20 December 2022) <<https://reyestr.court.gov.ua/Review/108230978>> accessed 4 August 2025.

39 *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996) <<https://hudoc.echr.coe.int/eng?i=001-58007>> accessed 4 August 2025.

40 See: Case No 753/15426/20 (Darnytsia District Court of Kyiv, 4 October 2022) <<https://reyestr.court.gov.ua/Review/106915823>> accessed 4 August 2025; Case No 754/10080/19 (Kyiv Court of Appeal, 20 December 2022) <<https://reyestr.court.gov.ua/Review/108091456>> accessed 4 August 2025; Case No 552/6293/22 (n 35).

41 *ibid.*

42 'Enforcement of Court Judgments in Lawsuits Against Russia: Proposals for Solving the Problem' (Dnistrianskyi Center, 24 April 2025) <<https://dc.org.ua/news/vykonannya-rishen-sudiv-za-pozovamy-proty-rosiyi-propozyciyi-schodo-vyrishennya-problemy>> accessed 4 August 2025.

enforcement of court decisions. In other words, immunity from enforcement may still formally remain in force. Therefore, even if the Russian Federation lacks the right to object to the consideration of a court case, it still retains the right to object to the seizure of its property. This distinction reflects the idea that enforcement immunity—particularly regarding non-commercial state property—is subject to an even higher threshold for derogation than adjudicative immunity.⁴³ However, this view is controversial, as the arguments used by the Supreme Court to justify abolishing judicial immunity could also apply to immunity against enforcement proceedings.

There is also a practical reason why such judgments are not enforced. Enforcement would require seizing the Russian Federation's assets located on Ukrainian territory. However, no such assets exist. More precisely, even if they exist, they are subject to nationalisation under the Law of Ukraine "On the Basic Principles of Compulsory Seizure in Ukraine of Property Belonging to the Russian Federation and Its Residents." Once such property is nationalised, it becomes Ukrainian property and can no longer be seized in favour of private individuals who have obtained court decisions against Russia.

Failure to enforce court judgments against the Russian Federation is problematic, as it can undermine trust in the judiciary. Plaintiffs obtain court judgments but do not obtain actual enforcement. This is frustrating and undermines faith in the effectiveness of justice restoration. Moreover, Ukraine may face criticism regarding the systemic non-enforcement of court judgments.

However, this problem can also be viewed from another angle. Would it not be worse if these judgments were actually enforced? Consider that, to enforce the judgment in favour of the four plaintiffs in *The Washington Post* case, bailiffs would have to seize Russian railcars, aircraft, and real estate remaining on Ukrainian territory. For how many such plaintiffs would Russian assets in Ukraine suffice? And would this be fair to the hundreds and thousands of other victims who courts in different regions have awarded smaller compensation?

43 Fox and Webb observe that "in contrast to adjudicative jurisdiction, the scope of immunity from execution is still largely absolute for property serving public, non-commercial purposes, even in states otherwise committed to restrictive immunity." See: Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015) 563-4.

Similarly, Crawford emphasises that enforcement measures "strike more directly at the dignity and independence of the foreign state" than mere adjudication, explaining the greater caution in permitting such measures under customary law. See: James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 489-90.

See also: Michael Wood, 'Immunity from Jurisdiction and Immunity from Measures of Constraint' in Roger O'Keefe and Christian J Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford Commentaries on International Law, Oxford Law Pro 2013) 13. doi:10.1093/law/9780199601837.003.0002.

The issue at stake is distributive justice.⁴⁴ It must be acknowledged that the resources available to satisfy the claims of war-affected persons are limited. For example, even if all frozen assets of the aggressor state (amounting to approximately US\$ 300 billion⁴⁵) were used to compensate for damage, it would still be insufficient to cover the damage (since, according to World Bank estimates, restoration alone will cost US\$ 524 billion,⁴⁶ not counting human losses, moral damage, etc.). Thus, the key problem is how to fairly distribute limited resources (Russian assets within the reach of international law) among all those affected.

The mechanism of private lawsuits in national courts appears unsuited to achieving this goal. A more effective approach would be a mechanism that defines different categories of victims and, within each category, establishes certain values (minimum and maximum) of compensation. The UN Compensation Commission, established to consider claims for damages caused by Iraq's invasion and subsequent occupation of Kuwait, was such a mechanism.⁴⁷ A similar mechanism for Ukraine should be the International Compensation Mechanism, the first component of which—the International Register of Damage for Ukraine—has already been launched and is accepting claims.⁴⁸

5 CONCLUSIONS

Tort law rests on the simple but powerful maxim that the party who causes harm must repair it. This principle governs liability between private actors and resonates at the level of international law, where wrongful state conduct, in theory, should trigger corresponding duties of reparation. Yet the institutional mechanisms through which this principle operates differ dramatically across these contexts. In disputes between private individuals, ordinary tort claims in national courts are usually adequate: they provide a forum for fact-

44 See: Izhak England, *Corrective and Distributive Justice: From Aristotle to Modern Times* (OUP 2009); Marc Loth, 'Corrective and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim' (2015) 22(6) *Maastricht Journal of European and Comparative Law* 788; Adam Slavny, *Wrongs, Harms, and Compensation* (OUP 2023).

45 See: Elena Fabrichnaya and Guy Faulconbridge, 'What and Where are Russia's \$300 Billion in Reserves Frozen in the West?' (*Reuters*, 28 December 2023) <<https://www.reuters.com/world/europe/what-where-are-russias-300-billion-reserves-frozen-west-2023-12-28/>> accessed 4 August 2025.

46 'Updated Ukraine Recovery and Reconstruction Needs Assessment Released' (*World Bank Group*, 25 February 2025) <<https://www.worldbank.org/en/news/press-release/2025/02/25/updated-ukraine-recovery-and-reconstruction-needs-assessment-released>> accessed 4 August 2025.

47 See: Richard Lillich (ed), *The United Nations Compensation Commission* (Brill 1995) doi:10.1163/9789004636682; Francis McGovern, 'Dispute Systems Design: The United Nations Compensation Commission' (2009) 14(171) *Harvard Negotiation Law Review* 171; Danio Campanelli, 'The United Nations Compensation Commission (UNCC): Reflections on its Judicial Character' (2011) 4(1) *Leiden Journal of International Law* 107. doi:10.1163/1571803053498871.

48 See: Council of Europe, *Register of Damage for Ukraine - RD4U* <<https://www.rd4u.coe.int/en/>> accessed 4 August 2025.

finding, a framework for individualised damage assessment, and an enforceable judgment that restores the injured party to something approximating their prior position.

In the context of large-scale, war-related harm, however, this model fails. The very magnitude of the damage—measured in millions of victims and hundreds of billions of dollars—renders individualised adjudication structurally incapable of achieving justice. What emerges instead is the problem of distributive justice: how to fairly allocate scarce resources fairly, ultimately traceable to the wrongdoing state, among an immense number of affected persons. Here, private lawsuits are not merely inefficient; they risk compounding injustice. Courts across different regions may adopt inconsistent methodologies for calculating damages, producing striking disparities between similarly situated victims. Awards issued in the defendant state's absence may be poorly substantiated, raising questions about their fairness and legitimacy. Even when judgments are rendered, enforcement remains uncertain at best, given the paucity of seizable assets and the persistent shield of enforcement immunity.

In short, atomised litigation disperses judicial energy, yields unequal outcomes, and does little to produce actual compensation. The symbolic value of such lawsuits should not be dismissed—they can affirm accountability, record individual losses, and maintain moral and legal pressure on the aggressor state. But as an instrument for delivering material redress, they fall short. Ukraine's experience underscores the need for a centralised mechanism capable of collecting and verifying claims, applying consistent valuation standards, and distributing compensation resources in a manner that is transparent, proportional, and sensitive to the range of harms inflicted. The United Nations Compensation Commission offers a historical precedent. For Ukraine, the emerging International Compensation Mechanism, anchored by the International Register of Damage, holds promise as a more rational and equitable means of restoring justice.

REFERENCES

1. Campanelli D, 'The United Nations Compensation Commission (UNCC): Reflections on its Judicial Character' (2011) 4(1) *Leiden Journal of International Law* 107. doi:10.1163/1571803053498871
2. Crawford J, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019)
3. Englund I, *Corrective and Distributive Justice: From Aristotle to Modern Times* (OUP 2009)
4. Fabrichnaya E and Faulconbridge G, 'What and Where are Russia's \$300 Billion in Reserves Frozen in the West?' (*Reuters*, 28 December 2023)
5. Faiola A and Bennett D, 'In the Ukraine War, a Battle for the Nation's Mineral and Energy Wealth' *The Washington Post* (Washington, 10 August 2022)
6. Fox H and Webb P, *The Law of State Immunity* (3rd edn, OUP 2015).

7. Karnaukh B, 'Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with regard to Tort Claims Brought by the Victims of the Russia-Ukraine War' (2022) 5(3) Access to Justice in Eastern Europe 165. doi:10.33327/AJEE-18-5.2-n000321
8. Lillich R (ed), *The United Nations Compensation Commission* (Brill 1995). doi:10.1163/9789004636682
9. Loth M, 'Corrective and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim' (2015) 22(6) Maastricht Journal of European and Comparative Law 788
10. McGovern F, 'Dispute Systems Design: The United Nations Compensation Commission' (2009) 14(171) Harvard Negotiation Law Review 171
11. Slavny A, *Wrongs, Harms, and Compensation* (OUP 2023)
12. Wood M, 'Immunity from Jurisdiction and Immunity from Measures of Constraint' in O'Keefe R and Tams CJ (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford Commentaries on International Law, Oxford Law Pro 2013) 13. doi:10.1093/law/9780199601837.003.0002

AUTHORS INFORMATION

Bohdan Karnaukh

Dr.Sc.(Law), Associate Professor, Yaroslav Mudryi National Law University, Kharkiv, Ukraine
b.p.karnauh@nlu.edu.ua
<https://orcid.org/0000-0003-1968-3051>

Corresponding author, solely responsible for the manuscript preparing.

Competing interests: No competing interests were disclosed.

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

RIGHTS AND PERMISSIONS

Copyright: © 2025 Bohdan Karnaukh. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

EDITORS

Managing Editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.
Ukrainian language Editor – Mag. Liliia Hartman.

ABOUT THIS ARTICLE

Cite this article

Karnaikh B, 'Can Tort Law Handle War? Reflections on Private Litigation for War-Related Damages in Ukraine' (2025) 8(4) Access to Justice in Eastern Europe 476-93 <<https://doi.org/10.33327/AJEE-18-8.4-c000130>>

DOI: <https://doi.org/10.33327/AJEE-18-8.4-c000130>

Summary: 1. Introduction. – 2. Methodology. – 3. Lawsuits against Ukraine. – 3.1. *Claims Based on the Law of Ukraine "On Combating Terrorism"*. – 3.2. *Claims Based on General Tort Law Principles*. – 4. Lawsuits Against the Russian Federation. – 4.1. *Jurisprudence before 2022*. – 4.2. *Proper Notification*. – 4.3. *Compensation Amounts*. – 4.4. *(Non)enforcement*. – 5. Conclusions.

Keywords: war-related damage, tort law, reparation, Russo-Ukraine war, jurisdictional immunity, right to a fair trial, access to court.

DETAILS FOR PUBLICATION

Date of submission: 06 Aug 2025

Date of acceptance: 08 Sep 2025

Last Publication: 18 Nov 2025

Whether the manuscript was fast tracked? - Yes

Number of reviewer report submitted in first round: 2 reports

Number of revision rounds: 1 round with major revisions

Technical tools were used in the editorial process:

Plagiarism checks - Turnitin from iThenticate <https://www.turnitin.com/products/ithenticate/>
Scholastica for Peer Review <https://scholasticahq.com/law-reviews>

AI DISCLOSURE STATEMENT

I confirm that no artificial intelligence tools or services were used at any stage of writing, translating, editing, or analyzing content for this manuscript.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

ЧИ МОЖЕ ДЕЛІКТНЕ ПРАВО ВПОРАТИСЯ З ВІЙНОЮ?

РОЗДУМИ ПРО ПРИВАТНІ СУДОВІ ПОЗОВИ ЩОДО ВІДШКОДУВАННЯ ЗБИТКІВ,
ПОВ'ЯЗАНИХ З ВІЙНОЮ В УКРАЇНІ

Богдан Карнаух

АНОТАЦІЯ

Вступ. Повномасштабне вторгнення Росії в Україну спричинило значні руйнування та величезну шкоду цивільному населенню, що спонукало фізичних та юридичних осіб домагатися компенсації через пред'явлення деліктних позовів. У зв'язку з цим постає нагальне питання: чи може деліктне право стати ефективним механізмом залагодження збитків, пов'язаних з війною? Хоча міжнародне право підтверджує зобов'язання відшкодовувати збитки за міжнародно-протиправні дії, постраждалі часто стикаються зі значними правовими та практичними перешкодами, коли звертаються за відшкодуванням до національних судів. У цьому дослідженні на прикладі судової практики українських судів розглядається питання, чи можуть приватні деліктні позови бути дієвим засобом відшкодування збитків жертвам війни.

Методи. У цій статті використовується сутнісна доктринальна методологія, що ґрунтується на аналізі судової практики. У ній розглянуто широкий спектр рішень українських судів, що стосуються деліктних позовів, поданих фізичними особами як проти Російської Федерації, так і проти України. У дослідженні проводиться розмежування між позовами, що були подані відповідно до конкретних законодавчих положень, таких як Закон України «Про боротьбу з тероризмом», та тими, що ґрунтуються на загальних принципах деліктного права. У роботі також простежується розвиток підходів щодо юрисдикційного імунітету Росії та досліджуються питання, пов'язані з процесуальною справедливістю, обґрунтованістю позовних вимог та виконанням судових рішень.

Результати та висновки. Аналіз показує, що приватні позови про деліктні справи виявилися здебільшого неефективними на практиці та концептуально непридатними для позовів, пов'язаних з війною. Хоча нещодавні рішення скасували юрисдикційний імунітет Росії, все ж залишаються серйозні проблеми: рішення судів не виконуються, стандарти доказування застосовуються непослідовно, а індивідуальні судові позови не забезпечують справедливого розподілу обмежених ресурсів. Крім того, позови проти України – як ті, що засновані на спеціальному законі, так і ті, що засновані на загальних принципах деліктного права – також дали обмежені результати через прогалини в законодавстві та відсутність ефективних

механізмів забезпечення виконання. У дослідженні було зроблено висновок, що приватні деліктні позови, хоча й мають символічне значення, не можуть служити дієвим засобом для післявоєнного правосуддя. Натомість, централізований механізм відшкодування, такий як новий Міжнародний компенсаційний механізм, пропонує більш справедливу та ефективну модель розподілу відшкодування відповідно до принципів розподільчої справедливості.

Ключові слова: збитки, пов'язані з війною, деліктне право, відшкодування збитків, російсько-українська війна, юрисдикційний імунітет, право на справедливий суд, доступ до правосуддя.

For further information, please contact

Access to Justice in Eastern Europe, Mazepy Ivana str., 10, Kyiv, 01010, Ukraine.

e-mail: info@ajee-journal.com. Tel: +38 (044) 205 33 65. Fax: +38 (044) 205 33 65.

Postal information

Access to Justice in Eastern Europe, Mazepy Ivana str., 10, Kyiv, 01010, Ukraine.

Permissions

For information on how to request permissions to reproduce articles from this journal, please visit our web-site and contact Editor-in-Chief.

Advertising

Inquiries about advertising and inserts should be addressed to info@ajee-journal.com.

Disclaimer

Statements of fact and opinion in the articles and notes in *Access to Justice in Eastern Europe* are those of the respective authors and contributors and not of *Access to Justice in Eastern Europe*.

No *Access to Justice in Eastern Europe* issue makes any representation, expressed or implied, regarding the accuracy of the material in this journal and cannot accept any legal responsibility or liability for any errors or omissions that may be made. The reader should make his/her evaluation as to the appropriateness or otherwise of any experimental technique described.

© AJEE 2025

All rights reserved; no part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without prior written permission of the Editor-in-Chief and AJEE Council.

Media identifier R30-00995

The print run of this issue is 200 copies

Офіційна назва зареєстрованого друкованого медіа - *Доступ до правосуддя в Східній Європі, Access to Justice in Eastern Europe*

Порядковий номер випуску друкованого медіа та дату його виходу у світ - № 4 за 2025 рік

Тираж випуску - 200 екз.

Ідентифікатор друкованого медіа у Реєстрі - R30-00995

Cover-list by **Alona Hrytsyk**

Publishing House 'Academic Insights Press'

('Akademische Einblicke Verlag') Kreuzplatz 19/3, Bad Ischl, 4820, Austria

<https://academicinsights.press>

Publishing House LLC 'VD 'Dakor' PH Cert. No 4349 dated 05.07.2012

Beresteysky Avenue , 56, Kyiv, 03057, Ukraine,

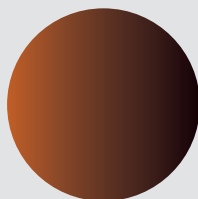
Tel: +38 (067) 153 96 73

e-mail: vd_dakor@ukr.net

www.dakor.kiev.ua.

<https://dakor.kiev.ua>





Access to Justice in Eastern Europe (AJEE) is a peer-reviewed, Open Access journal. The main aim of AJEE is to provide a forum for the discussion of topical issues related to judiciary and civil procedure reforms, as well as the sharing of research results on access to justice developments in Eastern European countries. This scope has been chosen due to the unique combination of post-socialist legal doctrine's legacy, Western influence, and the legislative approximation to EU law.

We also welcome and encourage submissions from other regions that explore comparative perspectives or offer insights into global trends and developments related to access to justice.

